STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

RHODE ISLAND DEPARTMENT OF ADMINISTRATION
DIVISION OF PURCHASES

NOTICE OF RULE MAKING

The Rhode Island Department of Administration has drafted proposed amendments to the Rhode Island State Procurement Regulations ("Procurement Regulations"). **These proposed amendments revise SECTION EIGHT of the Procurement Regulations, last filed with the Office of the Secretary of State as ERLID #6656.** The amendments are promulgated in accordance with Section 37-2-9 and Chapters 42-35 and 42-11 of the General Laws of Rhode Island, as amended. Among other changes, proposed are amendments to Regulation 8.1 regarding the definition of "Change Order" and amendments to Regulation 8.11 entitled "Selection of Methods of Construction Contracting Management". These amendments are proposed so that provisions of Section Eight of the Procurement Rules are consistent with recently enacted revisions to Chapter 37-2 of the General Laws of Rhode Island.

Notice is hereby given, in accordance with the provisions of Chapter 42-35 of the Rhode Island General Laws as amended, that a public hearing on the above proposed amended regulations shall be held on **Thursday, December 8, 2011 beginning at 10:30 AM in the Bid Opening Room, Division of Purchases, 2nd Floor,** in the William E. Powers Building, One Capitol Hill, Providence, Rhode Island, at which time and place all persons interested will be heard.

In the development of the proposed amended regulations, consideration was given to the following: (1) alternative approaches; (2) overlap or duplication with other statutory and regulatory provisions; and (3) significant economic impact on small business, as defined in Chapter 42-35 of the Rhode Island General Laws, as amended, which may result from these regulations. No alternative approach or duplication or overlap was identified based upon available information.

Copies of the proposed amended regulations are available for public inspection at the offices of Department of Administration, Division of Purchases, One Capitol Hill, Providence, RI 02908, or by calling Lorraine Hynes at (401) 574-8100 or by sending an email to: Rules.questions@purchasing.ri.gov If you send an email request, please refer to "Proposed Amended Rule--Section Eight". In conformance with Section 42-35-3(a)(1) of the General Laws of Rhode Island, a copy of a concise summary of all non-technical amendments being proposed is available upon request.

For the sake of accuracy, it is requested that comments made relative to any aspect of the regulations, including alternative approaches, overlap, or significant economic impact, are received prior to or at the hearing. These comments should refer to "Proposed Amendments to Procurement Regulations--Section Eight" and the specific regulations commented upon, and should be mailed to Lorraine Hynes, Division of Purchases, Department of Administration, One Capitol Hill, Providence, RI 02908. Written comments may also be submitted at the public hearing. Oral statements made at the hearing will be considered, but should be limited to five minutes each.

Any individual requiring a reasonable accommodation in order to participate in this hearing should contact James A. Pitassi, Jr. at 222-6395 (voice) or #711 (R.I. Relay) at least three (3) business days prior to the hearing.

Signed,

Richard A. Licht
Director, Rhode Island Department of Administration

11/8/11
Date

STATE OF RHODE ISLAND
PROCUREMENT REGULATIONS

SECTION 8 - CONTRACTS

Prepared November 2011

Division of Purchases
Rhode Island Department of Administration
One Capitol Hill, Second Floor
Providence, Rhode Island 02908
www.purchasing.ri.gov
Tel: (401) 574-8100

In accordance with the provisions of Chapter 37-2 and Chapter 42-35 of the General Laws of Rhode Island of 1956, as amended, I hereby adopt on this date the following amendments to Section Eight of the Procurement Rules and Regulations.

_____

Richard A. Licht, Director
State of Rhode Island
Department of Administration
One Capitol Hill
Providence, Rhode Island 02908

_____

DATE

Date of Public Notice: _____
Date of Public Hearing: _____
End of Comment Period: _____

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SECTION 8 - CONTRACTS

8.1 DEFINITIONS

8.1.1[37-2-7(7)]"Change order" shall mean a written ~~order signed by the purchasing agent, or the contractor directing or allowing the contractor to make changes which the changes clause of the contract authorizes the purchasing agent or contractor to order without the consent of the contractor or purchasing agent.~~ authorization signed by the purchasing agent directing or allowing the contractor to proceed with changes, alterations, or modifications to the terms, conditions, or scope of work on a previously awarded contract. *Cf.* R.I, Gen. Laws § 37-2-7 (2)

8.1.2 [37-2-7(5)] "Contract" shall mean all types of agreements, including grants and orders, for the purchase or disposal of supplies, services, construction, or any other items. It shall include awards, contracts of a fixed price, cost, cost-plus-a-fixed-fee, or incentive type; contracts providing for the issuance of job or task orders, leases, letter contracts, purchase orders and construction management contracts. It also includes supplemental agreements with respect to any of the foregoing. With respect to the procurement regulations set forth herein, "contract" shall not apply to labor contracts with employees of state agencies.

8.1.3 [37-2-7(6)] "Contract Modification" shall mean any written alteration in the specifications, delivery point, rate of delivery, contract period, price, quantity, or other contract provisions of any existing contract, whether accomplished by unilateral action in accordance with a contract provision, or by mutual action of the parties to the contract. It shall include bilateral actions, such as change orders, administrative changes, notices of termination, and notices of the exercise of a contract option.

8.1.4 "Contract Addendum" shall mean an alteration in the terms and/or scope of an agreement accomplished by mutual action of the parties, permissible under emergency purchases, construction work, sole source procurement, and otherwise where competition is not required.

8.1.5 [37-2-7(7)] "Contractor" shall mean any person having a contract with a governmental body.

8.1.6 An "independent contractor" shall mean a person (individual or firm) who, in various degrees and/or combinations:

- ~~8.1.6.1~~ is available to the general public on a regular and consistent basis; and
- ~~8.1.6.2~~ is free to work when and for whom he/she pleases; and
- ~~8.1.6.3~~ is employed by more than one person or company at a time; and

- ~~8.1.6.4~~ makes a significant investment in facilities not typically maintained by an employee; and

- ~~8.1.6.5~~ can realize a profit or loss as a result of providing services or products.

