

## **PROCUREMENT CODE**

### **ARTICLE 4—CONTRACT FORMATION**

#### **Part A – Authority to Bind County to a Contract**

##### **§4-101 Authorization By Dollar Amount.**

Regardless of the acquisition or disposal method to be used, the level of authorization necessary for the County to enter into a binding contract regarding goods, services, construction, or public property shall be dependent on the dollar amount involved. In determining the level of authorization necessary, the following shall apply:

1. If more than \$20,000.00 is reasonably expected to be expended, Council must authorize the transaction by vote in a public meeting.
2. If between \$100.01 and \$20,000.00 is reasonably expected to be expended, the transaction must be authorized by the Administrator, unless the Regulations and Operating Policies specify a lower administrative level for authorization.
3. If under \$100.00 is reasonably expected to be expended, the transaction must be authorized by the Director.

##### **§4-102 Equal Dignity.**

Every contract modification, change order, or contract price adjustment under a construction contract which exceeds available construction funds or is outside the scope of the original contract shall be subject to prior approval by the relevant authority that authorized the original contract. The Director shall report to said authority regarding the effect of the contract modification, change order, or contract price adjustment on the total project budget or the total contract budget.

##### **§4-103 Authorization of Legal Services.**

Professional legal services shall not be governed by §4-101. Professional legal services for the County shall be governed by the ordinance governing the Office of the County Attorney; however, professional legal services to be rendered by an attorney other than one in or then-affiliated with the Office of the County Attorney, must be approved by the Chair of Council and the Administrator.

#### **Part B – Restrictions as to Type of Contract**

##### **§4-201 Cost-Plus-a-Percentage-of-Cost Contracts.**

A cost-plus-a-percentage-of-cost contract is prohibited.

##### **§4-202 Cost Reimbursement Contracts.**

A “cost reimbursement” contract may be used only when (1) the County determines that such contract is likely to be less costly to the County than any other type of contract or (2) the County determines that it is impracticable to obtain the supplies, services, or construction required, except under a cost reimbursement contract.

##### **§4-203 Multi-Year Contracts.**

1. *Limitations on Multi-Year Contracts.* If a procurement qualifies as a Multi-Year Contract, then the payment and performance obligations of the County or its Departments for any fiscal year other than the first fiscal year shall be subject to the availability and appropriation of funds. In the event that the County or its Departments determine that funds are unavailable or have not been appropriated in sufficient amount to meet that fiscal year's obligation for any fiscal year subsequent to the first fiscal year, the County or its Departments shall notify the contractor that the Multi-Year Contract is being terminated pursuant to this provision, and the County and its Departments shall have no liability under the contract for the remainder of the contract term.
2. *Determination Prior to Use of Multi-Year Contract.* Prior to the utilization of a Multi-Year Contract, the Director shall determine in writing:
  - a. That estimated requirements cover the term of the contract and are reasonably firm and continuing; and
  - b. That such a contract will serve the best interest of the County or its Departments.
3. *Termination Due to Unavailability or Non-Appropriation of Funds.* All Multi-Year Contracts shall contain a clause stating that when funds are not appropriated or otherwise made available to support continuation of performance in a fiscal year of the term other than the initial fiscal year of the term, the County or its Departments shall be entitled to terminate the contract with no additional cost or liability to the County or its Departments.
4. *Maximum Term.* State law restricts the length of the term of a contract entered into by the County or its Departments. This provision is not intended to enlarge that time period.

### **Part C – Contract Terms and Documentation**

#### **§4-301 Contract Terms and Documentation.**

1. The contract between the County and the contractor shall be in writing and its terms shall be comprised of the following: (a) those included in the County's solicitation; (b) those set forth in this Code as mandatory terms, including those listed in §4-401; and (c) those included in the successful bid or proposal that do not contradict the previous two categories of terms.
2. It shall not be a justification to include a term in the contract based on a contractor's assertion that the term is one of the contractor's standard or mandatory contract terms.
3. In the event that the solicitation requests that vendors address a particular point and the point is not addressed in the otherwise successful proposal or bid, the County's award of the contract to the contractor is contingent on the parties negotiating a mutually acceptable provision to address the point.

