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GENERAL PROVISIONS

12 N.N.C. §301 Purposes. Rules of Construction.

(a) Interpretation. This Code shall be construed and applied to promote its underlying purposes and policies.

(b) Purposes and Policies. The underlying purposes and policies of this Code are:

(1) to simplify, clarify, and modernize the law governing procurement by the Navajo Nation, to foster effective broad-based competition within the free enterprise system to the extent consistent with the purposes and provisions of the Navajo Nation Business Preference Law;

(2) to permit the continued development of procurement policies and practices;

(3) to provide for consistent procurement practices;

(4) to provide for increased public confidence in the procedures followed in public procurement;

(5) to ensure the fair and equitable treatment of all persons who deal with the

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procurement system of the Navajo Nation;

(6) to provide increased economy in Navajo Nation procurement activities and to maximize to the fullest extent practicable the purchasing value of public funds of the Navajo Nation;

(7) to provide safeguards for the maintenance of a procurement system of quality and integrity.

12 N.N.C. §302 Requirement of Good Faith. This Code requires all Parties involved in the negotiation, Performance, or administration of Navajo Nation contracts to act in good faith.

12 N.N.C. §303 Application of this Code.

(a) General Application. This Code applies only to contracts solicited or entered into after the effective date of this Code unless the parties agree to its application to a contract solicited or entered into prior to the effective date.

(b) Application to Navajo Nation Procurement. This Code shall apply to every expenditure of public funds, irrespective of their source, by the Navajo Nation, acting through a Division, department, office, or program of the Navajo Nation as defined herein, under any contract. Nothing in this Code or in regulations promulgated hereunder shall prevent any Division, department, office, or program of the Navajo Nation or political subdivision of the Navajo Nation from complying with the terms and conditions of any grant, gift, bequest, intergovernmental, joint powers or cooperative agreement. This Act shall not apply to governance-certified Chapters, who are governed by their own procurement policies.

(c) For the purpose of procuring the services of accountants, physicians, dentists, or other licensed professional services, other than attorneys or tribal court advocates, any Division, department, office, program of the Navajo Nation of the Navajo Nation may act as a Purchasing Agency and contract on its own behalf for such services, subject to this Code and regulations promulgated by the Budget and Finance Committee. The Purchasing Agency may consult with the Director, Division of Finance, Purchasing Department or authorized designee when procuring such services.

(d) Contracts for the services of outside attorneys and tribal court advocates shall be awarded only through the Attorney General of the Navajo Nation. This limitation shall not apply to the employment of attorneys or tribal court advocates by Divisions, departments, offices, programs, and political subdivisions of the Navajo Nation, in accord with Navajo Nation law.

12 N.N.C. §304 Severability. If any Provision of this Code is held invalid, such invalidity shall not affect other provisions or application of this Code which can be given effect without the invalid provision or application, and to this end the provisions of this Code are declared to be severable.

12 N.N.C. §305 Construction Against Implicit Repealer. Since this Code is a general act, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction of the subsequent legislation can be reasonably avoided.

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12 N.N.C. §306 Effective Date. This Code shall become effective upon passage by the Navajo Nation Council.

12 N.N.C. §307 Determinations. Written determinations required by this Code shall be retained in the appropriate official contract file of the Director, Division of Finance, Purchasing Department or authorized designee or the Purchasing Agency for the period of three years, unless a different period of time is required by federal or state contract or grant requirements.

12 N.N.C. §308 Definitions. (a) The words used in this Code shall have their ordinary meanings unless:

- (1) the context in which they are used clearly requires a different meaning or
- (2) a different definition is prescribed for a particular Article or provision.

(b) "Architect-Engineer and Land Surveying Services" are those professional services within the scope of the practice of architecture, professional engineering, or land surveying, as defined by the laws the Navajo Nation, or in the absence of Navajo law, the states in which the professional services are to be performed.

(c) "Bid" means an offer to perform a contract for the performance of work and labor and/or the delivery of goods at a specified price.

(d) "Business" means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other private legal entity.

(e) "Change Order" means a written order signed by the Procurement Officer or authorized designee, directing the contractor to make changes as authorized by a contract without the consent of that contractor.