8.1.7 ~~In accordance with [37-2-15(1)]~~ "eCost-reimbursement contract" shall mean a contract under which the state reimburses the contractor for those contract costs, within a stated ceiling, which are allowable and allocable in accordance with cost principles established by the Chief Purchasing Officer herein, and a fixed fee.

8.1.8 "Prime contractor" shall mean a contractor who engages subcontractors in the course of satisfying the requirements of fulfilling a contract.

8.1.9 In accordance with Chapter 37-13-1 "Public works contract" shall mean a contract for grading, clearing, demolition, improvement, completion, repair, alteration or construction of any public road or any bridge, or portion thereof, or any public building or portion thereof, or any heavy constructions, or any public works projects of any nature or kind whatsoever.

8.1.10 "Punitive Termination" shall mean termination at the discretion of the state for failure of the contractor to perform with no liability on the part of the state.

8.1.11 "Renegotiation" shall mean deliberation, discussion, or conference to change or amend the terms of an existing agreement.

8.1.12 "Subcontractor" shall mean any person undertaking part of the work under the terms of the contract, by virtue of an agreement with the prime contractor, who, prior to such undertaking, receives in writing the consent and approval of the state.

8.1.13 [37-2-7(7)] "Supplemental Agreement" shall mean any contract modification which is accomplished by the mutual action of the parties.

8.1.14 "Vendor" shall be defined as a person or entity who sells or supplies goods, services and or real estate for consideration.

8.2 FUNDAMENTAL REQUIREMENTS AND PRINCIPLES FOR STATE CONTRACTS

A contract shall mean a promise, or a set of promises, for breach of which the law gives a remedy, and the performance of which the law recognizes as a duty.

8.2.1 [37-2-54(3)] No purchase or contract shall be binding on the state or any agency thereof unless approved by the Department [of Administration] or made under general regulations which the Chief Purchasing Officer may prescribe.

8.2.1.1 The terms and conditions of a valid Purchase Order and its supplements, as issued by the Office of Purchases and signed by the Purchasing agent or his designee, shall constitute the primary contractual instrument of the state.

8.2.1.1.1 Unless specifically established by law, regulation or procedures published by the Chief Purchasing Officer, no other instrument shall constitute a state purchasing contract.

8.2.1.1.2 Oral Agreements - Any alleged oral agreement or arrangements made by a bidder or contractor with any agency or an employee of the Office of Purchases may be disregarded and shall not be binding on the state.

8.2.1.2 "Purchasing Contract Authority" shall mean the authority to act on behalf of the state to commit funds, enter into binding agreements or contracts, dispose of state property, or in any other manner control procurement or obligate the State.

8.2.1.2.1 No state agency official shall have the right (capacity) to exercise purchasing contract authority through written or oral agreements or contracts or, in any other way, financially or otherwise obligate the State without the express written consent of the Chief Purchasing Officer.

8.2.1.2.2 No state agency may place orders or negotiate with suppliers or potential suppliers without the participation or express approval of the Chief Purchasing Officer.

8.2.2 [37-2-13(4)] No state purchasing regulation shall change in any way a contract commitment by the state nor of a contractor to the state which was in existence on the effective date of the regulation.

8.2.3 [37-2-13(5)] The provisions of state purchasing regulations shall be considered to be incorporated by operation of law in all state contracts.

8.2.4 [37-2-13(6)] Contract provisions and contracts entered into in violation of state purchasing regulations shall be void "ab initio" [from inception].

8.2.5 Supplemental Principles of Law - Obligation of Good Faith.

8.2.5.1 [37-2-3(1)] Unless displaced by the particular provisions of this chapter [37-2], the principles of law and equity, including the uniform commercial code, the law merchant, and the law of contracts, including, but not limited to, agency, fraud, misrepresentation, duress, coercion, mistake, and bankruptcy, shall supplement these provisions.

8.2.5.2 [37-2-3(2)] Every contract or duty under this chapter shall impose upon both parts the obligation of good faith in its performance and/or enforcement. "Good faith" shall mean honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing.

8.2.6 In accordance with Chapter 37-2-9(p), contractors must comply with state and federal Equal Opportunity requirements for all contracts for supplies and services exceeding ten thousand dollars ($10,000). Failure to comply will be considered a substantial breach of contract subject to penalties prescribed in regulations issued and administered by the State Equal Opportunity Office and set forth herein.

8.2.7 [37-2-41] Contractor's Bonds. - The provisions of chapter 37-12 of the general laws shall apply to all construction contracts awarded under this chapter.

8.2.7.1 "Performance Bond" shall mean a contract of guaranty executed subsequent to award by a successful bidder to protect the state from loss due to contractor inability to complete a contract.

8.2.7.2 Chapter 37-12 requires that every person awarded a public works contract shall furnish to the state good and sufficient surety (performance bond) not less than fifty percent (50%) and not more than one hundred percent (100%) of the contract price conditioned that the contractor, principal in said bond, the person's executors, administrators or successors, shall keep and perform the covenants, conditions and agreements in the contract. However, provided that good cause is shown, the Director of the Department of Administration may waive the requirements for contracts not in excess of fifty thousand dollars ($50,000).

8.2.7.3 In accordance with Chapter 37-13-14 a contractor's performance bond required for contracts exceeding one thousand dollars ($1000) under 37-12 must be furnished by a surety company authorized to do business in the state.

8.3 GENERAL CHARACTERISTICS OF STATE CONTRACTS

8.3.1 General Terms and Conditions - The Office of Purchases shall develop and make available to potential suppliers and state officials a document stating the general terms and conditions applicable to all quotations and state purchasing contracts. The General Terms and Conditions shall (1) be referenced and made a part of all solicitations for proposals and quotations; all state purchase orders, contracts, and letters of authorization; and bidder registration documentation and (2) provide notice to bidders that contract award may be subject to the bidder signing an affirmation (certification) regarding certain legal requirements or restrictions relating to foreign corporations, ~~goods produced in South Africa~~, disadvantaged business enterprises, labor rates, local product preference, etc., as required by the Purchasing Agent.

8.3.2 When a contract has been entered into between the state and another party, neither party shall have the legal right to add new terms or conditions without the consent of the other, unless the contract so specifies.