#### **§4-302 Rejection of Terms.**

1. To put the County on notice that the vendor will not accept a term of the solicitation as a contract term, the vendor shall expressly state that the specific term is rejected. Unless a vendor expressly rejects a term of the solicitation, the proposal or bid will be deemed to include all of the terms in the solicitation.
2. The County, at its option, may reject as non-conforming any proposal or bid that rejects a term of the solicitation.
3. In the event that a term of a vendor's proposal or bid contradicts a term of the solicitation,

but the proposal or bid fails to expressly reject the specific term of the solicitation, the term in the solicitation shall be a term of the contract and the contradictory term in the proposal or bid shall not be a term of the contract.

4. The County shall be entitled to compel specific performance of all of the terms of the solicitation, and to recover the County's actual attorney's fees and court costs from the vendor, if the County seeks specific performance.

#### **§4-303 Negotiation of Additional Terms.**

After the County makes the decision to award the contract to the vendor, the County is willing to consider additional contract terms other than those described in §4-301 only under the following circumstances:

1. The proposed additional terms are not inconsistent with the terms of the solicitation or the Code's mandatory terms; and
2. The vendor agrees in writing to reimburse the County for the attorney's fees the County will incur in attempting to negotiate the additional terms and reduce those terms to writing, regardless of whether such additional terms become part of an executed contract.

Under these circumstances:

- a. The County shall select the attorney to represent it and that attorney shall act in the best interest of the County; and
- b. The vendor shall pay the County's attorney's fees prior to beginning the work contracted.

#### **§4-304 Forbidden Terms.**

Under no circumstances shall the contract include any of the following terms:

1. *Choice of Law.* A term that the contract shall be interpreted in accordance with the law of any state other than the State of South Carolina.
2. *Contractor Rights and Remedies.* A term that a contract dispute the contractor asserts against the County shall be handled in any manner other than in accordance with Article 7 of the Code.
3. *Forum Selection.* A term that provides for disputes between the contractor and the County to be filed in any forum other than the Orangeburg County Court of Common Pleas.
4. *Indemnity.* An indemnity or hold harmless provision pursuant to which the County is expected to indemnify or hold another harmless.
5. *Liquidated Damages.* A term allowing liquidated damages to be obtained from the County.

#### **§4-305 Contract Clauses and Their Administration.**

All contracts for supplies, services, and construction shall include provisions necessary to define the responsibilities and rights of the parties to the contract. The County may include clauses providing for adjustments in prices, time of performance and other appropriate clauses, including, but not limited to:

1. The unilateral right of the County to order, in writing, changes in the work within the scope of the contract;
2. The unilateral right of the County to order changes in the time of performance that do not alter the scope of the contract work;

3. Variations occurring between estimated quantities of work in a contract and actual quantities;
4. Specified excuses for delay or nonperformance;
5. Termination of the contract for default;
6. Termination of the contract in whole or in part for the convenience of the County;
7. Suspension of work on a construction project ordered by the County; and
8. Site conditions differing from those indicated in the contract, or ordinarily encountered, except that differing site conditions clauses need not be included in a contract:
  - a. When the contract is negotiated;
  - b. When the contract provides the site or design; or
  - c. When the parties have otherwise agreed with respect to the risk of differing site conditions.

