

Article 3
Source Selection and Contract Formation

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§16301. Definitions. (a) *Capability*, as used in §16106(aa) (Definitions, Responsible Bidder or Offeror) of these Regulations, means capability at the time of the contract.

(b) *Cost Analysis* is the evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred, prices to be paid, and costs to be reimbursed.

(c) *Cost Data* are information concerning the actual or estimated cost of labor, material, overhead, and other cost elements which have been actually incurred or which are expected to be incurred by the contractor in performing the contract.

(d) *Discussions*, as used in the source selection process, means an exchange of information or other manner of negotiation during which the offeror and the hospital may alter or otherwise change the conditions, terms, and price of the proposed contract. Discussions may be conducted in connection with sole source, and

emergency procurement; discussions are not permissible in competitive sealed bidding (except to the extent permissible during the first phase of multi-step sealed bidding).

(e) *Prequalification for Inclusion on Bidders List* means determining in accordance with §16318 (Prequalification) that a prospective bidder or offeror satisfies the criteria established for being included on the bidders list.

(f) *Price Analysis* is the evaluation of price data, without analysis of the separate cost components and profit as in cost analysis, which may assist in arriving at prices to be paid and costs to be reimbursed.

(g) *Price Data* are factual information concerning prices, including profit, for supplies, services, or construction substantially similar to those being procured. In this definition, prices refer to offered or proposed selling prices, historical selling prices, and current selling prices of such items. This definition refers to data relevant to both prime and subcontract prices.

(h) *Solicitation* means an Invitation for Bids, a Request for Proposals, a request for quotations, or any other document issued by the hospital for the purpose of soliciting bids or proposals to perform a hospital contract.

(i) *Suppliers* as used in §16318 (Prequalification) means prospective bidders or offerors.

§16302. General Provisions. (a) **Extension of Time for Bid or Proposal Acceptance.** After opening bids or proposals, the Hospital Administrator may request bidders or offerors to extend the time during which the hospital may accept their bids or proposals, provided that, with regard to bids, no other change is permitted. The reasons for requesting such extension shall be documented.

(b) **Extension of Time on Indefinite Quantity Contracts.** The time of performance of an indefinite quantity contract may be extended upon agreement of the parties, provided the extension is for ninety (90) days or less and the Hospital Administrator or his designee determines in writing that it is not practical to award another contract at the time of such extension.

(c) **Only One Bid or Proposal Received.**

(1) **One Bid Received.** If only one responsible bid is received in response to an Invitation for Bids (including multi-step bidding), an award may be made to the single bidder if the Hospital Administrator finds that the price submitted is fair and reasonable, and that either other prospective bidders had reasonable opportunity to respond, or there is not adequate time for resolicitation. Otherwise, the bid may be rejected pursuant to the provisions of §16316 (Cancellation of Solicitations; Rejection of Bids or Proposals) and:

(A) new bids or offers may be solicited;

(B) the proposed procurement may be cancelled; or

(C) if the Hospital Administrator or his designee determines in writing that the need for the supply or service continues, but that the price of the one bid is not fair and reasonable and there is no time for resolicitation or resolicitation would likely be futile, the procurement may then be conducted under §16312 (Sole Source Procurement) or §16313 (Emergency Procurement), as appropriate.

(2) [Reserved]

(d) **Multiple or Alternate Bids or Proposals.** Unless multiple or alternate bids or proposals are specifically provided for, the solicitation shall state that such bids or proposals shall not be accepted. When prohibited, multiple or alternate bids or proposals shall be rejected, provided that if a bidder clearly indicates a base bid, it shall be considered for award as though it were the only bid or proposal submitted by the bidder or offeror. The provisions of this section shall be set forth in the solicitation, and if multiple or alternate bids or proposals are allowed, it shall specify their treatment.

(e) [Reserved]

(f) **Bid and Performance Bonds for Supply contracts or Service Contracts.** Bid and performance bonds or other security may be required for supply contracts or service contracts as the Hospital Administrator, or such officer's designee deems advisable to protect the interest of the hospital. Any such requirements must be set forth in the solicitation. Bid or performance bonds should not be used as a substitute for a determination of bidder or offeror responsibility. §16503 (Bid Bonds) and §16504 (Performance and Payment Bonds) set forth bonding requirements applicable to construction contracts and may be considered when establishing any such requirements for supply contracts or service contracts. See §16309 (c)(3) (Bid Bond) and §16309(c)(4) (Performance Bond) for application to supply or service contracts.

(g) **Conditioning Bids or Proposals Upon Other Awards not Acceptable.** Any bid or proposal which is conditioned upon receiving award of both the particular contract being solicited and another hospital contract shall be deemed non-responsive and not acceptable.

§16303. Relations Between Agencies. (a) Purchase Requisitions by Agencies.

(1) **Authority to Reject.** When the Hospital Administrator or his designee, after consultation with the requesting department, decides that processing the purchase requisition is clearly not in the best interest of the hospital or

that further review is needed, such officer shall return such purchase requisition to the requesting department. A statement of the reasons for its return shall accompany the returned requisition. Examples of reasons a purchase requisition may be returned include, but are no limited to:

(A) the request can be satisfied from existing hospital stocks or hospital contracts;

(B) the request exceeds the requesting departments needs;

(C) the supplies, services, or construction requested could be procured more economically at a different time without detriment to the hospital; or

(D) the quality requested is inconsistent with hospital standards and usage.

Rejected purchase requisitions may be reconsidered upon approval of a written justification from the affected department by the Hospital Administrator, or his designee. A written determination shall be made a part of the purchase requisition file.

(2) **Authority to Establish Lead Times.** Upon receipt of purchase requisitions, the Hospital Administrator, or his designee, has authority to decide when the procurement will be initiated and the time for response to the solicitation, provided the requesting department is notified if any dates this officer establishes exceed those stated by such department in the purchase requisition or will result in deliveries under the contract being later than the delivery date stated in the purchase requisition.

(3) **Requesting Department Response.** Any matters relating to disagreements between a requesting department and the Hospital Administrator, or his designee, with respect to actions taken under §16303(a)(1) or §16303(a)(2) of this section, or with regard to any other matter concerning a purchase requisition, may be brought to the Procurement Policy Office of the Board of Trustees for resolution.

(b) **Determination of contractual Terms and Conditions.** The Hospital Administrator, or his designee, is authorized to determine the contractual provisions, terms, and conditions of solicitations and contracts, provided such provisions, terms, and conditions are not contrary to statutory or regulatory requirements governing the procurement.

§16304. Unsolicited Offers. (a) **Unsolicited Offers Provision.**

(1) **Defined.** An unsolicited offer is any offer other than one submitted in response to a solicitation.

(2) **Processing of Unsolicited Offers.** The Hospital Administrator, or his designee, shall consider the offer as provided in this section. If a department that receives an unsolicited offer is not authorized to enter into a contract for the supplies, services, or construction offered, the head of such department shall forward the offer to the Hospital Administrator, or his designee, who shall have final authority with respect to evaluation, acceptance, and rejection of such unsolicited offers.

(3) **Conditions for Consideration.** To be considered for evaluation, an unsolicited offer:

(A) must be in writing;

(B) must be sufficiently detailed to allow a judgment to be made concerning the potential utility of the offer to the hospital;

(C) must be unique or innovative to hospital use;

(D) must demonstrate that the proprietary character of the offering warrants consideration of the use of sole source procurement; and

(E) may be subject to testing under terms and conditions specified by the hospital.

(4) **Evaluation.** The unsolicited offer shall be evaluated to determine its utility to the hospital and whether it would be to the hospital's advantage to enter into a contract based on such offer. If an award is to be made on the basis of such offer, the sole source procedures in §16312 (Sole Source Procurement) shall be followed.

(5) **Confidentiality.** Any written request for confidentiality of data contained in an unsolicited offer that is made in writing shall be honored. If an award is made, confidentiality of data shall be agreed upon by the parties and governed by the provisions of the contract. If agreement cannot be reached on confidentiality, the hospital may reject the unsolicited offer.

§16305. Novation or Change of Name. (a) Novation or Change of Name Provision.

(1) **No Assignment.** No hospital contract is transferable, or otherwise assignable, without the written consent of the Hospital Administrator and the Board of Trustees provided, however, that a contractor may assign monies receivable under a contract after due notice to the hospital.

(2) **Recognition of a Successor in Interest; Novation.** When in the best interest of the hospital, a successor in interest may be recognized in a novation agreement in which the transferor and the transferee shall agree that:

(A) the transferee assumes all of the transferor's obligations;

(B) the transferor waives all rights under the contract as against the hospital; and

(C) unless the transferor guarantees performance of the contract by the transferee, the transferee shall, if required, furnish a satisfactory performance bond.

(3) **Change of Name.** When a contractor requests to change the name in which it holds a contract with the hospital, the Hospital Administrator responsible for the contract shall, upon receipt of a document indicating such change of name (for example, an amendment to the Articles of Incorporation of the corporation), enter into an agreement with the requesting contractor to effect such a change of name. The agreement changing the name shall specifically indicate that no other terms and conditions of the contract are thereby changed.

(4) **Reports.** All change of name or novation agreements effected hereunder other than by the Hospital Administrator shall be reported to such officer within thirty (30) days of the date that the agreement becomes effective.

(5) **Actions Affecting More Than one Purchasing Agency.** Notwithstanding the provisions of Subsections (a)(1) through (a)(3) of this section, when a contractor holds contracts with more than one Purchasing Agency of the territory, the novation or change of name agreements herein authorized shall be processed only through the Office of the Hospital Administrator, or the Director of Public Works.

§16306. Contracting for Installment Purchase Payments.

(a) **Contracting for Installment Purchase Payments Including Interest.** Supply contracts may provide for installment purchase payments, including interest charges, over a period of time. Installment payments, however, should be used judiciously in order to achieve economy and not to avoid budgetary restraints and shall be justified in writing by the Hospital Administrator. The Hospital Administrator shall be responsible for ensuring that statutory or other prohibitions are not violated by use of installment provisions and that all budgetary, funding, or other required prior approvals are obtained. No such agreement shall be used unless provision for installment payments is included in the solicitation document.

§16307. Purchase of Items Separately From Construction Contract Provision. The Hospital Administrator is authorized to determine whether a supply item or group of supply items shall be included as a part of, or procured separately from, any contract for construction.

§16308. Methods of Source Selection. Unless otherwise authorized by law, all hospital contracts shall be by competitive sealed bidding, pursuant to §16309 (Competitive Sealed Bidding) of these Regulations, except as provided in:

- (1) Section 16310 (Procurement from Non Profit Corporations);
- (2) Section 16311 (Small Purchases);
- (3) Section 16312 (Sole Source Procurement);
- (4) Section 16313 (Emergency Procurement);
- (5) Section 16314 (Competitive Selection Procedures for Services Specified in §16212);
- (6) Section 16507 (Architect-Engineer and Land Surveying Services); or
- (7) Section 16315 (Purchase of Drugs by Generic Names).

§16309. Competitive Sealed Bidding. (a) **Application.** The provisions of this section apply to every procurement made by competitive sealed bidding, including multi-step bidding.

(b) **Use of Competitive Sealed Bidding.** Competitive sealed bidding is the preferred method for the procurement of supplies, services, or construction.

(c) **The Invitation for Bids.**

(1) **Use.** The Invitation for Bids is used to initiate a competitive sealed bid procurement.

(2) **Content.** The Invitation for Bids shall include the following:

(A) instructions and information to bidders concerning the bid submission requirements, including the time and date set for receipt of bids, the address of the office to which bids are to be delivered, the maximum time for bid acceptance by the hospital, and any other special information;

(B) the purchase description, evaluation factors, delivery or performance schedule, and such inspection and acceptance requirements as are not included in the purchase description; and

(C) the contract terms and conditions, including warranty and bonding or other security requirements, as applicable.

(3) **Bid Bond for Procurement of Supplies and Services.** A surety bid bond may be submitted with any bid, and if required, to prescribe the amount thereof and enforce forfeiture of such bond or deposit if the successful bidder fails

to enter into contract within the prescribed time. Bid bond may be required where essential to the best interest of the hospital. Determinations to require bid bonds shall be made by the Hospital Administrator in individual procurement. The use of a bid bond, however, is required when a performance bond is required. See 162303 for Bonding Requirement in Procurement of Construction.

(A) **Amount required.** Whenever a bid bond is required, the Hospital Administrator in accordance with his best judgment shall determine the amount or percentage which, when applied to the bid price, will produce an amount that will provide a bid guarantee which is adequate to protect the hospital from loss in the event of termination of the contract for default as provided in the bid guarantee provision. The amount shall be not less than ten percent (10%) of the bid price.

(B) **Invitation for Bids Provision.** When a bid guarantee is required, the invitation for bids shall contain:

1. a statement that identifies details which will enable bidders to determine the amount of the bid guarantee; and
2. a bid guarantee provision as prescribed in this section.

(4) Performance Bond for Procurement of Supplies and Services.

(A) To determine whether a performance bond shall be required before a contract is entered into, and if required, to prescribe the amount thereof and enforce forfeiture of such bond upon failure of the contractor to perform the contract in a satisfactory manner. Performance bonds may be required where essential to the best interest of the hospital. Determinations to require performance bonds shall be made by the Hospital Administrator on individual procurement. Examples of situations which may warrant requiring a performance bond for procurement of supplies and services are:

1. where substantial progress payments are made before delivery of end items commences;

(B) where, in connection with a contract for dismantling, demolition, or removal of improvements, etc., regardless of amount, a performance bond is determined necessary to ensure completion of work and to protect the hospital against damage to adjoining property during its performance;

(C) performance bond shall not be required unless the invitation for bids requires such a bond, or the requirement of such bond is in the best interest of the hospital; or

(D) any other conditions deemed to be in the best interest of the hospital.

(E) **Amount required.** Where the Hospital Administrator determines to require a performance bond, he shall determine the amount that will adequately protect the hospital.

(F) **Applicability.** The bonds prescribed in this section shall be applicable if its applications on individual procurement is essential to the best interest of the hospital as an assurance that the successful bidder will perform the services of the contract in a satisfactory manner. The bond required in this section may be waived by the Hospital Administrator if a determination is made in writing that the bond is not in the best interests of the hospital and the nature of the services or supplies being procured does not warrant the additional protection afforded by the bond.

(G) Bonds as may be required by this section shall be from a surety licensed to do business in this territory. Bonds shall be on a standard government form or standby irrevocable letter of credit or certified check or cashier's check issued by any local banks or bonding agencies.

(5) **Incorporation by Reference.** The Invitation for Bids may incorporate documents by reference provided that the Invitation for Bids specifies where such documents can be obtained.