8.3.3 All contract pricing shall be firm and fixed unless contract language provides for reconsideration.

8.3.4 Issuance of purchase orders shall not be made on the basis of "advise pricing" (or "pricing to be determined") agreements. All commitments shall be on the basis of estimated prices with a "not to exceed" maximum authorization when firm, fixed pricing agreements are not possible.

8.3.5 Changes in scope, price, and length of contract period shall require contract amendments which are specified in writing.

8.3.5.1 Unanticipated changes may be considered with the express consent of both parties.

8.3.5.2 The issuance of a Purchase Change Order in accordance with the provisions of the contract and other requirements specified herein shall be considered a binding contract.

8.3.6 Termination - As appropriate, state contracts shall include clauses which address special conditions/procedures for termination of contract not contained in the state's General Terms and Conditions; e.g., provisions for penalties or forfeitures for contract noncompliance may be included; a convenience termination clause which permits the state to terminate, at its own discretion, the performance of work in whole or in part, and to make a settlement of the vendor's claims in accordance with appropriate regulations and applicable contractual conditions.

8.3.7 Mutual Agreement - The agreement shall consist of an offer by one party, called the offeror, and an acceptance by the other party, called the state.

8.3.7.1 When a purchase order is issued which does not differ from the bid submitted by an offeror, mutuality shall be assumed.

8.3.7.2 In accordance with the General Terms and Conditions which notify offerors that the Purchasing Agent reserves the right to make partial bid awards, mutuality shall be assumed when a purchase order does not differ from the elements of a bid submitted by an offeror.

8.3.7.3 Any offer, whether in response to a solicitation for proposals or bids, or made without a solicitation, which is accepted in the form of an order made by the Purchasing Agent, or a state official with purchasing authority delegated by the Purchasing Agent, shall be considered a binding contract.

8.3.8 Consideration - Although consideration to support a contract may assume other forms, generally it shall mean the agreement to pay a sum of money for the delivery of the desired item or services rendered. It shall not be essential that the consideration be of a substantial consequence, but shall have some value. Compensation shall be specified and shall include but not be limited to: (a) terms of payment for partial delivery or completion; (b) unit of cost (hourly rate, per report rate), if appropriate; (c)

frequency/conditions for payment - weekly, monthly, upon completion of percentage of work, etc.; and (d) retainage, when appropriate.

8.3.9 Capacity of Parties - The contracting parties shall have the legal authority to enter into contracts.

8.3.10 Competence of Parties - The contracting parties shall be of legal age and of sound mind.

8.3.11 Length of contract period shall be specified.

8.3.12 A state official (or position) from whom the contractor shall obtain direction shall be named and/or a format for written authorization to deliver (e.g., request for delivery form for master pricing agreement) shall be specified.

8.3.13 Public Works/Construction Contracts shall provide for the following additional considerations:

8.3.13.1 Certificates of insurance to protect the general public or state property from injury or loss arising from actions or inaction of the contractor during the progress of a contract.

8.3.13.2 Each contractor shall be responsible for providing satisfactory evidence of complete coverage of all insurances, permits, and licenses required by state, city or town statutes, ordinances, and/or regulations.

8.4 THE PURCHASE ORDER CONTRACT

8.4.1 "Purchase Order" shall mean a document issued by the Purchasing Agent to formalize a purchase transaction with a vendor. The purchase order shall contain statements as to the quantity, description, and price of the goods or services ordered, applicable terms as to payment, discounts, date of performance, transportation, and other factors or suitable references pertinent to the purchase and execution by the vendor. Purchase orders shall include blanket orders, master pricing agreements, and utility purchase orders.

8.4.2 The entire agreement with the ~~supplier~~ vendor shall, at all times, reside solely in the purchase order and its referenced supplements.

8.4.3 Purchase Order Supplements shall consist of all of the following documents:

- ~~8.4.3.1~~ The state's General Terms and Conditions;
- ~~8.4.3.2~~ The state's request for quotations or proposals, including specifications;
- ~~8.4.3.3~~ The contractor's offer which is responsive to the solicitation; and/or

- ~~8.4.3.4~~ As appropriate, additional contract provisions, as necessary.

8.5 MULTI-YEAR CONTRACTS

8.5.1 [37-2-33(1)] Unless otherwise provided in the statute making appropriations therefore, multi-year contracts for supplies and services may be entered into for periods not extending beyond the end of the biennium in which the contract was made, if funds for the first fiscal year of the contemplated contract are available at the time of contracting. Payment and performance obligations for succeeding fiscal years shall be subject to the availability of funds therefore.

8.5.1.1 "Biennium" shall mean a period of time equal to two fiscal years.

8.5.1.2 "Fiscal year" shall mean a period of time beginning on the first day of July in one calendar year and ending on the last day of June of the subsequent calendar year.

8.5.1.3 Multi-year contracts which extend beyond a biennium shall be permitted provided that:

8.5.1.3.1 funds for the first year of the biennium have been appropriated; and

8.5.1.3.2 contracts shall contain a standard clause which states that implementation of the contract beyond the first fiscal year shall be subject to the availability of funds; and

8.5.1.3.3 a written justification is placed in the purchase order file or the category of procurement has by regulation or policy been identified by the Chief Purchasing Officer as appropriate for multi-year contracting, e.g., property leases.

8.5.1.4 Multi-year contracts shall specify the annual costs and total value of each contract.

8.5.2 [37-2-33(2)] Prior to the utilization of a contract as described in subsection 37-2-33(1), it shall be determined in writing by the Chief Purchasing Officer:

(a) That estimated requirements cover the period of the contract and are reasonably firm and continuing; and

(b) That such contract will serve the best interests of the state by encouraging effective competition or otherwise promoting economics in state procurement.

8.5.2.1 The Chief Purchasing Officer may delegate to the Purchasing Agent all or a portion of the responsibility and authority to make such determinations.