#### **§4-306 Price Adjustments.**

1. If a contractor seeks any adjustment in contract price, the contractor shall be required to submit cost or pricing data to the Director; however, any adjustment shall remain within the sole discretion of the County.
2. If a price adjustment shall be allowed, adjustment resulting from the use of contract clauses shall be computed in one or more of the following ways:
  - a. By agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;
  - b. By unit prices specified in the contract or subsequently agreed upon;
  - c. By the cost attributable to the events or situations under such clauses with adjustment of profit or fee, all as specified in the contract or subsequently agreed upon;
  - d. In such other manner as the contracting parties may mutually agree; or
  - e. In the absence of agreement by the parties, by unilateral determination by the County of the reasonable costs allocable, either directly or indirectly, to the events or situations under such clauses as accounted for in accordance with generally accepted accounting principles, and with adjustment of profit or fee, as appropriate.
3. If unit prices are stated in the contract or are subsequently agreed upon, and if quantities originally contemplated are so changed in a proposed change order that application of such unit prices to quantities of work proposed will cause substantial inequity to the County or the contractor, the applicable unit prices may be equitably adjusted at the discretion of the County.
4. In determining the cost or credit to the County resulting from a change in the work, such as by change order, the allowances for overhead and profit combined included in the total cost to the County shall not exceed the percentages as follows:
  - a. For a prime contractor, for any work performed by his own forces, fifteen percent (15%) of the cost;
  - b. For a subcontractor working for a prime contractor, for work performed by the subcontractor's own forces, fifteen percent (15%) of the cost; and
  - c. For a prime contractor, for work performed by its subcontractors, seven percent (7%) of the amount due to the subcontractor.

## Part D - Mandatory Contract Provisions

### **§4-401 Mandatory Contract Provisions.**

The following provisions must be included in a written contract between a contractor and the County and, in the event that the contract is not reduced to writing after an award, the vendor, by its participation in the procurement process, shall be deemed to have agreed to the following provisions:

1. *Accounting System Requirements.* At the Director's option, the County may require that a contractor's accounting system:
  - a. Permit timely development of all cost data the County finds appropriate;
  - b. Supply the County with the cost data in the form the County finds appropriate; and
  - c. Be adequate to allocate costs in accordance with generally accepted accounting principles.
2. *Applicable Law.* The contract shall be subject to the laws of the State of South Carolina.
3. *Assignment.* Neither party shall assign any right or interest it has in the contract without advance, written consent to the assignment by the other party to the contract.
4. *Audit.* At reasonable times during the performance of the contract and for three (3) years after completion of the contract work, the County shall be entitled to audit the books and records of a contractor relevant to the performance of the contract. The contractor shall not charge the County for any such audit. Each contractor shall maintain books and records relevant to the performance of any contract for a period of three (3) years from the date of final payment under the contract.
5. *Default.* Failure of either party to abide by the terms of the contract shall be a default.
6. *Forum Selection.* In the event that the contractor has the right to file a lawsuit against the County, the contractor shall file such lawsuit only in the Orangeburg County Court of Common Pleas.
7. *Inspection.* At reasonable times during the performance of the contract, the County shall be entitled to inspect the part of the contractor's plant or place of business which is related to the performance of the contract. The contractor shall not charge the County for any such inspection. If the contractor uses subcontractors, the contractor shall include in its contract with each subcontractor the same inspection rights for the County as to the subcontractor.
8. *Merger.* The written and fully executed contract shall be the entire agreement between the parties regarding the procurement.
9. *Modification.* To be enforceable, any modification must be in writing and signed by both parties.
10. *Non-Appropriation.* In multi-year contracts, a non-appropriation provision pursuant to which the County shall have no liability to complete the contract except as to payment for goods delivered or work performed prior to giving the contractor notice of termination of the contract due to non-appropriation.
11. *Notice.* All notices given in connection with the contract shall be deemed fully given, made, and/or sent when in writing and delivered to the party's agent whose name and contact information shall be set forth in the contract with a copy of same mailed to the party at its last known address. In the event that the party fails to keep the name and

contact information regarding its agent current, notice shall be deemed fully given, made and/or sent when in writing, addressed to the party at its last known address, at the time it is deposited with the United States Postal Service affixed with sufficient first class postage.

12. *Rights and Remedies.* By participating in the County's procurement process, the contractor (a) accepts that the rights and remedies listed in Article 7 of the Orangeburg County Procurement Code are contractor's exclusive rights and remedies concerning disputes arising from the procurement process and the contract and (b) waives all other rights or remedies otherwise provided by law. The contractor acknowledges that Article 7 limits the contractor's remedies to those set forth in the Article.