(6) **Acknowledgement of Amendments.** The Invitation for Bids shall require the acknowledgement of the receipt of all amendments issued.

(d) **Bidding Time.** Bidding time is the period of time between the date of distribution of the Invitation for Bids and the time and date set for receipt of bids. In each case bidding time will be set to provide bidders a reasonable time to prepare their bids. A minimum of fifteen (15) days shall be provided unless a shorter time is deemed necessary for a particular procurement as determined in writing by the Hospital Administrator.

(e) **Bidder Submissions.**

(1) **Bid Form.** The Invitation for Bids shall provide a form which shall include space in which the bid price shall be inserted and which the bidder shall sign and submit along with all other necessary submissions.

(2) **Telegraphic Bids.** The Invitation for Bids may state that telegraphic bids and mailgrams will be considered whenever they are received in hand at the designated office by the time and date set for receipt of bids. Such telegraphic bids or mailgrams shall contain specific reference to the Invitation for Bids; the items, quantities and prices for which the bid is submitted; the time and place of delivery; and a statement that the bidder agrees to all the terms, conditions, and provisions of the Invitation for Bids.

(3) **Bid Samples and Descriptive Literature.**

(A) *Descriptive Literature* means information available in the ordinary course of business which shows the characteristics, construction, or operation of an item which enables the hospital to consider whether the item meets its needs.

(B) *Bid Sample* means a sample to be furnished by a bidder to show the characteristics of the item offered in the bid.

(C) Bid samples and descriptive literature may be required when it is necessary to evaluate required characteristics of the items bid.

(D) The Invitation for Bids shall state that bid samples or descriptive literature should not be submitted unless expressly requested and that, regardless of any attempt by a bidder to condition the bid, unsolicited bid samples or descriptive literature which are submitted at the bidder's risk will not be examined or tested, and will not be deemed to vary any of the provisions of the Invitation for Bids.

(4) **Disclosure of Major Shareholders.** As a condition of bidding, any partnership, sole proprietorship or corporation doing business with the Government of Guam shall submit an affidavit executed under oath that lists the name and address of any person who has held more than ten percent (10%) of the outstanding interest or shares in said partnership, sole proprietorship or corporation at any time during the twelve (12) month period immediately preceding submission of a bid. The affidavit shall contain the number of shares or the percentage of all assets of such partnership, sole proprietorship or corporation which have been held by each such person during the twelve (12) month period. In addition, the affidavit shall contain the name and address of any person who has received or is entitled to receive a commission, gratuity or other compensation for procuring or assisting in obtaining business related to the bid for the bidder and shall also contain the amounts of any such commission, gratuity or other compensation. The affidavit shall be open and available

to the public for inspection and copying. Failure to submit the affidavit disclosing shareholders and the statement concerning commissions paid shall be deemed non-responsive and cause for rejection of the bid upon opening.

(f) Public Notice.

(1) **Distribution.** Invitations for Bids or Notices of the Availability of Invitation for Bids shall be mailed or otherwise furnished to a sufficient number of bidders for the purpose of securing competition. Notices of Availability shall indicate where, when, and for how long Invitations for Bids may be obtained; generally describe the supply, service, or construction desired; and may contain other appropriate information. Where appropriate, the Hospital Administrator may require payment of a fee or a deposit for the supplying of the Invitation for Bids.

(2) **Publication.** Every procurement in excess of twenty-five thousand dollars (\$25,000) shall be publicized at least once and at least seven (7) days before the final date of submission of bids:

(A) in a newspaper of general circulation on Guam;

(B) in a newspaper of local circulation in the area pertinent to the procurement;

(C) in industry media; or

(D) in a government publication designed for giving public notices.

(3) **Public Availability.** A copy of the Invitation for Bids shall be made available for public inspection at the GMHA Procurement Department or the public information office of the hospital.

(g) Bidders' Lists.

(1) **Purpose.** Bidders' lists may be compiled to provide the hospital with the names of businesses that may be interested in competing for various types of hospital contracts. Unless otherwise provided, inclusion or exclusion of the name of a business does not indicate whether the business is responsible in respect to a particular procurement or otherwise capable of successfully performing a hospital contract.

(2) **Deletion of Bidders.** Businesses that fail to respond to Invitation for Bids or Notices of Availability on three (3) consecutive procurement of similar items may be removed from the applicable bidders' list after notice to the bidder. Prospective bidders currently meeting the criteria for inclusion on the list may be reinstated on such lists at their request.

(3) **Public Availability.** Names and addresses on bidders' lists shall be available for public inspection provided the lists shall not be used for private promotional, commercial, or marketing purposes.

(h) **Pre-Bid Conferences.** Pre-bid conferences may be conducted to explain the procurement requirements. They shall be announced to all prospective bidders known to have received an Invitation for Bids. The conference shall be held long enough after the Invitation for Bids has been issued to allow bidders to become familiar with it, but sufficiently before bid opening to allow consideration of the conference results in preparing their bids. Nothing stated at the pre-bid conference shall change the Invitation for Bids unless a change is made by written amendment as provided in §16309(i) and the Invitation for Bids, if a pre-bid conference was required therein, or the notice of pre-bid conference shall so provide. A summary of the conference shall be supplied to all those prospective bidders known to have received an Invitation for Bids. If a transcript is made, it shall be a public record.

(i) **Amendments to Invitations for Bids.**

(1) **Form.** Amendments to Invitations for Bids shall be identified as such and shall require that the bidder acknowledge receipt of all amendments issued. The amendments shall reference the portions of the Invitations for Bids it amends.

(2) **Distribution.** Amendments shall be sent to all prospective bidders known to have received an Invitation for Bids.

(3) **Timeliness.** Amendments shall be distributed within a reasonable time to allow prospective bidders to consider them in preparing their bids. If the time and date set for receipt of bids will not permit such preparation, such time shall be increased to the extent possible in the amendment or, if necessary, by telegram or telephone and confirmed in the amendment.

(j) **Pre-Opening Modification or Withdrawal of Bids.**

(1) **Procedure.** Bids may be modified or withdrawn by written notice received in the office designated in the Invitation for Bids prior to the time and date set for bid opening. A telegraphic modification or withdrawal received by telephone from the receiving telegraph company office prior to the time and date set for bid opening will be effective if the telegraph company confirms the telephone message by sending a written copy of the telegram showing that the message was received at such office prior to the time and date set for bid opening.

(2) **Disposition of Bid Security.** If a bid is withdrawn in accordance with this section, the bid security, if any, shall be returned to the bidder.

(3) **Records.** All documents relating to the modification or withdrawal of bids shall be made a part of the appropriate procurement file.

(k) Late Bids, Late Withdrawals, and Late Modifications.

(1) **Definition.** Any bid received after the time and date set for 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 is late.

(2) **Treatment.** No late bid, late modification, or late withdrawal will be considered unless received before contract award, and the bid, modification, or withdrawal would have been timely but for the action or inaction of hospital personnel directly serving the procurement activity.

(3) **Notice.** Bidders submitting late bids that will not be considered for award shall be so notified as soon as practicable.

(4) **Records.** Records equivalent to those required in §309(j)(3) (Pre-opening Modification or Withdrawal of Bids, Records) shall be made and kept for each late bid, late modification, or late withdrawal.

(l) Receipt, Opening, and Recording of Bids.

(1) **Receipt.** Upon its receipt, each bid and modification shall be time stamped, but not opened and shall be stored in a secure place until the time and date set for bid opening.

(2) **Opening and Recording.** Bids and modifications shall be opened publicly in the presence of one or more witnesses, at the time, date, and place designated in the Invitation for Bids. The name of each bidder, the bid price, and such other information as is deemed appropriate by the Hospital Administrator, shall be read aloud or otherwise made available. Such information also shall be recorded at the time of bid opening; that is, the bids shall be tabulated or a bid abstract made. The names and addresses of required witnesses shall also be recorded at the opening. The opened bids shall be available for public inspection except to the extent the bidder designates trade secrets or other proprietary data to be confidential as set forth in §16309(l)(3). Material so designated shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the nonconfidential portion of the bid. Prices and makes and models or catalogue numbers of the items offered, deliveries, and terms of payment shall be publicly available at

the time of bid opening regardless of any designation to the contrary.

(3) **Confidential Data.** The Hospital Administrator shall examine the bids to determine the validity of any requests for nondisclosure of trade secrets and other proprietary data identified in writing. If the parties do not agree as to the disclosure of data, the Hospital Administrator shall inform the bidders in writing what portions of the bids will be disclosed and that, unless the bidder protests under Article 9 (Legal and Contractual Remedies) of the GMHA Procurement Regulations, the bids will be so disclosed. The bids shall be opened to public inspection subject to any continuing prohibition on the disclosure of confidential data.

(m) **Mistakes in Bids.**

(1) **General.** Correction or withdrawal of a bid because of an inadvertent, non-judgmental mistake in the bid requires careful consideration to protect the integrity of the competitive bidding system, and to assure fairness. If the mistake is attributable to an error in judgment, the bid may not be corrected. Bid correction or withdrawal by reason of a non-judgmental mistake is permissible, but only to the extent it is not contrary to the interest of the hospital or the fair treatment of other bidders.

(2) **Mistakes Discovered Before Opening.** A bidder may correct mistakes discovered before the time and date set for bid opening by withdrawing or correcting the bid as provided in §16309(j) (Pre-Opening Modification or Withdrawals of Bids).

(3) **Confirmation of Bid.** When the Hospital Administrator knows or has reason to conclude that a mistake has been made, such officer should request the bidder to confirm the bid.

Situations in which confirmation should be requested include obvious, apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted. If the bidder alleges mistake, the bid may be corrected or withdrawn if the conditions set forth in Subsections (m)(4) through (m)(6) of this section are met.

(4) **Mistakes Discovered After Opening**

(A) This Subsection sets forth procedures to be applied in the three (3) situations described in Subsections (m)(4)(A) through (m)(4)(C) of this Subsection in which mistakes in bids are discovered after the time and date set for bid opening but before award.

(B) **Minor Informalities.** Minor informalities are matters of form, rather than substance evident from the

bid document, or insignificant mistakes that can be waived or corrected without prejudice to other bidders; that is, the effect on price, quantity, quality, delivery, or contractual conditions is negligible. The Hospital Administrator shall waive such informalities or allow the bidder to correct them depending on which is in the best interest of the hospital. Examples include the failure of a bidder to:

1. return the number of signed bids required by the invitation for Bids;
2. sign the bid, but only if the unsigned bid is accompanied by other material indicating the bidder's intent to be bound; or
3. acknowledge receipt of an amendment to the Invitation for Bids; but only if:
 - (i) it is clear from the bid that the bidder received the amendment and intended to be bound by its terms; or
 - (ii) the amendment involved had a negligible effect on price, quantity, quality, or delivery.

(C) Mistakes Where Intended Correct Bid is Evident. If the mistake and the intended correct bid is clearly evident on the face of the bid document, the bid shall be corrected to the intended correct bid and may not be withdrawn. Examples of mistakes that may be clearly evident on the face of the bid document are typographical errors, errors in extending unit prices, transportation errors, and arithmetical errors.

(D) Mistakes Where Intended Correct Bid Is Not Evident. A bidder may be permitted to withdraw a low bid if:

1. a mistake is clearly evident on the face of the bid document, but the intended correct bid is not similarly evident; or
2. the bidder submits proof of evidentiary value which clearly and convincingly demonstrates that a mistake was made.

(5) Mistakes Discovered After Award. Mistakes shall not be corrected after award of the contract except where the Hospital Administrator makes a written determination that it would be unconscionable not to allow the mistake to be corrected.

(6) Determination Required. When a bid is corrected or withdrawn, or correction or withdrawal is denied, under

Subsection (m)(5) of this section, the Hospital Administrator shall prepare a written determination showing that the relief was granted or denied in accordance with these regulations, except that the GMHA Supply Management Administrator shall prepare the determination required in §16309(m)(4)(A).

(n) Bid Evaluation and Award.

(1) **General.** The contract is to be awarded "to the lowest responsible and responsive bidder" whose bid meets the requirements and criteria set forth in the Invitation for Bids. See §5211(g) (Competitive Sealed Bidding, Award) of the Guam Procurement Act. The Invitation for Bids shall set forth the requirements and criteria which will be used to determine the lowest responsive bidder. No bid shall be evaluated for any requirement or criterion that is not disclosed in the Invitation for Bids.

(2) **Responsibility and Responsiveness.** Responsibility of prospective contractors is covered by §16319 (Responsibility) of this Chapter. Responsiveness of bids is covered by §5201(g) of the Guam Procurement Act, which defines *responsive bidder* as a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.

(3) **Product Acceptability.** The Invitation for Bids shall set forth any evaluation criterion to be used in determining product acceptability. It may require submission of bid samples, descriptive literature, technical data, or other material. It may also provide for accomplishing any of the following prior to award:

(A) inspection or testing of a product prior to award for such characteristics as quality or workmanship;

(B) examination of such elements as appearance, finish, taste, or feel; or

(C) other examinations to determine whether it conforms with any other purchase description requirements.

The acceptability evaluation is not conducted for the purpose of determining whether one bidder's item is superior to another, but only to determine that a bidder's offering is acceptable as set forth in the Invitation for Bids. Any bidder's offering which does not meet the acceptability requirements shall be rejected as non-responsive.

(4) **Determination of Lowest Bidder.** Following determination of product acceptability as set forth in Subsection (n)(3) of this section, if any is required, bids will be evaluated to determine which bidder offers the lowest cost to the hospital in accordance with the evaluation criteria set

forth in the Invitation for Bids. Only objectively measurable criteria which are set forth in the Invitation for Bids shall be applied in determining the lowest bidder. Examples of such criteria include, but are not limited to, transportation and cost, and ownership of life cycle cost formulas. Evaluation factors need not be precise predictors of actual future costs, but to the extent possible such evaluation factors shall:

(A) be reasonable estimates based upon information the hospital has available concerning future use; and

(B) treat all bids equitably.

(5) **Restrictions.** Nothing in this section shall be deemed to permit contract award to a bidder submitting a higher quality item than that designated in the Invitation for Bids if such bidder is not also the lowest bidder as determined in Subsection (n)(4) of this section. Further, this section does not permit negotiations with any bidder except as authorized under §16208 of these Regulations with regard to a construction project.

(o) **Low tie Bids.**

(1) **Definition.** *Low tie bids* are low responsive bids from responsible bidders that are identical in price and which meet all the requirements and criteria set forth in the Invitation for Bids.