8.5.3 In accordance with [37-2-33(3)] when funds are not appropriated or otherwise made available to support continuation of performance in a subsequent year of a [multi-year]

contract, the contract for such subsequent year may be cancelled and the contractor shall be reimbursed for the reasonable value of nonrecurring costs incurred but not amortized in the price of the supplies or services delivered under the contract. The cost of cancellation may be paid from:

(a) Appropriations currently available for performance of the contract; or

(b) Appropriations currently available for procurement of similar supplies or services and not otherwise obligated; or

(c) Appropriations made specifically for the payment of such cancellation costs.

8.5.4 Multi-year contracts shall be appropriate purchasing instruments for transactions for which the nature of the goods and services will remain relatively stable over time; and for which potential changes in price can be predicted and agreed to in advance, including provisions for mandated escalation requirements, such as:

8.5.4.1 Lease and lease-purchase agreements for equipment, real property, and facilities;

8.5.4.2 Maintenance and repair of specialized equipment;

8.5.4.3 Special licensing agreements (computer, communication);

8.5.4.4 Special services for which the contract award is based on a request for proposals, such as residential treatment programs;

8.5.4.5 Supplemental services, the approval of which is based upon the recommendation of the State Architectural, Engineering and Consultant Selection Committee and selection by the Chief Purchasing Officer; and

8.5.4.6 Any other contractual relationship where it has been determined in writing by the Chief Purchasing Officer that a long-term agreement shall be the most cost effective method of procurement.

8.5.5 User agencies shall specify on requisitions and shall submit justification whether multi-year contracts should be considered by the Purchasing Agent for the supply or service requisitioned.

8.6 LETTER OF AUTHORIZATION

~~When~~ If the Chief Purchasing ~~Agent~~ Officer determines in writing that it is ~~absolutely~~ essential that the vendor be given a binding commitment so that work can be commenced immediately and that negotiation of a definitive contract cannot be accomplished in sufficient time, the Purchasing Agent may issue a Letter of Authorization.

8.6.1 A Letter of Authorization (LA) shall mean a written instrument binding only when signed by the Purchasing Agent, which authorizes immediate commencement of ~~implementation of the~~ a contract for delivery of supplies or the performance of services.

8.6.2 Such instrument shall:

8.6.2.1 Represent a preliminary authorization subject to the subsequent issuance of a Purchase Order.

8.6.2.2 Be superseded by a definitive contract at the earliest practicable date not later than the greater ~~of the following: (1)~~ the expiration of 180 days from the date of the LA, or delivery of 40% of the contract.

8.6.2.3 Be specifically negotiated and shall address the following contractual requirements that:

- ~~8.6.2.3.1 T~~the vendor will proceed immediately with performance of the contract, including procurement of necessary materials; and

- ~~8.6.2.3.2~~ specifies the extent and method of payments in the event of termination for the convenience of the state or for default; and

- ~~8.6.2.3.3~~ the vendor is not authorized to expend monies or incur obligations in excess of the maximum liability of the state as set forth in the ~~letter contract;~~

- ~~8.6.2.3.4~~ specifies the type of definitive contract contemplated; and

- ~~8.6.2.3.5~~ as many definitive contract provisions as possible; and

- ~~8.6.2.3.6~~ requires the vendor ~~shall~~ to provide such price and cost information as may reasonably be required by the state; and

- ~~8.6.2.3.7~~ the vendor and the state ~~shall~~ enter into negotiations promptly and in good faith to reach agreement and execute a definitive contract.

8.7 CHANGES TO PURCHASE ORDERS

8.7.1 All agreements and changes to scope of work, price, or other terms shall be incorporated into purchase orders via "change order" documents incorporating contract amendments.

8.7.2 Change Orders issued by the Office of Purchases shall be the only binding documents which may create a change in a purchase order.

8.7.3 Personnel shall not commit the state to technical/contractual changes to purchase orders without first securing all necessary approvals.

8.7.4 All discussions of potential changes (oral or written) may be disclaimed as not being binding on the supplier or the state until formally incorporated in the purchase order.

8.7.5 In general, change orders shall be issued by the Office of Purchases following receipt of quotations and discussions of price and delivery with the supplier. If circumstances preclude immediate issuance of a formal change order, interim direction to the supplier may be made via a letter of authorization signed by the Purchasing Agent.

8.7.6 Any request for retroactive approval of a change order valued at less than one hundred thousand dollars ($100,000) must be submitted to and approved by the Purchasing Agent. Any request for retroactive approval of a change order valued at more than one hundred thousand dollars ($100,000) must be submitted to and approved by the Chief Purchasing Officer.

8.8 TERMINATION AND CANCELLATION OF CONTRACT

8.8.1 If required bidder certifications are determined to be invalid, the Purchasing Agent shall declare the purchase order void.

8.8.2 Notice of termination by either party shall be submitted in writing to the other party in accordance with the termination clause of the contract.

8.8.3 Cancellation of a Contract by the State

8.8.3.1 Cancellations of Purchase Order Contracts or Master Pricing Agreements shall require the signature of the Purchasing Agent or his designee.

8.8.3.2 A contract may be cancelled or annulled at the contractor's expense upon determination by the Purchasing agent that a condition of nonperformance exists.

8.8.3.3 "Nonperformance" shall mean lack of compliance with the contract specifications and/or terms and conditions.

8.8.3.4 Cancellation by the Purchasing Agent for nonperformance shall be subject to the following rules:

8.8.3.4.1 A formal complaint of nonperformance or unsatisfactory performance shall be submitted by an authorized state official to the Purchasing Agent. Such complaint shall provide a description of and justification for the complaint.

8.8.3.4.2 The Purchasing Agent shall direct the complaint to the Standards and Inspection Unit (SIU) of the Office of Purchases.

8.8.3.4.3 The SIU inspector, in conjunction with the Office of Purchases official (buyer) responsible for the contract, shall be authorized to attempt to resolve the problem to the satisfaction of the user agency.

8.8.3.4.4 The inspector and buyer shall report in writing to the Purchasing Agent whether the problem requires formal action, and if the problem has not been resolved, the Purchasing Agent shall notify the contractor in writing that he/she is not in compliance with the contract. Such notice of nonperformance shall: (1) specify the nature of the complaint, (2) direct the contractor to take corrective action, (3) direct the contractor to respond in writing to the notice of nonperformance within a specified time period, and (4) notify the contractor that failure to respond as directed may result in cancellation of the order.