(f) "Construction" means the process of building, altering, repairing, improving, or demolishing any public structure or building, or other public improvement of any kind to any public real property. It does not include the routine operation, routine repair, or routine maintenance of existing structures, buildings, or real property.

(g) "Contract" means all types of Navajo Nation agreements, regardless of what they may be called, for the procurement or disposal of supplies, services, or construction. The term contract does not include agreements, including prime contracts and grants, between the Navajo Nation and federal, state, and local governments for the provision of governmental services to Navajos and other persons within the Navajo Nation.

(h) "Contract Modification" means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual action of the parties to the contract.

(i) "Contractor" means any person having a procurement contract with a Division, department, office, or program of the Navajo Nation.

(j) "Cost-Reimbursement Contract" means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of this Code, and a fee, if any.

(k) "Data" means recorded information, regardless of form or characteristic.

(l) "Designee" means a duly authorized representative of a person.

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(m) “Employee” means an individual drawing a salary from a Division, department, office, or program of the Navajo Nation, whether elected or not, and any uncompensated individual performing personal services for any Division, department, office, or program of the Navajo Nation.

(n) “Established Catalogue Price” means the price included in a catalogue, price list, schedule, or other form that:

(1) is regularly maintained by a manufacturer or contractor;

(2) is either published or otherwise available for inspection by customers; and

(3) states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the supplies or services involved.

(o) “Division, department, office, or program of the Navajo Nation” means any department, commission, council, board, bureau, committee, institution, legislative body, agency, government corporation, or other establishment or official of the Executive, Legislative, or Judicial branch of the Navajo Nation Government. It does not mean any other governance-certified political subdivision of the Navajo Nation, or an enterprise or authority of the Navajo Nation.

(p) “Grant” means the receipt or provision of governmental assistance, whether financial or otherwise, under a program authorized by Navajo Nation, state or federal law. It does not include an award whose primary purpose is to procure an end product, whether in the form of supplies, services, or construction; a contract resulting from such an award is not a grant but a procurement contract.

(q) “Invitation for Bids” means all documents, whether attached or incorporated by reference, utilized for soliciting bids. -

(r) “May” denotes the permissive.

(s) “Person” means any business, individual, union, committee, club, other organization, or group of individuals.

(t) “Political Subdivision” Political subdivisions are governmental units of the Navajo Nation which are created by Navajo Nation law and include the Chapters and Town sites of the Navajo Nation.

(u) “Procurement” means buying, purchasing, renting, leasing, or otherwise acquiring any goods and/or services, unless excluded from coverage by some other provision of Navajo Nation law. It also includes all functions that pertain to the obtaining of any goods and/or services, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

(v) “Procurement Officer or authorized designee” means any person authorized to enter into, make written determinations regarding, and administer contracts. The term also includes an authorized representative acting within the limits of authority.

(w) “Proposal” means an offer to perform a contract for the performance of work and labor and/or the delivery of goods sought where it is either not practicable or not advantageous to the Navajo Nation to procure specified types of supplies, services, or construction by competitive sealed bidding.

(x) “Purchase Description” means the words used in a solicitation to describe the supplies, services, or construction to be purchased, and includes specifications attached to, or

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made a part of the solicitation.

(y) "Purchasing Agency" means any Division, department, office, program, and political subdivisions of the Navajo Nation, other than the Division of Finance, Purchasing Department which is authorized by this Code or its implementing regulations, to enter into contracts.

(z) "Regulation" means. For purposes of this Code, the regulations adopted by the Budget and Finance Committee to regulate the procurement of goods and services by the divisions, departments, programs and offices of the Navajo Nation Government.

(aa) "Request for Proposals" means all documents, whether attached or incorporated by reference, utilized for soliciting proposals.

(bb) "Responsible Bidder or Offeror" means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.

(cc) "Responsive Bidder" means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.

(dd) "Services" means the furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance. This term shall not include employment agreements or collective bargaining agreements.

(ee) "Shall" denotes the imperative.

(ff) "Supplies" means all property, including but not limited to equipment, materials, printing, insurance, and leases of real property, excluding land or a permanent interest in land.

12 N.N.C. §309 Public Access to Procurement Information. Procurement information shall be available to the public to the extent provided by the Navajo Nation Privacy and Access to Information Act.