(2) **Award.** Award shall not be made by drawing lots, except as set forth below or by dividing business among identical bidders. In the discretion of the Hospital Administrator award shall be made in any permissible manner that will discourage tie bids. If no permissible method will be effective in discouraging tie bids and a written determination is made so stating, award may be made by drawing lots.

(3) **Record.** Records shall be made of all Invitation for Bids on which tie bids are received showing at least the following information:

(A) the identification number of the Invitation for Bids;

(B) the supply source, or construction items; and

(C) a listing of all the bidders and the prices submitted.

(p) **Documentation of Award.** Following award, a record showing the basis for determining the successful bidder shall be made a part of the procurement file.

(q) **Publicizing Awards.** Written notice of award shall be sent to the successful bidder. In procurement over twenty-five thousand

dollars (\$25,000), each unsuccessful bidder shall be notified of the award. Notice of award shall be made available to the public.

(r) Multi-Step Sealed Bidding.

(1) **Definition.** *Multi-step sealed bidding* is a two-phase process consisting of a technical first phase composed of one or more steps in which bidders submit unpriced technical offers to be evaluated by the hospital, and a second phase in which those bidders whose technical offers are determined to be acceptable during the first phase have their priced bids considered. It is designed to obtain the benefits of competitive sealed bidding by award of a contract to the lowest responsive, responsible bidder, and at the same time obtain the benefits of the solicitation of technical offers and the conduct of discussions to evaluate and determine the acceptability of technical offers.

(2) **Conditions for Use.** The multi-step sealed bidding method may be used when it is not practical to prepare initially a definitive purchase description which will be suitable to permit an award based on the price. Multi-step sealed bidding may thus be used when it is considered desirable:

(A) to invite and evaluate technical offers to determine their acceptability to fulfill the purchase description requirements;

(B) to conduct discussions for the purposes of facilitating understanding of the technical offer and purchase description requirements and, where appropriate, obtain supplemental information, permit amendments of technical offers, or amend the purchase description;

(C) to accomplish Subsections (r)(2)(A) and (r)(2)(B) of this section prior to soliciting priced bids; and

(D) to award the contract to the lowest responsive and responsible bidder in accordance with the competitive sealed bidding procedures.

(s) Pre-Bid Conferences in Multi-Step Sealed Bidding.

Prior to the submission of unpriced technical offers, a pre-bid conference as contemplated by §16309(h) (Pre-Bid Conference) may be conducted by the Hospital Administrator. The Hospital Administrator may also hold a conference of all potential bidders in accordance with §16309(h) at any time during the evaluation of the unpriced technical offers.

(t) Procedure for Phase One of Multi-Step Sealed Bidding.

(1) **Form.** Multi-step sealed bidding shall be initiated by the issuance of an Invitation for Bids in the form required by §16309(c) (The Invitation for Bids) except as hereinafter provided. In addition to the requirements set forth in §16309(c), the multi-step Invitation for Bids shall state:

(A) that unpriced technical offers are requested;

(B) whether priced bids are to be submitted at the same time as unpriced technical offers; if they are, such priced bids shall be submitted in a separate sealed envelope;

(C) that it is a multi-step sealed bid procurement, and priced bids will be considered only in the second phase and only from bidders whose unpriced technical offers are found acceptable in the first phase;

(D) the criteria to be used in the evaluation of the unpriced technical offers;

(E) that the hospital, to the extent the Hospital Administrator finds necessary, may conduct oral or written discussions of the unpriced technical offers;

(F) that bidders, may designate those portions of the unpriced technical offers which contain trade secrets or other proprietary data which are to remain confidential; and

(G) that the item being procured shall be furnished generally in accordance with the bidder's technical offer as found to be finally acceptable and shall meet the requirements of the Invitation for Bids.

(2) **Amendments to the Invitation for Bids.** After receipt of unpriced technical offers, amendments to the Invitation for Bids shall be distributed only to bidders who submitted unpriced technical offers, and they shall be permitted to submit new unpriced technical offers or to amend those submitted. If, in the opinion of the Hospital Administrator, a contemplated amendment will significantly change the nature of the procurement, the Invitation for Bids, shall be cancelled in accordance with §162316 (Cancellation of Solicitations; Rejection of Bids or Proposals) of this Chapter and a new Invitation for Bids issued.

(3) **Receipt and Handling of Unpriced Technical Offers.** Unpriced technical offers shall not be opened publicly, but shall be opened in front of two or more procurement officials. Such offers shall not be disclosed to unauthorized persons. Bidders may request nondisclosure of trade secrets and other proprietary data identified in writing.

(4) **Evaluation of Unpriced Technical Officer.** The unpriced technical offers submitted by bidders shall be evaluated solely in accordance with the criteria set forth in the Invitation for Bids. The unpriced technical offers shall be categorized as:

(A) acceptable;

(B) potentially acceptable; that is, reasonably susceptible of being made acceptable; or

(C) unacceptable. The Hospital Administrator shall record in writing the basis for finding an offer unacceptable and make it part of the procurement file.

The Hospital Administrator may initiate Phase Two of the procedure if, in the Hospital Administrator's opinion, there are sufficient acceptable unpriced technical offers to assure effective price competition in the second phase without technical discussions. If the Hospital Administrator finds that such is not the case, the Hospital Administrator shall issue an amendment to the Invitation for Bids or engage in technical discussions as set forth in Subsection (t)(5) of this section.

(5) **Discussions of Unpriced Technical Offers.** The Hospital Administrator may conduct discussions with any bidder who submits an acceptable or potentially acceptable technical offer. During the course of such discussions, the Hospital Administrator shall not disclose any information derived from one unpriced technical offer to any other bidder. Once discussions are begun, any bidder who has not been notified that its offer has been finally found unacceptable may submit supplemental information amending its technical offer at any time until the closing date established by the Hospital Administrator. Such submission may be made at the request of the Hospital Administrator or upon the bidder's own initiative.

(6) **Notice of Unacceptable Unpriced Technical Offer.** When the Hospital Administrator determines a bidder's unpriced technical offer to be unacceptable, such offeror shall not be afforded an additional opportunity to supplement its technical offer.

(u) **Mistakes During Multi-Step Sealed Bidding.** Mistakes may be corrected or bids may be withdrawn during Phase One at any time. During Phase Two, mistakes may be corrected or withdrawal permitted in accordance with §16309(m) (Mistakes in Bids).

(v) **Procedure for Phase Two.**

(1) **Initiation.** Upon the completion of Phase One, the Hospital Administrator shall either:

(A) open priced bids submitted in Phase One (if priced bids were required to be submitted) from bidders whose unpriced technical offers were found to be acceptable; or

(B) if priced bids have not been submitted, technical discussions have been held, or amendments to the Invitations for Bids have been issued, invite each acceptable bidder to submit a price bid.

(2) **Conduct.** Phase Two shall be conducted as any other competitive sealed bid procurement except:

(A) as specifically set forth in §16309(r) (Multi-Step Sealed Bidding) through this section;

(B) no public notice need be given of this invitation to submit priced bids because such notice was previously given;

(C) after award, the unpriced technical offer of the successful bidder shall be disclosed as follows. The Hospital Administrator shall examine written requests of confidentiality for trade secrets and proprietary data in the technical offer of such bidder to determine the validity of any such requests. If the parties do not agree as to the disclosure of data, the Hospital Administrator shall inform the bidder in writing what portions of the unpriced technical offer will be disclosed and that unless the bidder protests under Article 9 (Legal and Contractual Remedies) of the Guam Memorial Hospital Authority Procurement Regulations, the offer will be so disclosed. Such technical offer shall be opened to public inspection subject to any continuing prohibition on the disclosure of confidential data; and

(D) unpriced technical offers of bidders who are not awarded the contract shall not be opened to public inspection unless the Hospital Administrator determines in writing that public inspection of such offers is essential to assure confidence in the integrity of the procurement process; provided, however, that the provisions of subsection (v)(2)(C) of this section shall apply with respect to the possible disclosure of trade secrets and proprietary data.

§16310. Procurement from Nonprofit Corporations. A contract may be awarded for a supply or service without competition when the contractor is a nonprofit corporation employing sheltered or handicapped workers. As a condition of the award of the contract the contractor must certify that labor on the project will be performed by handicapped persons except that supervisory personnel do not have to be handicapped. A contractor

awarded a contract pursuant to this section shall not be required to post any of the bonds required under Article 5 of this Chapter.

§16311. Small Purchases.

(1) **Application.** In accordance with 5 GCA §5213 (Small Purchases) of the Guam Procurement Act, this section is established for procurement of less than five thousand dollars (\$5,000) for supplies or services and less than fifteen thousand dollars (\$15,000) for construction.

(b) **Authority to Make Small Purchases.**

(1) **Amount.** The Hospital Administrator may use this section if the procurement is to be less than five thousand dollars (\$5,000) for supplies or services and less than fifteen thousand dollars (\$15,000) for construction. If these methods are not used, the other methods of source selection provided in 5 GCA §5210 (Methods of Source Selection) of the Guam Procurement Act and these Regulations shall apply.

(2) **Delegation.** Delegation of authority to make small purchase is provided for under §16205 (Delegation of Procurement Authority) of these Regulations.

(3) **Existing Hospital Contract for Items.** Supplies, services or construction items which may be obtained under current hospital contracts shall be procured under such agreements in accordance with the terms of such contracts. Further, supplies or construction items available from hospital stocks shall not be procured under this section. Operational procedures and contract terms may provide for waivers or exceptions to this Subsection.

(4) **Available from One Business Only.** If the supply, service, or construction item is available from only one business, the sole source procurement method set forth in §16312 (Sole Source Procurement) of these regulations shall be used even if the procurement is a small purchase as specified in Subsection (b) of this section.

(5) **Division of Requirements.** Procurement requirements shall not be artificially divided to avoid using the other source selection methods set forth in §5210 (Methods of Source Selection) of the Guam Procurement Act and these Regulations.

(c) **Competition for Small Purchases of Supplies or Services Between \$500 and \$15,000.**

(1) **Procedure.** Insofar as it is practical for small purchases of supplies or services between five hundred dollars (\$500) and five thousand dollars (\$5,000), no less than three (3) businesses shall be solicited to submit written quotations or oral quotations that are recorded and placed in the

procurement file. Award shall be made to the business offering the lowest acceptable quotation.

(2) **Records.** The names of the businesses submitting quotations and the date and amount of each quotation shall be recorded and maintained as a public record.

(d) **Competition for Small Purchases of Construction.** For procurement of construction, as defined in §5030(g) of the Guam Procurement Act, between five hundred dollars (\$500) and fifteen thousand dollars (\$15,000), the procedures and records required in §16310(c) (Small Purchases of Supplies or Services Between \$500 and \$5,000) shall apply. For procurement of construction less than five hundred dollars (\$500), §16310(e) (Small Purchases of \$500 or Less) shall apply.

(e) **Small Purchases of \$500 or Less.** The Hospital Administrator shall adopt operational procedures for making small purchases of less than five hundred dollars (\$500). Such operational procedures shall provide for obtaining adequate and reasonable competition and for making records to properly account for funds and to facilitate auditing of the Procurement Department.

(f) **Small Purchases of Services Specified in §16112 (Authority to Contract for Certain Services and Approval of Contracts) and §16507 (Architect-Engineer and Land Surveying Services) of these Regulations.**

(1) **Conditions for Use.** If it is expected that the services of accountants, physicians, lawyers, dentists, architects, engineers, or land surveyors can be procured for less than five thousand dollars (\$5,000) but more than five hundred dollars (\$500), the methods specified in this section may be used in lieu of the procedures specified in §16314 (Competitive Selection Procedures for Services Specified in §16212) and §16507 (Architect-Engineer and Land Surveying Services) of these Regulations.

(2) **Examination for Qualifications and Negotiations.** Before contacting any person to perform the required services, the Hospital Administrator shall examine any current statements of qualifications on file with the hospital. Based on this examination, the Hospital Administrator shall contact the most qualified firm and attempt to negotiate a contract for the required services at a fair and reasonable price. If no current statements of qualifications are on file or the statements on file are inadequate to determine the most qualified firm, technical proposals or statements of qualifications shall be solicited. A minimum of three firms shall be considered unless there are only one or two qualified firms; in the latter case, the Hospital Administrator shall make a written determination justifying the consideration of only

one or two firms. A price or fee shall not be solicited until the most qualified firm is chosen and only the most qualified firm will be requested to submit a price. If after negotiations, a fair and reasonable price cannot be agreed to, negotiations will be terminated with such firm and negotiations begun with the next most qualified firm. The process shall continue until a contract can be negotiated at a fair and reasonable price to the hospital.

§16312. Sole Source Procurement. A contract may be awarded for a supply, service, or construction item without competition when the provisions of this section are met, provided that the Hospital Administrator or his designee above the level of Guam Memorial Hospital Authority Supply Management Administrator determines in writing that there is only one source for the required supply, service or construction item.

(a) **Application.** The provisions of this section apply to all sole source procurement unless emergency conditions exist as defined in §16313 (Emergency Procurement) of these Regulations.

(b) **Conditions for Use of Sole Source Procurement.** Sole source procurement is not permissible unless a requirement is available from only a single supplier. A requirement for a particular proprietary item does not justify a sole source procurement if there is more than one potential bidder or offeror for that item. The following are examples of circumstances which could necessitate sole source procurement:

- (1) where the compatibility of equipment, accessories, or replacement parts is of paramount consideration;
- (2) where a sole supplier's item is needed for trial use or testing;
- (3) where a sole supplier's item is to be procured for resale;
- (4) where public utility services are to be procured; or
- (5) where supplies are offered through bankruptcy or receivership sales, or other disposition at lower than prevailing market prices.

The determination as to whether a procurement shall be made as a sole source shall be made by the Hospital Administrator or the designee of such officer. Such determination and the basis therefore shall be in writing. Such officer may specify the application of such determination and the duration of its effectiveness. In cases of reasonable doubt, competition should be solicited. Any request by a using department that a procurement be restricted to one potential contractor shall be accompanied by an explanation as to why no other will be suitable or acceptable to meet the need.

(c) **Negotiation in Sole Source Procurement.** The Hospital Administrator shall conduct negotiations, as appropriate, as to price, delivery, and terms.

(d) **Record of Sole Source Procurement.** For the purpose of complying with 5 GCA §5248 (Record of Procurement Actions Taken Under 5 GCA §5249 (Sole Source Procurement) and 5 GCA §5250 (Emergency Procurement) of the Guam Procurement Act, a record listing all contracts made under sole source procurement shall be maintained for a period of five (5) years. The record shall contain:

- (1) each contractor's name;
- (2) the amount and type of each contract;
- (3) a listing of the supplies, services or construction procured under each contract; and
- (4) the identification number of each contract file.