8.8.3.5 If a contractor fails to take corrective action and/or respond to a notice of nonperformance, the Purchasing Agent may issue a change order canceling the contract.

8.8.3.6 If, after reviewing the contractor's response, the Purchasing Agent determines that the contractor is not out of compliance with the contract requirements, he shall so notify the user agency and the contractor in writing, providing a rationale for his decision.

8.8.3.7 If the Purchasing Agent determines that valid extenuating circumstances out of the control of the contractor have prevented compliance with the contract requirements, he shall so inform the user agency and may amend the contract to provide for a reasonable opportunity for the vendor to perform the contract, if necessary.

8.8.3.8 If the Purchasing Agent believes that a contractor's action or lack thereof presents a clear and immediate danger to the public interest, he may request in writing that the Chief Purchasing Officer authorize immediate termination of the contractual relationship.

8.8.3.9 Copies of all communications with a contractor regarding nonperformance shall be sent to the contractor's bonding company, power of attorney and the Department of Administration legal counsel.

8.8.3.10 If the Purchasing Agent determines that a contractor is unwilling or unable to perform a contract, he shall:

8.8.3.10.1 direct the contractor's bonding company to assume responsibility for the performance of the contract if a performance bond has been issued; and

8.8.3.10.2 so notify the user agency and contractor; and

8.8.3.10.3 notify the contractor whether he/she has been temporarily suspended or permanently debarred from the state Bidders List and shall be responsible for any costs incurred by the state in the completion of the contract.

8.9 TYPES OF PURCHASE ORDER CONTRACTS

8.9.1 Fixed Price (FP)

8.9.1.1 The Firm Fixed Price (FFP) contract shall mean one which provides for a price which is not subject to any adjustment by reason of the seller's cost experience in the performance of the contract. This type of contract should be used when the price is based on credible cost data for the completion of the order.

8.9.1.2 The Fixed Price with Economic Price Adjustment (FP W/EPA) contract shall mean one which provides for the upward or downward revision of the stated price upon the occurrence of certain economic conditions which are specifically defined in the contract. These conditions are limited to those beyond the control of the seller.

8.9.1.3 A Fixed Price Redeterminable (FPR) contract shall mean one which permits reconsideration of price at a stated time after contract initiation when the only supplier capable of performing a job cannot quote a fixed price with full assurance that it will be fair and reasonable.

8.9.1.4 The Fixed Price Incentive (FPI) contract shall mean one which provides for the adjustment of profit (fee) and price according to a sharing arrangement based on the relationship which final negotiated total cost bears to the negotiated target cost.

8.9.2 Cost Reimbursement

8.9.2.1 A Cost No Fee (CNF) contract shall mean one under which the seller receives no fee.

8.9.2.2 A Cost Sharing (CS) contract shall mean one under which the seller not only receives no fee but is reimbursed for only an agreed upon portion of its allowable costs.

8.9.2.3 A Cost Plus Fixed Fee (CPFF) contract shall mean one which provides for the payment of a fixed fee to the seller. The fixed fee negotiated does not vary with actual cost, but may be adjusted as a result of any subsequent changes in the work or service to be performed under the purchase order.

8.9.2.4 A Cost Plus Incentive Fee (CPIF) contract shall mean one which provides for a fee which is adjusted by formula in accordance with the relationship which total allowable costs bear to target costs, a target fee, a minimum and maximum fee, and a fee adjustment formula. Upon completion of the order, the fee is determined in accordance with the established formula as an incentive for performance efficiency; however, there is no ceiling price specified and the seller is under no obligation to complete the order once the funds obligated have been exhausted.

8.9.2.5 A Cost Plus Percentage of Cost (CPPC) contract shall mean one which provides for a fee which is adjusted by percentage formula in accordance with the relationship to

total cost. The percentage formula may be fixed, but fee paid may be adjusted as a result of any subsequent changes in the work or service to be performed under the purchase order.

8.9.2.6 A Time and Materials (T/M) contract shall mean one which provides for the purchase of supplies or services on the basis of (1) direct labor hours at specified fixed hourly rates (which rates include direct and indirect labor, overhead and profit) and (2) material at cost. Material handling costs may be included to the extent they are clearly excluded from any factor of the charge computed against direct labor hours (L/H).

8.9.3 A To Be Determined (TBD) contract shall mean one which enables the buyer and the seller to enter into a relationship with no predetermined terms at the initiation of the contract.

8.9.4 A Blanket Order shall mean an arrangement under which a purchaser contracts with a vendor to provide the purchaser's requirements for an item(s) or a service, on an as-required and often over-the-counter basis. Such an arrangement sets a limit on the period of time it is valid and the maximum amount of money which may be spent at one time or within a specified period. (Usually, but not always, the funds for agency blanket orders will be encumbered.)

8.9.4.1 A Pricing Agreement (PA) shall mean a special blanket order which establishes the terms and conditions under which a specific item or a specific category of items in an indefinite quantity, are to be purchased for a specific period of time, usually one year.

8.9.4.2 A Master Pricing Agreement (MPA) shall mean a pricing agreement which has been established on behalf of more than one entity. (Usually, funds for MPA contracts are not encumbered.)

8.9.4.3 A "Term Contract" shall be synonymous with an MPA contract.

8.10 PRINCIPLES FOR SELECTION OF TYPE OF PURCHASE ORDER CONTRACT

The selection of the appropriate type of contract is a matter which requires the exercise of judgment in order to obtain fair and reasonable prices in accordance with the circumstances of the procurement.

8.10.1 In determining the type of contract to be used, consideration shall be given but shall not be limited to such factors as:

- ~~8.10.1.1~~ Type and complexity of the item or scope of work to be performed;
- ~~8.10.1.2~~ Urgency of the requirement;
- ~~8.10.1.3~~ Prospective period of contract performance;

- ~~8.10.1.4~~ Degree of competition present;

- ~~8.10.1.5~~ Extent of completion of baseline and detail design; which in turn may influence other considerations as the adequacy and firmness of specifications, and the availability of relevant historical pricing data and prior experience;

- ~~8.10.1.6~~ Availability of comparative price data, or lack of firm market prices or wage levels;

- ~~8.10.1.7~~ Prior experience with the supplier;

- ~~8.10.1.8~~ Extent and nature of subcontracting contemplated;

- ~~8.10.1.9~~ Assumption of business risk;

- ~~8.10.1.10~~ ~~Supplier~~ Vendor's technical capability and financial responsibility;

- ~~8.10.1.11~~ Administrative costs;

- ~~8.10.1.12~~ Adequacy of the ~~supplier's~~ vendor's accounting system; and

- ~~8.10.1.13~~ Other concurrent contracts.