12 N.N.C. §310 Collection of Data Concerning Public Procurement, The Director, Division of Finance, Purchasing Department shall cooperate with the Division of Finance in the preparation of statistical data concerning the procurement, usage, and disposition of all supplies, services, and construction, and employ such trained personnel as may be necessary to carry out this function. All Divisions, departments, offices, programs, and political subdivisions of the Navajo Nation shall furnish such reports as the Director, Division of Finance, Purchasing Department or authorized designee may require concerning usage, needs, and stocks on hand, and the Director, Division of Finance, Purchasing Department or authorized designee shall have the authority to prescribe forms to be used by the Divisions, departments, offices, programs, and political subdivisions of the Navajo Nation, in requisitioning, ordering, and reporting of supplies, services, and construction.

12 N.N.C. §311 Retention of Procurement Records. All Procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the Government Services Committee. Inspection of all retained documents shall be governed by the Navajo Nation Privacy and Access to Information Act.

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12 N.N.C. §312 Reporting of And-competitive Practices. When for any reason, collusion or other anti-competitive practices are suspected in contracting provided under this Code, a notice of the relevant facts shall be transmitted to the Attorney General.

REGULATIONS REQUIRED BY THIS CODE

12 N.N.C. §320 Navajo Nation Procurement Regulations.

(a) Regulations shall be developed by the Division of Finance, Purchasing Department, in consultation with the Business Regulatory Department, Department of Justice and Office of Legislative Counsel, and adopted by the Budget and Finance Committee of the Navajo Nation Council within one (1) year of the passage of this Act, and shall be reviewed for potential revision at least every two (2) years. Navajo Nation procurement regulations shall be consistent with the provisions of the Navajo Nation Business Preference Law.

(b) The Budget and Finance Committee shall not delegate its power to promulgate procurement regulations.

(c) No regulation shall change any commitment, right, or obligation of the Navajo Nation or of a contractor under a contract in existence on the effective date of such regulation.

SOURCE SELECTION AND CONTRACT FORMATION

12 N.N.C. §330 Methods of Source Selection. Unless otherwise authorized by law, all Navajo Nation contracts shall be awarded by competitive sealed bidding, pursuant to 12 N.N.C. §331 (Competitive Sealed Bidding), except as provided in:

(a) 12 N.N.C. §332 (Competitive Sealed Proposals):

(b) 12 N.N.C. §333 (Small Purchases):

(c) 12 N.N.C. §334 (Emergency Procurement):

(d) 12 N.N.C. §335 (Sole Source Procurement): or

(e) 12 N.N.C. §346 (Architect-Engineer and Land Surveying Services).

12 N.N.C. §331 Competitive Sealed Bidding. Competitive Sealed Bidding shall be the preferred method of source selection, and shall be conducted in a manner consistent with the procedures set forth in the Navajo Nation Business Preference Act, 5 N.N.C. §205.

(a) Invitation for Bids. An Invitation for Bids shall include a purchase description, and all contractual terms and conditions applicable to the procurement. Purchase descriptions, terms and conditions, and specifications for goods and services shall not be unduly restrictive. The Invitation for Bids shall set forth the criteria to be used in evaluation of bids which are submitted. The Invitation for Bids shall refer to the preference of Navajo and Indian-owned businesses under the Navajo Nation Business Preference Law.

(b) Public Notice. Adequate public notice of the Invitation for Bids shall be issued a reasonable time prior to the date set for the opening of bids. Certified entities under the Navajo

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Nation Business Preference Act shall be provided such notice as set forth in the Navajo Nation Business Preference Act. Such notice may include publication in a newspaper of general circulation a reasonable time prior to bid opening.

(c) Bid Opening. Bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the Invitation for Bids. The opening of bids shall be performed in a manner consistent with the Navajo Nation Business Preference Act. The amount of each bid, and such other relevant information as may be specified by regulation, together with the name of each bidder shall be recorded: the record and each bid shall be open to public inspection, to the extent permitted by the Navajo Nation Privacy and Access to Information Act.

(d) Bid Acceptance and Bid Evaluation. Bids shall be unconditionally accepted without alteration or correction, except as authorized by the Navajo Nation Business Preference Act, or other provisions of law. Bids shall be evaluated based on the requirements set forth in the Invitation for Bids, which may include criteria to determine acceptability such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. The criteria affecting the bid price and considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. No criteria may be used in bid evaluation that are not set forth in the Invitation for Bids.