A copy of such record shall be submitted to the Legislature on an annual basis. The record shall be available for public inspection.

§16313. Emergency Procurement. Notwithstanding any other provision of this Chapter, the Hospital Administrator or a designee of such officer may make or authorize others to make emergency procurement when there exists a threat to public health, welfare, or safety under emergency conditions as defined in regulations promulgated by the Procurement Policy Committee; provided that such emergency procurement shall be made with such competition as is practicable under the circumstances, and further provided that the procurement agent must solicit at least three (3) informal price quotations, and if time allows must give notice to all contractors from the qualified bidders list who have provided the needed supplies and services to the hospital within the preceding twelve (12) months, and must award the procurement to the firm with the best offer, as determined by evaluating cost and delivery time. No emergency procurement or combination of emergency procurement may be made for an amount of goods or supplies greater than the amount of such goods and supplies which is necessary to meet an emergency for the thirty (30) day period immediately following the procurement. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The requirements for a written determination for the emergency shall be met if the procurement are being made on the basis of the Governor's declaration of an emergency situation by Executive Order if such Order states that emergency procurement may be resorted to for the purposes of the Order. Unless authorized by an Executive Order declaring an emergency, no emergency procurement may be made except on a certificate made under penalty of perjury by the Hospital Administrator. Certified copies of the certificate shall be sent, prior to award and as a

condition thereof, to the Governor and Speaker of the Legislature. The certificate shall contain the following:

- (1) a statement of the facts giving rise to the emergency;
- (2) the factual basis of the determination that an emergency procurement is necessary; and
- (3) a statement that emergency procurement is not being used solely for the purpose of avoidance of the provisions of this Chapter.

In addition to any other requirement, the Governor must approve in writing all authorizations for emergency procurement.

(a) **Application.** The provisions of this section apply to every procurement made under emergency conditions that will not permit other source selection methods to be used.

(b) **Definition of Emergency Conditions.** An emergency condition is a situation which creates a threat to public health, welfare, or safety such as may arise by reasons of floods, earthquakes, epidemics, typhoons, riots, equipment failures, and other disasters, or such other reasons as may be proclaimed by the Governor, or upon written determination of the basis for the emergency and for the selection of a particular contractor. The existence of such condition creates an immediate and serious need for supplies, services, or construction that cannot be met through normal procurement methods and the lack of which would seriously threaten:

- (1) the functioning of the territorial government;
- (2) the preservation or protection of property; or
- (3) the health or safety of any person.

The requirements for a written determination for the emergency shall be met if the procurement are being made on the basis of the Governor's declaration of an emergency situation by Executive Order if such Order states that emergency procurement may be resorted to for the purposes of the Order.

(c) **Scope of Emergency Procurement.** Emergency procurement shall be limited to those supplies, services, or construction items necessary to meet the emergency.

(d) **Source Selection Methods.**

(1) **General.** The procedure used shall be selected to assure that the required supplies, services or construction items are procured in accordance with the provisions of §16313, and in time to meet the emergency. Given this constraint, such competition as is practicable shall be obtained.

(2) After Unsuccessful Competitive Sealed Bidding.

When competitive sealed bidding is unsuccessful because bids received pursuant to an Invitation for Bids are unreasonable, noncompetitive, or the low bid exceeds available funds as certified by the appropriate fiscal officer, and time or other circumstances will not permit the delay required to resolicit competitive sealed bidding, then an emergency procurement may be made.

(e) Determination and Record of Emergency Procurement.

(1) Determination. The Hospital Administrator or his designee shall make a written determination stating the basis for an emergency procurement and for the selection of the particular contractor. Such determination shall be sent prior to the award to the Governor and the Speaker of the Legislature.

(f) Record. For the purpose of complying with 5 GCA §5248 (Record of Procurement Actions Taken Under §5249 (Sole Source Procurement) and §5250 (Emergency Procurement) of the Guam Procurement Act, a record listing all contracts made under emergency procurement shall be maintained for a period of five (5) years. The record shall contain:

- (1) the contractor's name;
- (2) the amount and type of the contract;
- (3) a listing of the supplies, services, or construction procured under the contract; and
- (4) the identification number of the contract file.

A copy of such record shall be submitted to the Legislature on an annual basis. The record shall be available for public inspection.

§16314 Competitive Selection Procedures for Services Specified in §16212 (Authority to Contract for Certain Services and Approval of Contracts) of these Regulations. (a)

Application. The provisions of this section apply to every procurement of the services of accountants, physicians, lawyers, dentists, and other professionals as specified in §16212 (Authority to Contract for Certain Services and Approval of Contracts) of these Regulations.

(b) Conditions for Use of Competitive Selection Procedures. The services specified in §16212 of this Chapter shall be procured in accordance with this section, except as authorized under §16312 (Sole Source) or 162313 (Emergency Procurement) of this Article. Services for architecture, engineering, construction, land surveying, environmental assessment and other such services shall be procured in accordance with Article 5 of this Chapter.

(c) **Determination Required Prior to Use of Competitive Selection Procedures.** For the purposes of procuring the services specified in §16314(a) (Application), the Hospital Administrator may, in his or her discretion, procure services for a using department when requested. In either case, the head of the using department shall determine in writing, prior to announcing the need for any such services:

(1) that the services to be acquired are services specified in §16314(a);

(2) that a reasonable inquiry has been conducted, which shall include requesting the appropriate Personnel Services Department to report on the availability of such personnel, and the hospital does not have the personnel nor resources to perform the services required under the proposed contract;

(3) the nature of the relationship to be established between the using department and the contractor by the proposed contract; and

(4) that the using department has developed, and fully intends to implement, a written plan for utilizing such services which will be included in the contractual statement of work.

(d) **Statement of Qualifications.** When the services specified in §16314(a) (Application) are needed on a recurring basis, the Hospital Administrator shall actively solicit persons engaged in providing such services to submit annual statements of qualifications in a prescribed format which shall include the following information:

(1) technical education and training;

(2) general or special experience, certifications, licenses, and membership in professional associations, societies, or boards;

(3) an expression of interest in providing a particular service specified in §16314(a) and

(4) any other pertinent information requested by the Hospital Administrator.

Persons may amend statements of qualifications at any time by filing a new statement.

(e) **Public Notice in Competitive Selection Procedures.** Notice of the need for services specified in 162314(a) (Application) shall be made by the Hospital Administrator in the form of a Request for Proposals at least ten (10) days before the proposals are due. Adequate public notice shall be given as provided in 162309(f) (Public Notice), and additionally shall consist of distributing Requests for Proposals to persons interested in performing the services required by the proposed contract.

(f) Request for Proposals.

(1) **Contents.** The Request for Proposals shall be in the form specified by the Hospital Administrator and contain at least the following information:

- (A) the type of services required;
- (B) a description of the work involved;
- (C) an estimate of when and for how long the services will be required;
- (D) the type of contract to be used;
- (E) a date by which proposals for the performance of the services shall be submitted;
- (F) a statement that the proposals shall be in writing;
- (G) a statement that offerors may designate those portions of the proposals which contain trade secrets or other proprietary data which should remain confidential;
- (H) a statement of the minimum information that the proposal shall contain, to include:

1. the name of the offeror, the location of the offeror's principal place of business and, if different, the place of performance of the proposed contract;

2. if deemed relevant by the Hospital Administrator, the age of the offeror's business and average number of employees over a previous period of time, as specified in the Request for Proposals;

3. the abilities, qualifications, and experience of all persons who would be assigned to provide the required services;

4. a listing of other contracts under which services similar in scope, size, or discipline to the required services were performed or undertaken within a period of time, as specified in the Request for Proposals;

5. a plan giving as much detail as is practical explaining how the services will be performed; and

6. the factors to be used in the evaluation and selection process and their importance.

(2) **Evaluation.** Proposals shall be evaluated only on the basis of evaluation factors stated in the Request for Proposals. The following factors may be appropriate to use in conducting the evaluation. The relative importance of these and other

factors will vary according to the type of services being procured. The minimum factors are:

(A) the plan for performing the required services;

(B) the ability to perform the services as reflected by the technical training and education, general experience specific experience in providing the required services, and the qualifications and abilities of personnel proposed to be assigned to perform the services;

(C) the personnel, equipment, and facilities to perform the services currently available or demonstrated to be made available at the time of contracting; and

(D) a record of past performance of similar work.

(g) **Pre-Proposal Conferences.** Pre-proposal conferences, as appropriate, may be conducted in accordance with §16309(h) (Pre-Bid Conferences). Such a conference may be held anytime prior to the date established for submission of proposals.

(h) **Receipt and Handling of Proposals.**

(1) **Registration.** Proposals and modifications shall be time-stamped upon receipt and held in a secure place until the established due date. Proposals shall not be opened publicly nor disclosed to unauthorized persons, but shall be opened in the presence of two or more procurement officials. A register of proposals shall be established which shall include for all proposals, the name of each offeror, the number of modifications received, if any, and a description sufficient to identify the services offered. The register of proposals shall be opened to public inspection only after award of the contract. Proposals of offerors who are not awarded the contract shall not be opened to public inspection.

(2) **Request for Non-Disclosure of Data.** If the offeror selected for award has requested in writing the nondisclosure of trade secrets and other proprietary data so identified, the Hospital Administrator or a designee of such official shall examine the request in the proposal to determine its validity prior to entering negotiations. If the parties do not agree as to the disclosure of data in the contract, the Hospital Administrator or a designee of such officer shall inform the offeror in writing what portion of the proposal will be disclosed and that, unless the offeror withdraws the proposals or protests under Article 9 (Legal and Contractual Remedies) of the Guam Procurement Act, the proposal will be so disclosed.

(i) **Discussion.**

(1) **Discussions Permissible.** The Hospital Administrator or a designee of such officer shall evaluate all

proposals submitted and may conduct discussions with any offeror. The purposes of such discussions shall be to:

(A) determine in greater detail such offeror's qualifications; and

(B) explore with the offeror the scope and nature of the required services, the offeror's proposed method of performance, and the relative utility of alternative methods of approach.

(2) **No Disclosure of Information.** Discussions shall not disclose any information derived from proposals submitted by other offerors, and the Hospital Procurement Department shall not disclose any information contained in any proposals until after award of the proposed contract has been made. The proposal of the offeror awarded the contract shall be opened to public inspection except as otherwise provided in the contract. (See §16314(h)(1), Receipt and Handling of Proposals, Registration.)

(3) **Modification or Withdrawal of Proposals.** Proposals may be modified or withdrawn at any time prior to the conclusion of discussions.

(j) **Selection of the Best Qualified Offerors.** After conclusion of validation of qualifications, evaluation, and discussion as provided in §16309(t)(5) (Discussions of Unpriced Technical Offers) and 162314(i) (Discussions), the Hospital Administrator or a designee of such officer shall select, in the order of their respective qualification ranking, no fewer than three acceptable offerors (or such lesser number if less than three acceptable proposals were received) deemed to be the best qualified to provide the required services.

(k) **Submission of cost or Pricing Data.** The offeror determined to be best qualified shall be required to submit cost or pricing data to the Hospital Administrator at a time specified prior to the commencement of negotiations in accordance with §16321 (Cost or Pricing Data) of these Regulations.

(l) Negotiation and Award of Contract.

(1) **General.** The Hospital Administrator or a designee of such officer shall negotiate a contract with the best qualified offeror for the required services at compensation determined in writing to be fair and reasonable.

(2) **Elements of Negotiation.** Contract negotiations shall be directed toward:

(A) making certain that the offeror has a clear understanding of the scope of work, specifically, the essential requirements involved in providing the required services;

(B) determining that the offeror will make available the necessary personnel and facilities to perform the services within the required time; and

(C) agreeing upon compensation which is fair and reasonable, taking into account the estimated value of the required services, and the scope complexity, and nature of such services.

(3) Successful Negotiation of Contract with Best Qualified Offeror. If compensation, contract requirements, and contract documents can be agreed upon with the best qualified offeror, the contract shall be awarded to that offeror.

(4) Failure to Negotiate Contract with Best Qualified Offeror.

(A) If compensation, contract requirements, or contract documents cannot be agreed upon with the best qualified offeror, a written record stating the reasons therefor shall be placed in the file and the Hospital Administrator or a designee of such officer shall advise such offeror of the termination of negotiations which shall be confirmed by written notice within three (3) days.

(B) Upon failure to negotiate a contract with the best qualified offeror, the Hospital Administrator or the designee of such officer may enter into negotiations with the next most qualified offeror. If compensation, contract requirements, and contract documents can be agreed upon, then the contract shall be awarded to that offeror. If negotiations again fail, negotiations shall be terminated as provided in Subsection (1)(4)(A) of this section and commence with the next qualified offeror.

(5) Notice of Award. Written notice of award shall be public information and made a part of the contract file.

(6) Failure to Negotiate Contract with Offerors Initially Selected as Best Qualified. Should the Hospital Administrator or a designee of such officer be unable to negotiate a contract with any of the offerors initially selected as the best qualified offerors, offers may be resolicited or additional offers may be selected based on original, acceptable submissions in the order of their respective qualification ranking and negotiations may continue in accordance with Subsection (1)(4) of this section until an agreement is reached and the contract awarded.

(m) Memorandum of Evaluation and Negotiation. At the conclusion of negotiations resulting in the award of the contract, the Hospital Administrator or a designee of such officer shall prepare a memorandum setting forth the basis of award including:

(1) how the evaluation factors stated in the Request for Proposals were applied to determine the best qualified offerors; and

(2) the principal elements of the negotiations including the significant considerations relating to price and the other terms of the contract.

All memoranda shall be included in the contract file and be available for public inspection.

(n) **Approval of Contracts for Legal Services.** As provided in §21611 (Authority to Contract for Certain Services, Approval of Contracts for Legal Services) of these Regulations, no contract for the services of legal counsel may be awarded without the approval of the Attorney General.

(o) **Reports.** The Hospital Administrator shall submit annually to the Board of Trustees a listing of all contracts awarded under §16314 of these Regulations in the preceding fiscal year. The report shall identify the parties to the contract, the contract amount, duration, and the services to be performed thereunder.

§16315. Purchase of Drugs by Generic Names. As used in §16315(a) through §16315(b) of this section, generic drug means the chemical or generic name, as determined by the United States Adopted Names (USAN) and accepted by the Federal Food & Drug Administration (FDA), of those drug products having the same active chemical ingredients.

(a) **Government to Purchase Drugs from Manufacturer.** Whenever possible, the Guam Memorial Hospital Authority shall purchase drugs, generic or otherwise, directly from the manufacturer so as to ensure and maximize economy.