8.10.2 [37-2-32] Approval of Accounting System. - Except with respect to firm fixed price contracts, no contract type shall be used unless it has been determined in writing that the proposed contractor's accounting system will permit timely development of all necessary cost data in the form required by the specific contract type contemplated and that the contractor's accounting system is adequate to allocate costs in accordance with generally accepted accounting principles.

8.10.2.1 The firm fixed price contract shall be used in applications and under limitations hereinafter set forth, unless the use of another type of contract is more appropriate.

8.10.3 [37-2-31] Subject to the limitations on entering into cost plus percentage of cost and cost reimbursement contracts set forth herein, any type of contract which will promote the best interests of the state may be used.

8.10.4 Cost Reimbursement Contracts.

8.10.4.1 [37-2-29] The Cost Plus a Percentage of Cost (CPPC) contract is prohibited.

8.10.4.2 [37-2-30(1)] No contract providing for the reimbursement of the contractor's cost plus a fixed fee (cost reimbursement) may be made through negotiation or in sole source or emergency procurements unless it is determined in writing by the Chief Purchasing Officer that such contract is likely to be less costly to the state than any other

type of contract, or that it is impracticable to obtain supplies or service of the kind or quality required except under such a contract.

8.10.4.3 [37-2-30(2)] Each contractor under a cost reimbursement type contract shall obtain consent from the Chief Purchasing Officer, as provided for in the contract, before entering into:

(a) a cost reimbursement subcontract; or

(b) any other type of subcontract involving more than ten thousand ($10,000) or ten percent (10%) of the estimated cost of the prime contract[whichever is greater].

8.10.4.4 [37-2-30(3)] All cost reimbursement contracts shall contain a provision that only costs recognized as allowable, in accordance with cost principles set forth in regulations issued by the Chief Purchasing Officer will be reimbursed.

8.10.5 When a FP W/EPA contract is employed, provisions shall be included for downward adjustment of the contract price in those instances where the prices or rates may be expected to fall below the base price agreed to by contract.

8.10.5.1 Types of economic adjustments shall include but shall not be limited to:

8.10.5.1.1 Price Adjustment - a modification of the base purchase order price on the basis of increases or decreases in published or established prices of specific items.

8.10.5.1.2 Labor and Material Adjustment - a modification of the contract base price on the basis of increases or decreases of wage rates, specific material costs, or both, using agreed upon standards or indices.

8.10.5.2 This type of contract may be appropriate where valid doubt exists as to the predictability of economic conditions which will exist during a multi-year contract period. Price adjustment provisions shall not be used to provide protection to contractors against contingencies which arise from inaccurate estimates of the quantities of labor or materials required for completion of a contract.

8.10.6 When FPR contracts are employed the basis for adjustments shall be established when the contract is negotiated and a cost baseline shall be established.

8.10.6.1 The following data shall be secured from each source before placing a re-determinable order: number of estimated hours and method used in arriving at hours; direct labor rates per hour; material cost, including both quantities and unit prices; overhead rates (categorized by element); profit, any other data deemed pertinent for analysis of the prices quoted.

8.10.6.2 The establishment of a re-determinable type of contract shall require the written authorization of the Chief Purchasing Officer. Upon analysis conducted jointly by the

user agency and the Purchasing Agent, a request and justification for considering re-determinable pricing provisions shall be submitted in writing by the Purchasing Agent to the Chief Purchasing Officer.

8.10.7 When FPI contracts are employed:

8.10.7.1 There shall be an initially negotiated firm target cost, a target profit, a price ceiling and a final profit and price adjustment formula. After completion, a final cost shall be negotiated and a final price established in accordance with the predetermined formula.

8.10.7.2 The circumstances must be such that targets are reasonably free of contingencies and provided that a fair and reasonable incentive formula can be established at the time of initial contract negotiation and the contract is of sufficient duration to permit achievement of substantial cost reductions.

8.10.7.3 The same supplier cost data shall be required as for a re-determination contract.

8.10.8 A CNF contract may be used for research and development work – particularly with nonprofit organizations and educational institutions.

8.10.9 A CS contract is suitable for:

8.10.9.1 Jointly sponsored research and development with educational institutions or other nonprofit organizations or

8.10.9.2 Other research and development work where the results of the contract may have commercial benefit to the seller.

8.10.10 A CPFF contract is suitable when:

8.10.10.1 The scope and nature of work cannot be definitely specified.

8.10.10.2 Definite specifications exist but the seller lacks a valid basis for estimating costs because the supplies called for are not items regularly manufactured, or the services called for have not been previously performed, or partial experience will not reveal a proper pricing basis for the remainder of the contract.

8.10.10.3 Specifications are not complete or major changes substantially affecting the scope of production or construction work are expected.

8.10.10.4 Work is to be performed in a state-owned facility with the use of state-owned equipment, materials, or personnel.

8.10.11 A T/M contract shall include the establishment of a cost limitation which the seller may not exceed (except at his/her own risk). A T/M contract shall be used only in situations when:

8.10.11.1 It is not possible at the time of placing the order to estimate the extent of the work or to anticipate final costs with any reasonable degree of accuracy such as: (1) engineering and design services, (2) certain repair, maintenance or overhaul work, (3) emergencies.

8.10.11.2 Provision is made for appropriate surveillance by state personnel during performance.

8.10.12 L/H contracts based solely on labor hours shall be considered a subcategory of T/M contracts, subject to the same restrictions as the T/M contract and shall be used only after the Purchasing Agent has determined that no other type of contract is suitable for meeting the needs of the requisitioner.