(e) Correction or Withdrawal of Bids; Cancellation of Awards. Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation of awards or contracts based on such bid mistakes, shall be permitted in accordance with regulations promulgated by the Budget and Finance Committee. After bid opening no changes in bid prices or other provisions of bids prejudicial to the interest of the Navajo Nation or fair competition shall be permitted. Except as otherwise provided by regulation, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts based on bid mistakes, shall be supported by a written determination made by the Director, Division of Finance, Purchasing Department or authorized designee or head of a Purchasing Agency.

(f) Award. The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids. In the event all bids in a procurement exceed available funds as certified by the appropriate fiscal officer, and the low responsive and responsible bid does not exceed such funds by more than five percent, the Director, Division of Finance, Purchasing Department or authorized designee, or the head of a Purchasing Agency, is authorized in situations where time or economic considerations preclude re-solicitation of work of a reduced scope to negotiate an adjustment of the bid price, including changes in the bid requirements, with the low responsive and responsible bidder, in order to bring the bid within the amount of available funds.

(g) Multi-Step Sealed Bidding. When it is considered impractical to initially prepare a purchase description to support an award based on price, an Invitation for Bids may be issued requesting the submission of unpriced offers to be followed by an Invitation for Bids limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.

12 N.N.C. §332 Competitive Sealed Proposals. (a) Conditions for Use. When, under regulations promulgated by the Budget and Finance Committee, the Director, Division of Finance,

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Purchasing Department, the head of a Purchasing Agency, or a designee of either officer determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the Navajo Nation, a contract may be entered into by competitive sealed proposals. The Budget and Finance Committee may provide by regulation that it is either not practicable or not advantageous to the Navajo Nation to procure specified types of supplies, services, or construction by competitive sealed bidding. The competitive sealed proposals process shall be conducted in a manner consistent with the procedures set forth in the Navajo Nation Business Preference Act, 5 N.N.C. §205.

(b) Request for Proposals. Proposals shall be solicited through a Request for Proposals. A Request for Proposals shall be issued and shall include a purchase description, and all contractual terms and conditions applicable to the procurement. Purchase descriptions, terms and conditions, and specifications for goods and services shall not be unduly restrictive. The Request for Proposals shall set forth the criteria to be used in evaluation of proposals which are submitted. The Request for Proposals shall refer to the preference of Navajo and Indian-owned businesses under the Navajo Nation Business Preference Law.

(c) Public Notice. Adequate public notice of the Request for Proposals shall be given in the same manner as provided in 12 N.N.C. §331(b) (Competitive Sealed Bidding, Public Notice).

(d) Opening of Proposals. The opening of proposals shall be performed in a manner consistent with the Navajo Nation Business Preference Act. Proposals shall be opened so as to avoid disclosure of contents to competing offerors during the process of negotiation. A Register of Proposals shall be prepared in accordance with regulations promulgated by the Budget and Finance Committee, and shall be open for public inspection after contract award, to the extent provided in the Navajo Nation Privacy and Access to Information Act.

(e) Evaluation Factors. The Request for Proposals shall state the relative importance of price and other evaluation factors. The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive offeror whose proposal meets the requirements and criteria set forth in the Request for Proposals. In the event all proposals in a Procurement exceed available funds as certified by the appropriate fiscal officer, and the low responsive and responsible proposal does not exceed such funds by more than five percent, the Director, Division of Finance, Purchasing Department or authorized designee, or the head of a Purchasing Agency, is authorized in situations where time or economic considerations preclude re-solicitation of work of a reduced scope to negotiate an adjustment of the proposal price, including changes in the proposal requirements, with the low responsive and responsible offeror, in order to bring the proposal within the amount of available funds.

(f) Discussion with Responsible Offerors and Revisions to Proposals. As provided in the Request for Proposals, and under regulations promulgated by the Budget and Finance Committee, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

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(g) Award. Award shall be made to the responsible offerer whose proposal is determined in writing to be the most advantageous to the Navajo Nation taking into consideration price and the evaluation factors set forth in the Request for Proposals. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made, and shall be made public to the extent provided in the Navajo Nation Privacy and Access to Information Act.