All purchase of drugs direct to the Manufacturer shall cite the authority of this section and each purchase order document shall reflect the following statement. "REF: Guam Code Annotated Chapter 5 Procurement §5270. Source: GC §6600.5 Added by P.L. 16-40:1 renumbered and placed in this Chapter by P.L. 16-124:2."

In addition, each order in excess of \$5,000, shall be accompanied by a written statement for the Justification for the Purchase of Prescription Drugs under the Special Drug Procurement Authority (GMHA citation §21615(a)). This document shall be attached to the purchase order prior to its presentation for signature by the Hospital Administrator.

§16316. Cancellation of Invitations for Bids or Requests for Proposals. (a) **Scope of This Section.** The provisions of this section shall govern the cancellation of any solicitations whether issued by the hospital under competitive sealed bidding, small purchases, or any other selection method, and rejection of bids or proposals in whole or in part.

(b) **Policy.** Solicitations should only be issued when there is a valid procurement need unless the solicitation states that it is for informational purposes only. The solicitation shall give the status of funding for the procurement. Preparing and distributing a solicitation requires the expenditure of government time and funds. Businesses likewise incur expense in examining and responding to solicitations.

Therefore, although issuance of a solicitation does not compel award of a contract, a solicitation is to be cancelled only when there are cogent and compelling reasons to believe that the cancellation of the solicitation is in the hospital's best interest.

(c) **Cancellation of Solicitation - Notice.** Each solicitation issued by the hospital shall state that the solicitation may be cancelled as provided in these Regulations.

(d) **Cancellation of Solicitation: Rejection of All Bids or Proposals.**

(1) **Prior to Opening.**

(A) As used in this section, *opening* means the date set for opening of bids, or receipt of unpriced technical offers in multi-step sealed bidding.

(B) Prior to opening, a solicitation may be cancelled in whole or in part when the Hospital Administrator determines in writing that such action is in the hospital's best interest for reasons including but not limited to:

1. the hospital no longer requires the supplies, services or construction;
2. the hospital no longer can reasonably expect to fund the procurement; or
3. proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable.

(C) When a solicitation is cancelled prior to opening, notice of cancellation shall be sent to all businesses solicited.

(D) The notice of cancellation shall:

1. identify the solicitation;
2. briefly explain the reason for cancellation; and
3. where appropriate, explain that an opportunity will be given to compete on any resolicitation or any future procurement of similar supplies, services or construction.

(2) **After Opening.**

(A) After opening, but prior to award, all bids or proposals may be rejected in whole or in part when the Hospital Administrator determines in writing that such action is in the hospital's best interest for reasons including, but not limited to:

1. the supplies, services, or construction being procured are no longer required;
2. ambiguous or otherwise inadequate specifications were part of the solicitation;
3. the solicitation did not provide for consideration of all factors of significance to the hospital;
4. prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
5. all otherwise acceptable bids or proposals received are at clearly unreasonable prices; or
6. there is reason to believe that the bids or proposals may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith.

(B) A notice of rejection should be sent to all businesses that submitted bids or proposals, and it shall conform to Subsection (d)(1)(D) of this section.

(3) **Documentation.** The reasons for cancellation or rejection shall be made part of the procurement file and shall be available for public inspection.

(e) Rejection of Individual Bids or Proposals.

(1) **General.** This section applies to rejection of individual bids or proposals in whole or in part.

(2) **Notice of Solicitation.** Each solicitation issued by the hospital shall provide that any bid or proposal may be rejected in whole or in part when in the best interest of the hospital as provided in these Regulations.

(3) Reason for Rejection.

(A) **Bids.** As used in this subsection, *bid* means any bid submitted in competitive sealed bidding or in the second phase of multi-step sealed bidding and includes submissions under §16311 (Small Purchases) of these Regulations if no changes in offers are allowed after submission. Reasons for rejecting a bid include, but are not limited to:

1. the business that submitted the bid is non-responsive as determined under §16319(e) (Written Determination of Non-responsibility Required) of this article;

2. the bid is not responsible, that is, it does not conform in all material respects to the Invitation for Bids; See 162309(n)(2) (Bid Evaluation and Award, Responsibility and Responsiveness) of this article; or

3. the supply, service, or construction offered in the bid is unacceptable by reason of its failure to meet the requirements of the specifications or permissible alternates or other acceptable criteria set forth in the Invitation for Bids. (See §16309(n)(3) Bid Evaluation and Award, Product Acceptability of this Chapter.)

(B) **Proposals.** As used in this Subsection, *proposal* means any offer submitted in response to any solicitation, including an offer under §16311 (Small Purchase), except a bid as defined in §16316(e)(3)(A) of this section. Unless the solicitation states otherwise, proposals need not be unconditionally accepted without alteration or correction, and the hospital's stated requirements may be revised or clarified after proposals are submitted. This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal. Reasons for rejecting proposals include, but are not limited to:

1. the business that submitted the proposals is non-responsive as determined under §16319 (Responsibility of Bidders and Offerors) of these Regulations;

2. the proposals ultimately (that is, after opportunity has passed for altering or clarifying the proposal) fail to meet the announced requirements of the hospital in some material respect; or

3. the proposed price is clearly unreasonable.

(4) **Notice of Rejection.** Upon request, unsuccessful bidders or offerors shall be advised of the reasons therefor.

(f) **“All or None“ Bids or Proposals.** Only when provided by the solicitation may a bid or proposal limit acceptance to the entire bid or proposal offering. Otherwise, such bids or proposals shall be deemed to be non-responsive. If the bid or proposal is properly so limited, the hospital shall not reject part of such bid or proposal and award on the remainder.

(g) **Disposition of Bids or Proposals.** When bids or proposals are rejected, or a solicitation cancelled after bids or

proposals are received, the bids or proposals which have been opened shall be retained in the procurement file, or if unopened, returned to the bidders or offerors upon request, or otherwise disposed of.

§16317. Responsibility of Bidders and Offerors.

(1) **Determination of Non-responsibility.** A written determination of non-responsibility of a bidder or offeror shall be made in accordance with this section. The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of non-responsibility with respect to such bidder or offeror.

(2) **Right of Nondisclosure.** Information furnished by a bidder or offeror pursuant to this section shall not be disclosed outside of the Procurement Department of the Guam Memorial Hospital or by the Hospital Administrator without the prior written consent of the bidder or offeror.

(a) **Application.** A determination of responsibility or non-responsibility shall be governed by this section.

(b) **Standards of Responsibility.**

(1) **Standards.** Factors to be considered in determining whether the standard of responsibility has been met include whether a prospective contractor has:

(A) available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;

(B) a satisfactory record of performance;

(C) a satisfactory record of integrity;

(D) qualified legally to contract with the territory;
and

(E) supplied all necessary information in connection with the inquiry concerning responsibility.

(2) **Information Pertaining to Responsibility.** The prospective contractor shall supply information requested by the Hospital Administrator concerning the responsibility of such contractor. If such contractor fails to supply the requested information, the Hospital Administrator shall base the determination of responsibility upon any available information or may find the prospective contractor non-responsible if such failure is unreasonable.

(3) **Ability to Meet Standards.** The prospective contractor may demonstrate the availability of necessary

financing, equipment, facilities, expertise, and personnel by submitting upon request:

(A) evidence that such contractor possesses such necessary items;

(B) acceptable plans to subcontract for such necessary items; or

(C) a documented commitment from, or explicit arrangement with, a satisfactory source to provide necessary items.

(d) **Duty Concerning Responsibility.** Before awarding a contract, the Hospital Administrator must be satisfied that the prospective contractor is responsible.

(e) **Written Determination of Non-responsibility Required.** If a bidder or offeror who otherwise would have been awarded a contract is found non-responsible, a written determination of non-responsibility setting forth the basis of the finding shall be prepared by the Hospital Administrator. A copy of the determination shall be sent promptly to the non-responsible bidder or offeror. The final determination shall be made part of the procurement file.

§16318. Prequalification of Suppliers. Prospective suppliers may be prequalified for particular types of supplies, services, and construction. Solicitation mailing lists of potential contractors shall include, but shall not be limited to, such prequalified suppliers.

(a) **Prequalification.**

(1) **General.** Prospective contractors may be prequalified for bidder lists, but distribution of the solicitation shall not be limited to prequalified contractors, nor may a prospective contractor be denied award of a contract simply because such contractor was not prequalified. The fact that a prospective contractor has been prequalified does not necessarily represent a finding of responsibility.

(b) **Qualified Products Lists.** This section is not applicable to qualified products lists which are treated in §16403(b)(2) (Procedures for the Development of Specifications, Special Additional Procedures) of Article 4 (Specifications) of these Regulations.

§16319. Cost or Pricing Data.

(a) **Scope of regulation on Cost or Pricing Data.** This section sets forth the pricing policies which are applicable to contracts of any type and any price adjustments thereunder when cost or pricing data are required to be submitted. The provisions of this section requiring submission of cost or pricing data do not apply to a contract let by competitive

sealed bidding (including multi-step bidding) or small purchases. However, cost or pricing data may be required under a contract let by competitive sealed bidding when price adjustments are subsequently made in such a contract and, to this extent, those provisions would apply. See §16321(b) (Requirement for Cost or Pricing Data) for when the contractor may be required to submit cost or pricing data.

(b) Requirement for Cost or Pricing Data.

(1) **Submission of cost or Pricing Data.** Except as provided in subsection (b)(2)(C) of this section, cost or pricing data is required to be submitted in support of a proposal when:

(A) any contract expected to exceed one hundred thousand dollars (\$100,000) is to be awarded by sole source procurement, by competitive selection or under Article 5 of the Guam Procurement Act (Architect-Engineer and Land Surveying Services);

(B) adjusting the price of any contract, including a contract awarded by competitive sealed bidding, whether or not cost or pricing data were required in connection with the initial pricing of the contract, if the adjustment involves aggregate increases and/or decreases in costs plus applicable profits expected to exceed one hundred thousand dollars (\$100,000). (For example, the requirement applies to a thirty thousand dollars (\$30,000) net modification resulting from a reduction of seventy thousand dollars (\$70,000) and an increase of forty thousand dollars (\$40,000) when the reduction and increase are related.) However, this requirement shall not apply when unrelated and separately priced adjustments for which cost or pricing data would not be required if considered separately are consolidated for administrative convenience. The price shall also be adjusted to reflect non-payment by the contractor of any taxes which would have been paid were it not for the exclusion provided by Section 19543.1016 (Gross Receipts Tax) as added by Section 26 of the Guam Procurement Act; or

(C) the Hospital Administrator makes a written determination that the circumstances warrant requiring submission of cost or pricing data; provided, however, cost or pricing data shall not be required where the contract award is made pursuant to competitive sealed bidding. However, generally cost or pricing data should not be required where the contract or modification is less than twenty-five thousand dollars (\$25,000). Moreover, when less than complete cost analysis (for example, analysis of only specific factors) will provide a reasonable

pricing result on awards under one hundred thousand dollars (\$100,000) without the submission of complete cost or pricing data, the Hospital Administrator shall request only that data considered adequate to support the limited extent of the cost analysis needed and need not require certification.

(2) **Exceptions.** Cost and pricing data need not be submitted or certified:

(A) Where the contract price is based on:

1. adequate price competition;
2. established catalogue prices or market prices, except as provided by §16321(c)(3) or
3. prices set by law or regulation; or

(B) When the Hospital Administrator determines in writing to waive the applicable requirement for submission of cost or pricing data under Subsections (b)(1)(a), (b) (c) of this section in a particular pricing action and the reasons for such waiver are stated in the termination. A copy of such determination shall be kept in the contract file and made available to the public upon request.

If, after cost or pricing data is initially requested and received, it is determined that adequate price competition does exist, the data need not be certified.

(c) Meaning of Terms Adequate Price Competition, Established Catalogue Prices or Market Prices⁴, and prices set by Law or Regulation⁴.

(1) **Application.** As used in the exceptions set forth in §16321(b)(2) (Requirement for Cost or Pricing Data, Exceptions) the terms *adequate price competition*, *established catalogue prices or market prices*, and *prices set by law or regulations* shall be construed in accordance with the following definitions:

(2) *Adequate Price Competition.* Price competition exists if competitive sealed bids are solicited and at least two responsible offerors independently compete for a contract to be awarded to the responsible offeror submitting the lowest evaluated price by submitting priced offers (or best and final offers) meeting the requirements of the solicitation. If the foregoing conditions are met, price competition shall be presumed to be 'adequate' unless the Hospital Administrator determines in writing that such competition is not adequate.

(3) *Established Catalogue Prices or Market Prices.*

(A) See 5 GCA §5201(b) (Definitions, Established Catalogue Price of the Guam Procurement Act), for the definition of established catalogue price. (This definition is quoted in §14106(x) of these Regulations).

(B) *Established Market Price* means a current price established in the usual and ordinary course of trade between buyers and sellers, which can be substantiated from sources which are independent of the manufacturer or supplier and may be an indication of the reasonableness of price.

(C) If, despite the existence of an established catalogue price or market price, and after consultation with the prospective contractors, the Hospital Administrator considers that such price is not reasonable, cost or pricing data may be requested. Where the reasonableness of the price can be assured by a request for cost or pricing data limited to data pertaining to the differences in the item or services being procured and those listed in the catalogue or market, requests should be so limited.

(4) *Prices Set by Law or Regulation.* The price of a supply or service is set by law or regulation if the governmental body establishes the price that the offeror or contractor may charge the hospital and other customers.

(d) Submission of Cost or Pricing Data and Certification.

(1) **Time and Manner.** When cost or pricing data are required, they shall be submitted to the Hospital Administrator prior to beginning price negotiations at any reasonable time and in any reasonable manner prescribed by the Hospital Administrator. When the Hospital Administrator requires the offeror or contractor to submit cost or pricing data in support of any proposal, such data shall either be actually submitted or specifically identified in writing.

(2) **Obligation to Keep Data Current.** The offeror or contractor is required to keep such submission current until the negotiations are completed.

(3) **Time for Certification.** The offeror or contractor shall certify as soon as practicable after agreement is reached on price that, to the best of his knowledge and belief, the cost or pricing data submitted are accurate, complete, and current as of a mutually determined date prior to reaching an agreement. Certification shall be made using the certificate set forth in §16321(e) (Certificate of Current Cost or Pricing Data) of these Regulations.

(4) **Refusal to Submit Data.** A refusal by the offeror to supply the required data shall be referred to the Hospital

Administrator, whose duty shall be to determine in writing whether to disqualify the noncomplying offeror, to defer award pending further investigation, or to enter into the contract. A refusal by a contractor to submit the required data to support a price adjustment shall be referred to the Hospital Administrator who shall determine in writing whether to further investigate the price adjustment, not to allow any price adjustment, or to set the amount of the price adjustment, subject to the contractor's rights under Article 9 (Legal and Contractual Remedies) of these Regulations.