8.10.13 Employment of TBD contracts shall be prohibited.

8.10.14 Considerations for use of a MPA contract:

8.10.14.1 The MPA shall specifically state the term and probable volume consideration of the agreement.

8.10.14.2 The seller shall be authorized to ship to the state only those items specified by a delivery request (on a form to be provided) issued under the authority of the Master Pricing Agreement. The state is obligated for payment only to the extent of the specific quantities set forth in the delivery request or for express considerations applicable to the contract itself.

8.10.14.3 The specific category of items to be purchased may be listed in a catalog prepared specifically for the agreement, a catalog of items offered for sale by a supplier, a national catalog published by a catalog publishing firm, or such other lists of items as may, from time to time, be determined as being a legally sufficient description of the item or items being purchased.

8.11 SELECTION OF METHODS OF CONSTRUCTION CONTRACTING MANAGEMENT

8.11.1 Construction Contract Management. The intent of Rule 8.11 is to specifically identify alternative methods of management of construction and the criteria to be used in selecting such methods. In addition, the intent of this Rule is to clarify that the method of source selection used to award a state contract for a particular construction project shall continue to be governed by all the applicable provisions of chapter 2 of title 37, entitled "State Purchases", also referred to as the "State Purchases Act". These provisions include but are

not limited to sections 37-2-17 "Methods of source selection"; 37-2-18 "Competitive sealed bidding"; 37-2-19 "Competitive negotiation"; 37-2-20 "Negotiations after unsuccessful competitive sealed bidding"; 37-2-21 "Noncompetitive procurements"; 37-2-22 "Small purchases" and 37-2-59 "Professional services – Architectural, engineering, and consultant services – Committee". Provided, however, the provisions of Rules 8.11.3 and 8.11.4 shall not apply to road, bridge and heavy construction projects which are funded in whole or in part by federal funds.

8.11.2 Road, Bridge and Heavy Construction Projects. The provisions of Rules 8.11.3 and 8.11.4 shall not apply to road, bridge and heavy construction projects that are managed by the Rhode Island Department of Transportation and are funded in whole or in part by federal funds. Road, bridge and heavy construction projects are subject to the methods of management of construction contracting, including the criteria for selecting such methods, that are set forth in applicable federal law, including but not limited to 23 U.S.C. 112(b)(i) as amended, and regulations promulgated there under.

8.11.3 Construction Contract Management Methods and Criteria. For all other construction projects not included in Rule 8.11.2, the methods below, along with the criteria for each method, are the alternative methods of construction contract management deemed feasible by the Chief Purchasing Officer. The methods below are not mutually exclusive and may be combined on a project.

8.11.3.1 General Contractor Method. The general contractor method is typified by one business, acting as a general contractor, contracting with the State to timely complete an entire construction project in accordance with drawings and specifications provided by the State. Generally the drawings and specifications are prepared by an architectural or engineering firm under contract with the State. Further, while the general contractor may take responsibility for successful completion of the project, much of the work may be performed by specialty contractors with whom the general contractor has entered into subcontracts.

The general contractor method is the generally preferred method of construction work and may be selected for a project <u>only</u> when it is determined <u>in writing by the Chief Purchasing Officer</u> that the following criteria will be met:

(a) the project requires timely completion of the construction work in accordance with drawings and/or specifications provided by the State and/or the State's agent.

(b) the project work may be performed by specialty sub-

contractors under the control and supervision of a general contractor.

(c) the project does not require direct supervision or coordination between the contractor and project engineering/design professionals other than as normally performed by State employees.

(d) the construction project is estimated to cost in excess of ten thousand dollars ($10,000).

(e) sufficient time exists to complete the design, bid the project and construct the work by the desired occupancy date.

8.11.3.2 Multiple Prime Contractors. Under the multiple prime contractor method, the State or its agent contracts directly with any number of contractors, often representing different trades, to complete portions of the project in accordance with the State's drawings and specifications. The State and/or its agent shall have primary responsibility for successful completion of the entire project.

The multiple prime contractor method may be selected for a project <u>only</u> when it is determined <u>in writing by the Chief Purchasing Officer</u> that the following criteria will be met:

(a) the State or its agent is able to coordinate job site activities of any number of contractors and/or subcontractors with varying areas of construction expertise to complete portions of the project in accordance with the State's drawings and specifications, and the State or its agent will contract directly with such contractors and/or subcontractors.

(b) the State and/or its agent is able to assume primary responsibility for successful completion of the entire project.

(c) the construction project is for the rehabilitation or renovation of a building or buildings.

(d) the contract(s) for the rehabilitation or renovation of any building(s) in the aggregate are estimated to cost less than two million dollars ($2,000,000).

8.11.3.3 Design-Build. In a design-build project, a person or firm contracts directly with the State to meet the State's requirements as described

in a set of design or engineering specifications, bridging documents, or scope of work. Final design and construction are both the responsibility of the design-build contractor. This method can include projects where the design-build contractor supplies the site as part of the design-build package.

The design-build method may be selected for a project only when it is determined in writing by the Chief Purchasing Officer that the following criteria will be met:

(a) the State does not have the ability to prepare the requisite design or engineering specifications, bridging documents, or scope of work.

(b) the State cannot manage or supervise the work of specialty trade contractors and it is not in the State's best interest to contract directly with such specialty contractors.

(c) the State determines that it is in its best interest for a design-build firm to assume responsibility for both final design and construction of the project.

(d) due to time constraints and the need to complete the project on an expedited basis, it is in the State's best interest to select a design-build contractor rather than a general contractor for the project.

(e) construction work on the project has an estimated cost equal to or greater than two-million five-hundred thousand dollars ($2,500,000).

(f) the State desires to have a single firm responsible for both design and construction.