12 N.N.C. §333 Small Purchases. (a) Applicability. Any procurement not exceeding fifty thousand dollars (\$50,000.00) may be made using small purchase regulations adopted by the Budget and Finance Committee, provided, however, that Procurement requirements shall not be artificially divided so as to constitute a small purchase under this section. Certified entities under the Navajo Nation Business Preference Law shall receive preference in small purchases.

(b) Review and Signature Requirements. Small purchases shall require only the following signatures and reviews: program director, division director or other Procurement Officer and appropriate representative of the Attorney General's Office (or Office of Legislative Counsel, for small purchases within the Legislative Branch). No oversight committee approval shall be required for these contracts.

12 N.N.C. §334 Emergency Procurement. Notwithstanding any other provision of law, the Director, Division of Finance, Purchasing Department, the head of a Purchasing Agency, or a designee of either 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 Budget and Finance Committee; provided that such emergency procurement shall be made with such competition as is practicable under the circumstances. A written determination of emergency shall be made by the Executive Director of the affected division, in concert with the Director, Division of Finance, Purchasing Department or authorized designee, and a representative of the Attorney General's Office (or the Office of Legislative Counsel for emergency procurements by the Legislative Branch). To the extent possible, certified entities under the Navajo Nation Business Preference Law shall receive preference in emergency procurement. The written determination and the selection of the particular contractor shall be included in the contract file. No oversight committee approval shall be required for these contracts.

12 N.N.C. §335 Sole Source Procurement. A contract may be awarded for goods and/or services without competition when, under regulations promulgated by the Budget and Finance Committee, the Executive Director of the affected division or other Procurement Officer, in concert with the Director, Division of Finance, Purchasing Department or authorized designee, and a representative of the Attorney General's Office, or the Office of Legislative Counsel for procurements by the Legislative Branch, determines in writing that there is only one source for the required goods and/or services. Certified entities under the Navajo Nation Business Preference Law shall receive preference in sole source procurement. The written determination and the selection of the particular contractor shall be included in the contract file. No oversight

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committee approval shall be required for these contracts.

12 N.N.C. §336 Record of Small Purchases. Sole Source Procurement and Emergency Procurement

(a) Contents of Record. The Director, Division of Finance, Purchasing Department shall maintain a record listing all contracts made under 12 N.N.C. §333 (Small Purchases), 12 N.N.C. §334 (Emergency Procurement) and 12 N.N.C. §335 (Sole Source Procurement) for a minimum of five 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 Navajo Nation Council. A copy of such record shall be submitted to the Navajo Nation Council on an annual basis. The record shall be available for public inspection to the extent provided by the Navajo Nation Privacy and Access to Information Act.

12 N.N.C. §337 Cancellation of Invitations for Bids or Requests for Proposals. An Invitation for Bids, a Request for Proposals, or other solicitation may be cancelled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, or when it is in the best interests of the Navajo Nation in accordance with regulations promulgated by the Budget and Finance Committee. The reasons therefore shall be made part of the contract file.

12 N.N.C. §338 Responsibility of Bidders and Offerors. (a) Determination of Nonresponsibility. A written determination of nonresponsibility of a bidder or offeror shall be made in accordance with regulations promulgated by the Budget and Finance Committee. 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 nonresponsibility with respect to such bidder or offeror.

(b) Right of Nondisclosure, Information furnished by a bidder or offeror pursuant to this section shall only be disclosed in accord with the provisions of the Navajo Nation Privacy and Access to Information Act.

12 N.N.C. §339 Prequalification of Suppliers. Prospective suppliers may be prequalified for particular types of supplies, services, and construction in accordance with regulations promulgated by the Budget and Finance Committee. Solicitation mailing lists of potential contractors shall include but shall not be limited to such prequalified suppliers.