(e) Certificate of Current cost or Pricing Data.

(1) **Form of Certificate.** When cost or pricing data must be certified, a certificate substantially as set forth below shall be included in the contract file along with any award documentation required under these Regulations. The offeror or contractor shall be required to submit the certificate as soon as practicable after agreement is reached on the contract price or adjustment.

CERTIFICATE OF CURRENT COST OR PRICING

This is to certify that, to the best of my knowledge and belief, cost or pricing data as defined in §16301(a) of the Guam Memorial Hospital Authority Procurement Regulations submitted, either actually or by specific identification in writing (See §16321(d)) to the Hospital Administrator in support of,¹ are accurate, complete and current as of (date) (month) (year).....²

This certification includes the cost or pricing data supporting any advance agreement(s) between the offeror and the hospital which are part of the proposal.

FIRM.....

NAME.....

TITLE.....

DATE OF EXECUTION.....³

(End of Certificate)

(1) Describe the proposal, quotation, request for price adjustment or other submission involved, giving appropriate identifying number (e.g., RFP No. _____).

(2) The effective date shall be a mutually determined date prior to, but as close as possible to the date when price negotiations were concluded and the contract price was agreed to. The responsibility of the offeror or contractor is not

limited by the personal knowledge of the offeror's or contractor's negotiator if the offeror or contractor had information reasonably available at the time of the agreement, showing that the negotiated price is not based on accurate, complete, and current data.

(3) This date should be as soon after the date when the price negotiations were concluded and the contract price was agreed to as practical.

(2) Representation as to Accuracy of Cost of Pricing Data. Although the certificate pertains to "cost or pricing data", it is not to be construed as a representation as to the accuracy of the offeror's or contractor's judgment on the estimated portion of future costs or projections. It does, however, constitute a representation as to the accuracy of the data upon which the offeror's or contractor's judgment is based. A Certificate of Current Cost or Pricing shall not substitute for examination and analysis of the offeror's or contractor's proposal.

(3) Inclusion of Notice and Contract Clause. Whenever it is anticipated that a Certificate of Current Cost or Pricing may be required, notice of this requirement shall be included in the solicitation. If such a certificate is required, the contract shall include a clause giving the hospital a contract right to a reduction in the price as provided in §16321(f) (Defective Cost or Pricing Data).

(4) Exercise of Option. The exercise of an option at the price established in the initial negotiation in which certified cost or pricing data was used does not require recertification or further submission of data.

(f) Defective Cost or Pricing Data.

(1) Overstated Cost or Pricing Data. If certified cost or pricing data are subsequently found to have been inaccurate, incomplete, or non-current as of the date stated in the certificate, the hospital is entitled to an adjustment of the contract price, including profit or fee or any exclusion of taxes (Gross Receipts Tax) pursuant to §19543.1016 as added by Section 26 of the Guam Procurement Act, to exclude any significant sum by which the price, including profit or fee or any exclusion of taxes (Gross Receipts Tax) pursuant to §19543.1016 as added by Section 26 of the Guam Procurement Act was increased because of the defective data. Judgmental errors made in good faith concerning the estimated portions of future costs or projections do not constitute defective data. It is presumed that overstated cost or pricing data increased the contract price in the amount of the defect plus related overhead and profit or fee. Therefore, unless there is a clear indication that the defective data were

not used or relied upon, the price should be reduced by such amount. In establishing that the defective data caused an increase in the contract price, the Hospital Administrator is not expected to reconstruct the negotiation by speculating as to what would have been the mental attitudes of the negotiating parties if the correct data had been submitted at the time of agreement on price.

(2) **Off-Setting Understated Cost or Pricing Data.** In determining the amount of a downward adjustment, the contractor shall be entitled to an off-setting adjustment for any understated cost or pricing data submitted in support of price negotiations for the same pricing action up to the amount of the hospital's claim for overstated cost or pricing data arising out of the same pricing action.

(3) **Dispute.** If the contractor and the Hospital Administrator cannot agree as to the existence of the defective cost or pricing data or amount of adjustment due to defective cost or pricing data, the Hospital Administrator shall set an amount in accordance with Subsections (f)(1) and (f)(2) of this section and the contractor may appeal this decision as a contract controversy under Article 9 (Legal and Contractual Remedies) of these Regulations.

(g) **Price Analysis Techniques.** Price analysis is used to determine if a price is reasonable and acceptable. It involves an evaluation of the prices for the same or similar items, services, or construction. Examples of price analysis criteria include, but are not limited to:

- (1) price submissions of prospective bidders or offerors in the same current procurement;
- (2) prior price quotations and contract prices charged by the bidder, offeror, or contractor;
- (3) prices published in catalogues or price lists;
- (4) prices available on the open market; and
- (5) in-house estimates of cost.

In making such analysis, consideration must be given to any differing terms and conditions.

(h) **Cost Analysis Techniques.** Cost analysis includes the appropriate verification of cost or pricing data, and the use of this data to evaluate:

- (1) specific elements of costs;
- (2) the necessity for certain costs;
- (3) the reasonableness of amounts estimated for the necessary costs;

- (4) the reasonableness of allowances for contingencies;
- (5) the basis used for allocation of indirect costs;
- (6) the appropriateness of allocations of particular indirect costs to the proposed contract; and
- (7) the reasonableness of the total cost or price.

(i) **Evaluations of Cost or Pricing Data.** Evaluations of cost or pricing data should include comparisons of costs and prices of an offeror's cost estimates with those of other offerors and any independent territorial price and cost estimates. They shall also include consideration of whether such costs are reasonable and allocable under the pertinent provisions of Article 7 (Cost Principles) of these Regulations.

§16320. Types of Contracts.

(a) **Scope of Section.** This section contains descriptions of types of contracts and limitations as to when they should be utilized by the hospital in its procurement.

(b) **Prohibition of contracting.** Any contract in violation of §16322(a) through §16325(b)(5), described herein, shall not be authorized.

(c) **Policy Regarding Selection of Contract Types.**

(1) **General.** The selection of an appropriate contract type depends on the factors such as the nature of supplies, services, or construction to be procured, the uncertainties which may be involved in contract performance, and the extent to which the hospital or the contractor is to assume the risk of the cost of performance of the contract. Contract types differ in the degree of responsibility assumed by the contractor.

The objective when selecting a contract type is to obtain the best value in needed supplies, services, or construction in the time required and at the lowest cost or price to the hospital.

In order to achieve this objective, the Hospital Administrator, before choosing a contract type, should review those elements of the procurement which directly affect the cost, time, risk, and profit incentives bearing on the performance.

Among the factors to be considered in selecting any type of contract are:

- (A) the type and complexity of the supply, service or construction item being procured;
- (B) the difficulty of estimating performance costs such as the inability of the hospital to develop definitive

specifications, to identify the risks to the contractor inherent in the nature of the work to be performed, or otherwise to establish clearly the requirements of the contract;

(C) the administrative costs to both parties;

(D) the degree to which the hospital must provide technical coordination during the performance of the contract;

(E) the effect of the choice of the type of contract on the amount of competition to be expected;

(F) the stability of material or commodity market prices or wage levels;

(G) the urgency of the requirement; and

(H) the length of contract performance.

(2) **Use of Contract types Not Herein Described.** The provisions of this §16322 described and defined the principal contract types. Any other type of contract, except cost-plus-a-percentage of cost, may be used provided the Hospital Administrator determines in writing that such use is in the hospital's best interest.

(d) **Types of Fixed Price Contracts.**

(1) **General.** A fixed-price contract places responsibility on the contractor for the delivery of the product or the complete performance of the services or construction in accordance with the contract terms at a price that may be firm or may be subject to contractually specified adjustments. The fixed-price contract is appropriate for use when the extent and type of work necessary to meet hospital requirements can be reasonably specified and the cost can be reasonably estimated, as is generally the case for construction or standard commercial products. A fixed-price type of contract is the only type of contract that can be used in competitive sealed bidding.

(2) **Firm Fixed-Price Contract.** A firm fix-priced contract provides a price that is not subject to adjustment because of variations in the contractor's cost of performing the work specified in the contract. It should be used whenever prices which are fair and reasonable to the hospital can be established at the outset. Bases upon which firm fixed prices may be established include:

(A) adequate price competition for the contract;

(B) comparison of prices in similar prior procurement in which prices were fair and reasonable;

(C) establishment of realistic costs of performance by utilizing available cost or pricing data and identifying uncertainties in contract performance; or

(D) use of other adequate means to establish a firm price.

(3) Fixed-Price Contract with Price Adjustment.

(A) A fixed price contract with price adjustment provides for variation in the contract price under special conditions defined in the contract, other than customary provisions authorizing price adjustments due to modifications to the work. The formula or other basis by which the adjustment in contract price can be made shall be specified in the solicitation and the resulting contract. Adjustments allowed may be upward or downward only or both upward and downward. Examples of conditions under which adjustments may be provided in fixed-price contracts are:

1. changes in the contractor's labor agreement rates as applied to industry or area wide (such as may be found in some territorial contracts);

2. changes due to rapid and substantial price fluctuations, which can be related to an accepted index (such as contracts for gasoline, heating oils, and dental gold alloy); and

3. in requirement contracts:

(i) when a general price change applicable to all customers occurs; or

(ii) when a general price change alters the base price (such as a change in a manufacturer's published price list or posted price to which a fixed discount is applied pursuant to the contract to determine the contract price).

(B) If the contract permits unilateral action by the contractor to bring about the condition under which a price increase may occur, the contract shall reserve to the hospital the right to reject the price increase and terminate without cost the future performance of the contract. The contract shall also require that notice of any such price increase shall be given within such time prior to its effective date as is specified in the contract. These restrictions shall not apply to fixed-price cost incentive contracts which are covered in §16322(f)(2) (Cost Incentive Contracts, Fixed-Price Cost Incentive Contract) and fixed-price performance incentive

contracts, which are covered in §16322(g) (Performance Incentive Contracts).

(e) Types of Cost-Reimbursement Contracts.

(1) **General.** The cost-reimbursement type contract provides for payment to the contractor of allowable costs incurred in the performance of the contract as determined in accordance with Article 7 (Cost Principles) of these Regulations and as provided in the contract. This type of contract establishes at the outset an estimated cost for the performance of the contract and a dollar ceiling which the contractor may not exceed (except at its own expense) without prior approval or subsequent ratification by the Hospital Administrator and, in addition, may provide for payment of a fee. The contractor agrees to perform as specified in the contract until the contract is completed or until the costs reach the specified ceiling, whichever first occurs. This type of contract is appropriate when the uncertainties involved in contract performance are of such magnitude that the cost of contract performance cannot be estimated with sufficient certainty to realize economy by use of any type of fixed-price contract. In addition, a cost-reimbursement contract necessitates appropriate monitoring by hospital personnel during performance so as to give reasonable assurance that the objectives of the contract are being met. It is particularly suitable for research, development, and study type contracts.

(2) **Determination Prior to Use.** A cost-reimbursement type contract may be used only when the Hospital Administrator or a designee of either officer determines in writing that:

(A) such a contract is likely to be less costly to the hospital than any other type or that it is impracticable to obtain otherwise the supplies, services, or construction;

(B) 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

(C) the proposed contractor's accounting system is adequate to allocate costs in accordance with generally accepted accounting principles.

(3) **Cost Contract.** A cost contract provides that the contractor will be reimbursed for allowable costs incurred in performing the contract, but will not receive a fee.

(4) **Cost-Plus Fixed Fee Contract.** This is a cost-reimbursement type contract which provides for payment to the contractor of an agreed fixed fee in addition to reimbursement of allowable incurred costs. The fee is

established at the time of contract award and does not vary whether or not the actual cost of contract performance is greater or less than the initial estimated cost established for such work. Thus, the fee is fixed but not the contract amount because the final contract amount will depend on the allowable costs reimbursed. The fee is subject to adjustment only if the contract is modified to provide for an increase or decrease in the scope of work specified in the contract. The cost-plus-fixed-fee contract can be either a Completion Form or Term Form.

(A) The Completion Form is one which describes the scope of work to be done as a clearly defined task or job with a definite goal or target expressed and with a specific end-product. This form of contract normally requires the contractor to complete and deliver the specified end-product (in certain instances, final report of research accomplishing the goal or target) as a condition for payment of the entire fixed fee established for the work and within the estimated cost if possible. However, in the event the work cannot be completed within the estimated cost, the Hospital Administrator can elect to require more work and effort from the contractor without increase in fee, provided it increases the estimated cost.

(B) Term Form is one which describes the scope of work to be done in general terms and which obligates the contractor to devote a specified level of effort for a stated period of time. Under this form, the fixed fee is payable at the termination of the agreed period of time, upon certification that the contractor has exerted the level of effort specified in the contract in performing the work called for, and that such performance is considered satisfactory by the hospital.

(C) The Completion Form of Contract, because of differences in obligation assumed by the contractor, is to be preferred over the Term Form whenever the work itself or specific milestones can be defined with sufficient precision to permit the development of estimates within which prospective contractors can reasonably be expected to complete the work. A milestone is a definable point in a program when certain objectives can be said to have been accomplished.

(D) In no event should the Term Form of contract be used unless the contractor is obligated by the contract to provide a specific level of effort within a definite period of time.

(f) Costs Incentive Contract.

(1) **General.** A cost incentive type of contract provides for the reimbursement to the contractor allowable costs incurred up to the ceiling amount and establishes a formula whereby the contractor is rewarded for performing at less than target cost (that is, the parties' agreed best estimate of the cost of performing the contract) or is penalized if it exceeds target cost. The profit or fee under such a contract will vary inversely with the actual, allowable costs of performance and consequently is dependent on how effectively the contractor controls cost in the performance of the contract.

(2) **Fixed-Price Cost Incentive Contract.** In a fixed-price cost incentive contract, the parties establish at the outset a target cost, a target profit (that is, the profit which will be paid if the actual cost of performance equals the target cost), a formula which provides a percentage increase or decrease of the target profit depending on whether the actual cost of performance is less than or exceeds the target cost, and a ceiling price. After performance of the contract, the actual cost of performance is arrived at based on the total incurred allowable costs as determined in accordance with Article 7 (Cost Principles) of these Regulations and as provided in the contract. The final contract price is then established in accordance with the formula using the actual cost of performance. The final contract price may not exceed the ceiling price. The contractor is obligated to complete performance of the contract, and, if actual costs exceed the ceiling price, the contractor suffers a loss.