8.11.3.4 Construction Manager At Risk. The terms ~~A~~ "Construction Manager at Risk ~~is a person or firm experienced in construction that has the ability to evaluate and to implement drawings and specifications as they affect time, cost, and quality of construction and the ability to coordinate the construction of the project, including the administration of change orders. Without limitation, the construction manager at risk shall guarantee that the project will be completed on time and will not exceed a specified maximum price, and/or may obtain subcontractors through the issuance of multiple competitively negotiated bid packages as the design is developed. The construction manager at risk may provide for any and all services as deemed necessary~~

~~by the state which may include, but not be limited to, construction services, management services, accounting services, design services and, the employment of specialty subcontractors to the construction manager at risk as deemed necessary to successfully complete the project.~~ ,"construction management at-risk services," "construction management at-risk delivery method" shall all be limited to that certain construction method defined by R. I. Gen. Laws § 37-2-7 (30). The terms "construction manager at-risk" and "construction management at-risk firm" shall be limited as defined by R.I Gen. Laws § 37-2-7 (31).

The ~~C~~ construction ~~M~~ manager at ~~R~~ risk method of construction management may be selected for a project only when it is determined in writing by the Chief Purchasing Officer that ~~the following~~ all criteria mandated by R.I. Gen. Laws § 37-2-27.2, 27.3, and 27.4, as amended ~~will be~~ have been met.

~~(a) the State lacks the resources to evaluate and implement drawings and specifications as they affect time, cost, and quality of construction and lacks the ability to coordinate the construction of the project, including the administration of change orders.~~

~~(b) the State requires professional assistance in the development of a cost effective design (also known as the construction document phase) for the project.~~

~~(c) it is in the State's best interest to hire a construction manager who can guarantee that the project will be completed on time and will not exceed a specified guaranteed maximum price for construction for the scope of the work, as defined by the drawings, specifications, and other pertinent information known at the time the guaranteed maximum price was set.~~

~~(d) it is in the State's best interest not to retain the services of a general contractor for the project and not to directly hold contracts with subcontractors, but rather to retain the services of a construction manager, who shall be required to directly retain subcontractors through issuance of multiple, competitively negotiated bid packages.~~

~~(e) it is in the State's best interest to pay a single management fee which may be either a lump sum or a combination of other fees, except that said fees shall not be calculated as a~~

~~percentage of construction costs, with a guaranteed maximum cost for construction.~~

~~(f) it is in the State's best interest to hire a construction manager who can provide construction services, management services, accounting services, and retain specialty subcontractors as deemed necessary to successfully complete the project.~~

~~(g) the project has an estimated cost equal to or greater than twenty-five million dollars ($25,000,000).~~

8.11.3.5 "Owner's Program Manager"~~ment~~. shall be limited to that certain construction method defined by R.I. Gen. Laws § 37-2-7 (32), as amended. ~~Owner Program Management is a method of procurement in which the program manager acts as the owner's agent in all aspects of the construction project including architectural programming, planning, design and as well as construction. The owner's program manager provides services ranging from early feasibility studies to post-construction facilities management. The program manager typically provides services that include: a) the establishment and management of cost and time parameters, b) value engineering input and cost analysis, c) preparation of bid packages, d) establishment and maintenance of quality control standards, e) project reporting and, f) project accounting services. Other specific services may be contracted to the owner's program manager.~~

The Owner's Program Manager ~~ment~~ method may be selected for a project only when it is determined in writing by the Chief Purchasing Officer that the following criteria will be met:

(a) the State does not have the ability to prepare the requisite design or engineering specifications, bridging documents, or scope of work;

(b) the State cannot manage or supervise the work of specialty trade contractors and will not contract directly with such specialty trade contractors;

(c) it is in the State's best interest to retain a program manager to supervise and or monitor the activities of a general contractor; and/or

(d) it is in the State's best interest to retain a program manager to supervise and or monitor the engineering and

architectural services for a project;

(e) the construction project has an estimated cost equal to or greater than ten thousand dollars ($10,000).

8.11.4 Construction Contract Management Selection Information. In addition to criteria set-forth in Rule 8.11.3, the following information for a particular project shall be submitted to the Chief Purchasing Officer under Rule 8.11.5:

8.11.4.1 when the project must be completed or ready for occupancy or use;

8.11.4.2 the specific nature of the project and its specialized needs, e.g. housing, offices, laboratories, and specialized construction;

8.11.4.3 the extent to which the requirements of the procuring agency and the ways in which said requirements are to be met are known;

8.11.4.4 the location of the project;

8.11.4.5 the size, scope, complexity, and economics of the project;

8.11.4.6 the amount and type of financing available for the project, including whether the budget is fixed and the source of funding, e.g., general or special appropriation, federal assistance moneys, general obligation bonds or revenue bonds;

8.11.4.7 the availability, qualification, and experience of State personnel to be assigned to the project and how much time the State personnel can devote to the project;

8.11.4.8 the availability, experience and qualifications of outside consultants and contractors to complete the project under the various methods being considered;

8.11.4.9 the method of source selection under the State Purchases Act that will be used to award a contract to a vendor for this particular project.

8.11.5 Documentation of Selection Determination. Using and including the information in Rule 8.11.4, the purchasing agent or purchasing agency responsible for carrying out the construction project shall set forth in writing to the Chief Purchasing Officer the facts that led to the selection of a particular method of construction contract management pursuant to the criteria set forth in Rule 8.11.2 or 8.11.3 and the information required in Rule 8.11.4. The Chief Purchasing Officer shall include in the contract file a written statement setting forth the facts that led to the selection of a particular method

of management of construction in each instance. The Chief Purchasing Officer's written statement may adopt, in whole or in part, any written statements provided by the purchasing agent or the purchasing agency.

8.11.6 Protest. Any actual or prospective bidder, offeror, or contractor, who is aggrieved in connection with the solicitation, ~~or~~ selection, or ~~for~~ award of a method of construction management contract, may file a bid protest with the Chief Purchasing Officer pursuant to R.I. Gen Laws ~~section~~ § 37-2-52 using the procedures required by Section 1.6 of these Procurement Regulations.

8.12 CONTRACT ADMINISTRATION

Subsequent to the award of any contract for goods or services and continuously over the life of any contract, each agency shall determine and verify that service(s) provided or goods received match exactly all contract specifications as to kind, quality, quantity, or frequency and price. Each Agency shall document in detail all deviation(s) and submit formal complaint(s) to the Office of Purchases for follow up action.

8.12.1 Attestation and approval of payment vouchers by duly authorized agents of the agency shall constitute acceptable evidence of such verification.