(3) **Cost-Reimbursement Contract with Cost Incentive Fee.** In a cost reimbursement contract with cost incentive fee, the parties establish at the outset a target cost; a target fee; a formula for increase or decrease of the fee depending on whether actual cost of performance is less than or exceeds the target cost, with maximum and minimum fee limitations; and a cost ceiling which represents the maximum amount which the hospital is obligated to reimburse the contractor. The contractor continues performance until work is complete or costs reach the ceiling specified in the contract, including any modification thereof, whichever first occurs. After performance is complete or costs reach the ceiling, the total incurred allowable costs reimbursed in accordance with Article 7 (Cost Principles) of these Regulations and as provided in the contract are applied to the formula to establish the incentive fee payable to the contractor.

(4) **Determinations Required.** Prior to entering into any cost incentive contract, the Hospital Administrator shall make the written determination required by 5 GCA §5236 (Approval of Accounting System) of the Guam Procurement Act. Prior to entering any cost-reimbursement contract with cost incentive fee, the Hospital Administrator shall make the

written determination required by §16322(e)(2) (Types of Cost-Reimbursement Contracts, Determination Prior to Use).

(g) **Performance Incentive Contracts.** In a performance incentive contract, the parties establish at the outset a pricing basis for the contract, performance goals, and a formula which varies the profit or the fee if the specified performance goals are exceeded or not met. For example, early completion may entitle the contractor to a bonus while late completion may entitle the hospital to a price decrease.

(h) **Time and Materials Contracts: Labor Hour Contracts.**

(1) **Time and Materials Contracts.** Time and materials contracts provide an agreed basis for payment for materials supplied and labor performed. Such contracts shall, to the extent possible, contain a stated ceiling or an estimate that shall not be exceeded without prior hospital approval and shall be entered into only after the Hospital Administrator determines in writing that:

(A) Hospital personnel have been assigned to closely monitor the performance of the work; and

(B) under the circumstances, it would not be practicable to use any other type of contract to obtain needed supplies, services, or construction, in the time required, and at the lowest cost or price to the hospital.

(2) **Labor Hour Contracts.** A labor hour contract provides only for the payment of labor performed. It shall contain the same ceiling as provided in subsection (h)(1) of this section. Prior to the award of such contract, the Hospital Administrator shall make the determination as required in subsection (h)(1) of this section.

(i) **Definite Quantity and Indefinite Quantity Contracts.**

(1) **Definite Quantity.** A definite quantity contract is a fixed-price contract that provides for delivery of a specified quantity of supplies or services either at specified times or when ordered.

(2) **Indefinite Quantity.** An indefinite quantity contract is a contract for an indefinite amount of supplies or services to be furnished at specified times, or as ordered, that establishes unit prices of a fixed-price type. Generally, an approximate quantity or the best information available as to quantity is stated in the solicitation. The contract may provide a minimum quantity the hospital is obligated to order and may also provide for a maximum quantity that limits the hospital's obligation to order. Each indefinite quantity contract proposed to be entered into by the hospital shall include a written determination by the Hospital Administrator indicating the rationale for the use of this type of contract and

the reasons why another contract form will not suffice. Such contracts will be reviewed every six (6) months for a determination of the continued need for such a contract.

(3) **Requirements Contracts.** A requirements contract is an indefinite quantity contract for supplies or services that obligates the hospital to order all the actual requirements of the designated using departments during a specified period of time. The obligation to order the hospital's actual requirements is limited by the provisions of the Uniform Commercial Code of Guam, §2306 (quoted below). For the protection of the hospital and the contractor, requirements contracts shall include the following:

(A) a provision which requires the hospital and any other users named in the solicitation to order their actual requirements of the supplies or services covered. However, the hospital may reserve in the solicitation and in the resulting contract the right to take bids separately if a particular quantity requirement arises which exceeds the hospital's normal requirements or an amount specified in the contract;

(B) two exemptions from ordering under the contract when:

1. the Hospital Administrator approves a finding that the supply or service available under the contract will not meet a nonrecurring, special need of the hospital; or

2. supplies are produced or services are performed incidental to the hospital's own programs as may be available that can satisfy the need.

Uniform Commercial Code of Guam (13 GCA) §2306 states: §2306. Output, Requirements and Exclusive Dealings

(1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

(2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes, unless otherwise agreed, an obligation by the seller to use his best efforts to supply the goods and by the buyer to use his best efforts to promote their sale.

(j) **Leases**

(1) **Description.** A lease is a contract for the use of equipment or other supplies or real property under which title will not pass to the hospital at any time. §16322(k) (Option Provisions) applies to a lease with purchase option where title may pass to the hospital.

(2) **Use.** A lease may be entered into provided:

(A) it is in the best interest of the hospital;

(B) all conditions for renewal and costs of termination are set forth in the lease; and

(C) the lease is not used to circumvent normal procurement procedures.

(k) **Option Provisions.**

(1) **Contract Provision.** When a contract is to contain an option for renewal, extension, or purchase, notice of such provision shall be included in the solicitation. Exercise of the option is always at the hospital's discretion only, and not subject to agreement or acceptance by the contractor. A written record indicating the need for this shall be made and put in file.

(2) **Exercise of Option.** Before exercising any option for renewal, extension or purchase, the Hospital Administrator should attempt to ascertain whether a competitive procurement is practical, in terms of pertinent competitive and cost factors, and would be more advantageous to the hospital than renewal or extension of the existing contract. A written record of the Hospital Administrator's findings and determination shall be made and maintained as part of the contract file.

(3) **Lease with Purchase Option.** A purchase option in a lease may be exercised only if the lease containing the purchase option was awarded under competitive sealed bidding, or the leased supply or facility is the only supply or facility that can meet the hospital's requirements, as determined in writing by an officer above the level of the GMHA Supply Management Administrator. Before exercising such an option the Hospital Administrator shall:

(A) investigate alternative means of procuring comparable supplies or facilities; and

(B) compare estimated costs and benefits associated with the alternative means and the exercise of such option, for example, the benefit of buying new state-of-the-art equipment compared to the estimated, initial savings associated with exercise of a purchase option.

§16321. Approval of Accounting Systems. Title 10 Guam Code Annotated §5236 (Approval of Accounting System) of the

Guam Procurement Act is quoted in §16322 (Types of Contracts) and implementation of that statutory provision is integrated into these Regulations.

§16322. Multi-Term Contracts. (a) General. A multi-term contract is appropriate when it is in the best interest of the hospital to obtain uninterrupted services extending over more than one fiscal period, where the performance of such services involves high start-up costs, or where a changeover of service contractors involves high phase-in/phase-out costs during a transition period. The multi-term method of contracting is also appropriate when special production refers to production for contract performance which requires alteration in the contractor's facilities or operations involving high start-up costs. The contractual obligation of both parties in each fiscal period succeeding the first is subject to the appropriation and availability of funds thereof. The contract shall provide that, in the event that funds are not available for any succeeding fiscal period, the remainder of such contract shall be cancelled and the contractor shall be reimbursed the reasonable value of any nonrecurring costs incurred but not amortized in the price of the supplies delivered or services performed under the contract.

(b) **Objective.** The objective of the multi-term contract is to promote economy and efficiency in procurement by obtaining the benefits of sustained volume production and consequent low prices, and by increasing competitive participation in procurement which involve special production with consequent high start-up costs and in the procurement of services which involve high start-up costs or high phase-in/phase-out costs during change-over of service contractors.

(c) **Multi-Term Contract Regulation Inapplicable.** This §16324 (Multi-Term Contracts) applies only to contracts for supplies or services described in §16324(a) and does not apply to any other contracting including, but not limited to contracts for construction and leases (including leases of real property).

(d) **Conditions for Use of Multi-term Contracts.** A multi-term contract may be used when it is determined in writing by the Hospital Administrator that:

(1) special production of definite quantities or the furnishing of long term services are required to meet hospital needs; and

(2) a multi-term contract will serve the best interest of the hospital by encouraging effective competition or otherwise promoting economies in hospital procurement.

The following factors are among those relevant to such determination:

(1) firms which are not willing or able to compete because of high start-up costs or capital investment in facility expansion will be encouraged to participate in the competition when they are assured of recouping such costs during the period of contract performance;

(2) lower production costs because of large quantity or service requirements, and substantial continuity of production or performance over a longer period of time, can be expected to result in lower unit prices;

(3) stabilization of the contractor's work force over a longer period of time may promote economy and consistent quality; or

(4) the cost and burden of contract solicitation, award, and administration of the procurement may be reduced.

(e) Multi-Term Contract.

(1) **Solicitation.** The solicitation shall state:

(A) the amount of supplies or services required for the proposed contract period;

(B) that a unit price shall be given for each supply or service, and that such unit prices shall be the same throughout the contract (except to the extent price adjustments may be provided in the solicitation and resulting contract);

(C) that the multi-term contract will be cancelled only if funds are not appropriated or otherwise made available to support continuation of performance in any fiscal period succeeding the first; however, this does not affect either the hospital's rights or the contractor's rights under any termination clause in the contract;

(D) that the Hospital Administrator must notify the contractor on a timely basis that the funds are, or are not, available for the continuation of the contract for each succeeding fiscal period;

(E) whether bidders or offerors may submit prices for:

1. the first fiscal period only;
2. the entire time of performance only; or
3. both the first fiscal period and the entire time of performance;

(F) that a multi-term contract may be awarded and how award will be determined including, if prices for the first fiscal period and entire time of performance are submitted, how such prices will be compared; and

(G) that, in the event of cancellation as provided in subsection (e)(1) of this section, the contractor will be reimbursed the unamortized, reasonably incurred, nonrecurring costs.

(2) **Award.** Award shall be made as stated in the solicitation and permitted under the source selection method utilized. Care should be taken when evaluating multi-term prices against prices for the first fiscal period that award on the basis of prices for the first period does not permit the successful bidder or offeror to "buy in", that is, give such bidder or offeror an undue competitive advantage in subsequent procurement.

(3) **Cancellation.**

(A) *Cancellation*, as used in multi-term contracting, means the cancellation of the total requirements for the remaining portion of the contract because funds were not appropriated or otherwise made available. The contract for the first fiscal period shall not be cancelled. Cancellation results when the Hospital Administrator:

1. notifies the contractor of non-availability of funds for contract performance for any fiscal period subsequent to the first; or

2. fails to notify the contractor by the date set forth in the contract, unless the parties agree to extend such date, that funds are available for performance of the succeeding fiscal period and funds which may be used for the contract have not been appropriated or otherwise made available.

(B) These provisions on cancellation of multi-term contracts do not limit the rights of the hospital or the contractor under any termination clause of the contract if the contract is terminated pursuant to that clause rather than cancelled as provided in this Subsection.

§16323. Multiple Source Contracting. (a) Incremental Award.

(1) **General.** An incremental award is an award of portions of a definite quantity requirement to more than one contractor. Each portion is for a definite quantity and the sum of the portions is the total definite quantity required. An incremental award may be used only when awards to more than one bidder or offeror for different amounts of the same item are necessary to obtain the total quantity or the required delivery.

(2) **Intent to use.** If an incremental award is anticipated prior to issuing a solicitation, the hospital shall reserve the

right to make such an award and the criteria for award shall be stated in the solicitation.

(3) **Determination Required.** The Hospital Administrator shall make a written determination setting forth the reasons for the incremental award, which shall be made a part of the procurement file.

(b) Multiple Award.

(1) **General.** A multiple award is an award of an indefinite quantity contract for one or more similar supplies or services to more than one bidder or offeror when the hospital is obligated to order all of its actual requirements for the specified supplies or services from those contractors. The obligation to order the hospital's actual requirements is limited by the provisions of the Uniform Commercial Code of Guam, §2306(1). (See end of §16322(j)(3) for Code quotation.)

(2) **Limitations on Use.** A multiple award may be made when award to two or more bidders or offerors for similar products is necessary for adequate delivery, service or product compatibility. Any multiple award shall be made in accordance with the provisions of §16309 (Competitive Sealed Bidding), §16311 (Small Purchases), or §16313 (Emergency Procurement), as applicable. Multiple awards shall not be made when a single award will meet the hospital's needs without sacrifice of economy or service. Awards shall not be made for the purpose of dividing the business, making available product or supplier selection to allow for user preference unrelated to utility or economy, or avoiding the resolution of tie bids. Any such awards shall be limited to the least number of suppliers necessary to meet the valid requirements of using departments.

(3) **Contract and Solicitation Provisions.** All eligible users of the contract shall be named in the solicitation, and it shall be mandatory that the actual requirements of such users that can be met under the contract be obtained in accordance with the contract, provided, that:

(A) the hospital shall reserve the right to take bids separately if a particular quantity requirement arises which exceeds its normal requirement or an amount specified in the contract;

(B) the hospital shall reserve the right to take bids separately if the Hospital Administrator approves a finding that the supply or service available under the contract will not meet a nonrecurring special need of the hospital; and

(C) the contract shall allow the hospital to procure supplies produced, or services performed, incidental to the hospital's own programs as may be available when such hospital's or services satisfy the need.

(4) **Intent to Use.** If a multiple award is anticipated prior to issuing a solicitation, the hospital shall reserve the right to make such an award and the criteria for award shall be stated in the solicitation.

(5) **Determination Required.** The Hospital Administrator shall make a written determination setting forth the reasons for a multiple award, which shall be made a part of the procurement file.

§16324. Inspections. (a) **Right to Inspect Plant.** The hospital may at reasonable times, inspect the part of the plant or place of business of a contractor or any subcontractor which is related to the performance of any contract awarded or to be awarded by the hospital.

(1) **Inspection of Plant Site.** Circumstances under which the hospital may perform inspections include, but are not limited to, inspections of the contractor's plant or site in order to determine:

(A) whether the standards set forth in §16319(b) (Standards of Responsibility) have been met or are capable of being met; or

(B) if the contract is being performed in accordance with its terms.

(b) **Access to Plant or Place of Business.** The hospital may enter a contractor's or subcontractor's plant or place of business to:

(1) inspect supplies or services for acceptance by the hospital pursuant to the terms of a contract;

(2) audit cost or pricing data or audit the books and records of any contractor or subcontractor pursuant to 5 GCA §5241 (Right to Audit Records) of the Guam Procurement Act, which is quoted in §16327 (Audits); or

(3) investigate in connection with an action to debar or suspend a person from consideration for award of contracts pursuant to §16902 (Authority to Debar or Suspend) of these Regulations.

(c) **Inspection and Testing of Supplies and Services.**

(1) **Solicitation and Contractual Provisions.** Hospital contracts may provide that the hospital may inspect supplies and services at the contractor or subcontractor's facility and perform tests to determine whether they conform to solicitation requirements, or, after award, to contract

requirements, and are, therefore, acceptable. Such inspection and test shall be conducted in accordance with the terms of the solicitation and contract.

(2) **Procedures for Trial Use and Testing.** The Hospital Administrator may establish operational procedures governing the testing and trial use of equipment, materials, and other supplies by any hospital department, and the application of resulting information and data to specifications or procurement.

(d) **Conduct of Inspections.**

(1) **Inspectors.** Inspections or tests shall be performed so as not to unduly delay the work of the contractor or subcontractor. No inspector other than the Hospital Administrator may change any provision of the specifications or the contract without written authorization of the Hospital Administrator. The presence or absence of an inspector shall not relieve the contractor or subcontractor from any requirements of the contract.

(2) **Location.** When an inspection is made in the plant or place of business of a contractor or subcontractor, such contractor or subcontractor shall provide without charge all reasonable facilities and assistance for the safety and convenience of the person performing the inspection or testing.

(3) **Time.** Inspection or testing of supplies and services performed at the plant or place of business of any contractor or subcontractor shall be performed at reasonable times.

(e) **Inspection of Construction Projects.** On-site inspection of construction projects shall be performed in accordance with the terms of the contract.

§2325. Right to Audit Records. (a) **Audit of Cost or Pricing Data.** The hospital may, at reasonable times and places, audit the books and records of any person who has submitted cost or pricing data pursuant to 5 GCA §5232 (Cost or Pricing Data) of the Guam Procurement Act, to the extent that such books and records relate to such cost or pricing data. Any person who receives a contract, change order, or contract modification for which cost or pricing data is required, shall maintain such books and records that relate to such cost or pricing data for three (3) years from the date of final payment under the contract, unless a shorter period is otherwise authorized in writing.

(b) **Contract Audit.** The hospital shall be entitled to audit the books and records of a contractor or any subcontractor under any negotiated contract or subcontract other than a firm fixed-price contract to the extent that such books and records relate to the performance of such contract or subcontract. Such books and

records shall be maintained by the contractor for a period of three (3) years from the date of final payment under the prime contract and by the subcontractor for a period of three (3) years from the date of final payment under the subcontract, unless a shorter period is otherwise authorized in writing.

(c) **Statutory Authority to Audit.** Pursuant to §16327 (Right to Audit Records) of these Regulations, the hospital may, at reasonable times and places, audit the books and records of a contractor, prospective contractor, subcontractor, or prospective subcontractor which are related to:

(1) the cost or pricing data submitted under §16321 (Cost or Pricing Data) of these Regulations; or

(2) a hospital contract, including subcontracts, other than a firm fixed price contract, awarded pursuant to the following sections of these Regulations:

(A) Section 16310 (Nonprofit Corporation Procurement);

(B) Section 16312 (Sole Source Procurement);

(C) Section 16313 (Emergency Procurement);

(D) Section 16314 (Competitive Selection Procedures for Services Specified in §16212);

(E) Section 16315 (Purchase of Drugs by Generic Names); or

(F) Section 16507 (Architect-Engineer and Land Surveying Services).

(d) **Auditors: Audit Reports.** Audits requested under this Subsection shall be performed by the Hospital Administrator. An audit report shall be prepared in accordance with §16327(f) (Cost or Pricing Data Audit Report) or §16327(h) (Contract Audit Report). Such report shall be made available to the party audited upon request.

(e) **Cost or Pricing Data Audit.**

(1) **General.** The Hospital Administrator, or such officer's designee, may require an audit of cost or pricing data that has been submitted under 5 GCA §5232 (Cost Data or Price Data and Analysis) of the Guam Procurement Act.

(2) **Conditions for An Audit.** An audit should be required when with respect to the contractor, prospective contractor, subcontractor, or prospective subcontractor, there is:

(A) a question as to the adequacy of accounting policies or cost systems;

(B) a substantial change in the methods of levels of operation;

(C) previous unfavorable experience indicating doubtful reliability of estimating, accounting, or purchasing methods;

(D) a lack of cost experience due to the procurement of new supply, or construction; or

(E) other evidence that an audit is in the hospital's best interests as determined by the Hospital Administrator or such officer's designee.

(f) **Cost or Pricing Data Audit Report.** When the Hospital Administrator or such officer's designee requires an audit under §16327(e) (Cost or Pricing Data Audit) the auditor shall submit a written report to the officer by an agreed upon date.

(g) **Contract Audit.**

(1) **Types of Contracts Audited.** Under the authority of §16327(c) (Statutory Authority to Audit), the type of contract under which books and records should be audited is that in which price is based on costs or is subject to adjustment based on costs or that in which auditing would be appropriate to assure satisfactory performance such as a time and materials contract.

(2) **Conditions for an Audit.** The requirements of a contract audit may be warranted when a question arises in connection with:

(A) the financial condition, integrity, and reliability of the contractor or subcontractor;

(B) any prior audit experience;

(C) the adequacy of the contractor's or subcontractor's accounting system;

(D) the number or nature of invoices or reimbursement vouchers submitted by the contractor or subcontractor for payment;

(E) the use of federal assistance funds;

(F) the fluctuation of market prices affecting the contract; or

(G) any other situation when the Hospital Administrator finds that such an audit is necessary for the protection of the hospital's interest.

The scope of the audit may be limited by the Hospital Administrator or such officer's designee.

(h) **Contract Audit Report.** Where the Hospital Administrator or such officer's designee requires a contract audit under §16327(g) (Contract Audit), the auditor shall submit a written report to the officer by an agreed upon date.

(i) **Retention of Books and Records.**

(1) **Relating to Cost and Pricing Data.** Any contractor who receives a contract, change order, or contract modification for which cost or pricing data is required under 5 GCA §5232 (Cost or Pricing Data) of the Guam Procurement Act, shall maintain such books and records that relate to such cost or pricing data for three (3) years from the date of final payment under the contract. See §16327, §16327(e) (Right to Audit Records, Audit of Cost or Pricing Data) of these Regulations.

(2) **Relating to Territorial Contracts.** Books and records that relate to a hospital contract, including subcontracts, other than a firm fixed price contract awarded under any method set forth in §16327(c) (Statutory Authority to Audit) shall be maintained:

(A) by a contractor, for three (3) years from the date of final payment under the prime contract; and

(B) by a subcontractor, for three (3) years from the date of final payment under the subcontract. See §16327, §16327(g) (Right to Audit Records, Contract Audit) of these Regulations.

§2326. Finality of Determinations. The determinations required by 5 GCA §5211(f) (Competitive Sealed Bidding, Correction or Withdrawal of Bids; Cancellation of Awards), §5214 (Sole Source Procurement), §5215 (Emergency Procurement), §5216(e) (Competitive Selection Procedures for Services Specified in §5121, Award), §5230(a) (Responsibility of Bidders and Offerors, Determination of Non-Responsibility), §5232(c) (Cost or Pricing Data, Cost or Pricing Data Not Required), §5235 (Types of Contracts), §5236 (Approval of Accounting System), and §5237(b) (Multi-Term contracts, Determination Prior to Use) are final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law. (See §5245 of the Guam Procurement Act.)

§16327. Reporting of Anti-competitive Practices. When for any reason collusion or other anti-competitive practices are suspected among any bidders or offerors, a notice of the relevant facts shall be transmitted to the Attorney General and the Territorial Prosecutor. (See §5246 of the Guam Procurement Act.)

(a) **Anti-competitive Practices.** For the purposes of this section, an anti-competitive practice is a practice among bidders or offerors which reduces or eliminates competition or restrains trade. An anti-competitive practice can result from an agreement or

understanding among competitors to restrain trade such as submitting collusive bids or proposals, or result from illicit business actions which have the effect of restraining trade, such as controlling the resale price of products or an improper collective refusal to bid. Indications of suspected anti-competitive practices include, but are not limited to, identical bids or proposals, rotated low bids or proposals, sharing of the business, "tie-in" sales, resale price maintenance, and group boycotts. See §16329(e) (Other Anti-competitive Practices).

(b) **Independent Price Determination.** Every solicitation shall provide that by submitting a bid or offer, the bidder or offeror certifies that the price submitted was independently arrived at without collusion.

(c) **Detection of Anti-competitive Practices.** In order to assist in ascertaining whether or not an Anti-competitive practice may have occurred or may be occurring, the Hospital Administrator should be alerted and sensitive to conditions of the market place and will often find it necessary to study past procurement including, as appropriate, the following:

- (1) a study of the bidding history of a supply, service, or construction item over a period of time sufficient to determine any significant bidding patterns or changes;
- (2) a review of similar hospital contract awards over a period of time; or
- (3) consultation with outside sources of information, such as bidders or offerors who have competed for similar hospital business in the past, but who are no longer competing for such business.

(d) **Identical Bidding and Price Fixing.** The term *identical bidding* means the submission by bidders or offerors of the same total price or the same price on a particular line item. The submission of identical bids may or may not signify the existence of collusion. In some instances, price controls imposed by state or federal governments result in the submission of identical bids. Identical bids for supplies are more likely to occur in the absence of collusion if:

- (1) the supply is a commodity with a well-established market price or a brand name with a "suggested retail price";
- (2) the quantity being purchased is small in relation to the supplier's total sales;
- (3) early delivery is required; or
- (4) transportation expenses are low relative to total costs.

In seeking to determine whether collusion has taken place, the Hospital Administrator should view the identical bids against present and past pricing policies of the bidders or offerors, the

structure of the industry involved including comparisons of prices f.o.b. shipping point and f.o.b. destination, and nature of the supply, service, or construction involved, such as whether it is a basic chemical or metal. Identical bids may also result from resale price maintenance agreements which are described in §16329(e)(3) (Other Anti-Competitive Practices, Resale Price Maintenance). Any other attempt by bidders or offerors to fix prices should also be reported.

(e) Other Anti-competitive Practices.

(1) **General.** The practices which are described in §16329(e)(2) through 162332(5) and which the Hospital Administrator suspects might be anti-competitive shall be reported in accordance with §16329 (Reporting Suspected Anti-Competitive Practices).

(2) **Rotated Low Bids or Proposals.** Rotated low bids or proposals result where all bidders or offerors participating in the collusive scheme submit bids and by agreement alternate being the lowest bidder or offeror. To aid in determining whether rotation may be occurring, the Hospital Administrator must review past similar procurement in which the same bidders or offerors have participated.

(3) **Resale Price Maintenance.** The practice of resale price maintenance consists of an agreement between a manufacturer and a distributor or a dealer to fix the resale price of a supply. The Hospital Administrator should consider the possibility that such an agreement exists where prices offered adhere to an established pattern, such as a published price schedule, and when identical bidding occurs.

(4) **Sharing of the Business.** Sharing of the business occurs where potential bidders or offerors allocate business among themselves based on the customers or the territory involved. Thus, a Procurement Officer might discover that a potential bidder or offeror is not participating in a hospital procurement because a particular territory has not been allocated to such bidder or offeror by the producer or manufacturer.

(5) **“Tie-In“ Sales.** Tie-in sales are those in which a bidder or offeror attempts to sell one supply or service only upon the condition that the Hospital Administrator purchases another particular supply or service.

(6) **Group Boycott.** A group boycott results from an agreement between competitors not to deal with another competitor or not to participate in, for instance, a hospital procurement until the boycotting competitor's conditions are met by the boycotted competitor or the hospital. The boycott of a competitor by other competitors may have an effect on

the market structure or price of a supply, service, or construction item needed by the hospital.

(f) **Reporting Suspected Anti-Competitive Practices.** The Hospital Administrator in consultation with the hospital legal counsel, shall develop procedures including forms, for reporting suspected anti-competitive practices. Any Procurement Department employee who suspects that an anti-competitive practice has occurred or may be occurring shall follow these procedures.

§16328. Retention of Procurement Records. All procurement records shall be retained and disposed of in accordance with the records retention guidelines and schedules approved by the Attorney General. All retained documents shall be made available to the Attorney General or a designee upon request and proper receipt therefor. (See §5247 of the Guam Procurement Act.)

(a) **Contents of Record.** The Hospital Administrator shall maintain a record listing all contracts made under §16312 (Sole Source Procurement) or §16313 (Emergency Procurement) of these Regulations for a minimum of five (5) years. The record shall contain:

- (1) each contractor's name;
- (2) the amount and type of each contract; and
- (3) a listing of the supplies, services or construction procured under each contract.

(b) **Submission to Legislature.** A copy of such record shall be submitted to the Legislature on an annual basis. The record shall be available for public inspection.

§16329. Record of Procurement Actions Taken Under §16312 (Sole Source Procurement) and §16313 (Emergency Procurement) (See 5 GCA §5248, Guam Procurement Act.) (a)

Contents of Record. The Hospital Administrator shall maintain a record listing all contracts made under §16312 (Sole Source Procurement) or §16313 (Emergency Procurement) of these Regulations for a minimum of five (5) years. The record shall contain:

- (1) each contractor's name;
- (2) the amount and type of each contract; and
- (3) a listing of the supplies, services, or construction procured under each contract.

(b) **Submission to Legislature.** A copy of such record shall be submitted to the Legislature on an annual basis. The record shall be available for public inspection.

§16330. Record of Procurement Actions. The Hospital Administrator shall maintain a complete record of each procurement. The record shall include the following:

- (1) the date, time, subject matter and names of participants at any meeting including government employees that are in any way related to a particular procurement;
- (2) a log of all communications between government employees and any member of the public, potential bidder, vendor or manufacturer which is in any way related to the procurement;
- (3) sound recordings of all pre-bid conferences; negotiations arising from a request for proposals and discussions with vendors concerning small purchase procurement;
- (4) brochures and submittal of potential vendors, manufacturers or contractors, and all drafts, signed and dated by the draftsman, and other papers or materials used in the development of specifications; and
- (5) the requesting department's determination of need.

§16331. Certification of Record. No procurement award shall be made unless the Hospital Administrator certifies in writing under penalty of perjury that he has maintained the record required by §16332 of this Article and that it is complete and available for public inspection. The certificate is itself a part of the record.

§16332. Public Record. The record required by §16332 (Record of Procurement Actions) of this Chapter is a public record and, subject to rules promulgated by the Procurement Appeals Board, any person may inspect and copy any portion of the record.

§16333. Rules for Procurement Records. The rules promulgated pursuant to §16334 (Public Record) of this article shall:

- (1) protect the integrity of the bidding process;
- (2) protect the confidentiality of trade secrets;
- (3) establish reasonable charges for copying papers;
- (4) provide for transcription of sound recordings;
- (5) require public access to the record at the earliest possible time; and
- (6) not require that the record be complete or that the procurement award be made before inspection and copying are permitted.