PROCUREMENT OF CONSTRUCTION AND RELATED SERVICES

12 N.N.C. §340 Responsibility for Selection of Methods of Construction Contracting Management. The Budget and Finance Committee, in consultation and coordination with the Transportation and Community Development Committee, shall promulgate regulations providing for as many alternative methods of construction management as it may determine to be feasible. These regulations shall:

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- (a) set forth criteria to be used in determining which method of construction contracting management is to be used for a particular project;
- (b) grant to the Director, Division of Finance, Purchasing Department or authorized Designee, or the head of the Purchasing Agency responsible for carrying out the Construction Project, the discretion to select the appropriate method of construction contracting management for a particular project, and;
- (c) require the Procurement Officer or authorized designee to execute and include in the contract file a written statement setting forth the facts which led to the selection of a particular method of construction contracting management for each project.

12 N.N.C. §341 Bid Security. (a) Requirement for Bid Security. Bid security shall be required for all competitive sealed bidding for construction contracts when the price is estimated by the Procurement Officer or authorized designee to exceed the amount established by regulation of the Budget and Finance Committee. Bid security shall be a bond provided by a surety company authorized to do business within the Navajo Nation, or the equivalent in cash, or otherwise supplied in a form satisfactory to the Navajo Nation. Nothing herein prevents the requirement of such bonds on construction contracts under the amount set by the Budget and Finance Committee when the circumstances warrant.

(b) Amount of Bid Security. Bid security shall be in an amount equal to at least 10% of the amount of the bid.

(c) Rejection of Bids for Noncompliance with Bid Security Requirements. When the Invitation for Bids requires security, noncompliance requires that the bid be rejected unless, pursuant to Budget and Finance Committee regulations, it is determined that the bid fails to comply in a in-substantial manner with the security requirements.

(d) Withdrawal of Bids. After the bids are opened, they shall be irrevocable for the period specified in the Invitation for Bids, except as provided in 12 N.N.C. §331 (Competitive Sealed Bidding, Correction or Withdrawal of Bids; Cancellation of Awards). If a bidder is permitted to withdraw its bid before award, no action shall be had against the bidder or the bid security.

12 N.N.C. §342 Contract Performance and Payment Bonds.

(a) When Required-Amounts. When a construction contract is awarded in excess of \$50,000, the following bonds or security shall be delivered to the Navajo Nation and shall become binding on the parties upon the execution of the contract;

(1) a performance bond satisfactory to the Navajo Nation, executed by a surety company or otherwise secured in a manner satisfactory to the Navajo Nation, in an amount equal to 100% of the price specified in the contract; and

(2) a payment bond satisfactory to the Navajo Nation, executed by a surety company or otherwise secured in a manner satisfactory to the Navajo Nation, for the Protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the work provided for in the contract. The bond shall be in an amount equal to 100% of the price specified in the contract.

(b) Reduction of Bond Amounts. The Budget and Finance Committee may promulgate regulations that authorize the Director, Division of Finance, Purchasing

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Department or authorized designee or head of a Purchasing Agency to reduce the amount of performance and payment bonds to 50% of the contract price for each bond.

(c) Authority to Require Additional Bonds. Nothing in this section shall be construed to limit the authority of the Navajo Nation to require a performance bond or other security in addition to those bonds, or in circumstances other than specified in subsection (a) of this section.

12 N.N.C. §343 Bond Forms and Copies. (a) Bond Forms. The Budget and Finance Committee shall promulgate by regulation the form of the bonds required by this Act.

(b) Certified Copies of Bonds. Any person may request and obtain from the Navajo Nation a certified copy of a bond upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond shall be prima facie evidence of the contents, execution, and delivery of the original.

12 N.N.C. §344 Contract Clauses and Their Administration. (a) Contract Clauses. The Budget and Finance Committee shall promulgate regulations requiring the inclusion in Navajo Nation construction contracts of clauses providing for adjustments in prices, time of performance, or other contract provisions, as appropriate and covering the following subjects:

(1) the unilateral right of the Navajo Nation to order in writing;

(A) changes in the work within the scope of the contract; and

(B) changes in the time of performance of the contract that do not alter the scope of the contract work;

(2) variations occurring between estimated quantities of work in a contract and actual quantities;

(3) suspension of work ordered by the Navajo Nation; and

(4) site conditions differing from those indicated in the contract, or ordinarily encountered, except that differing site conditions clauses may be included in a contract:

(A) when the site conditions within the contract are specifically negotiated;

(B) when the contractor provides the site or design; or

(C) when the parties have otherwise agreed with respect to the risk of differing site conditions.

- . (b) price adjustments.

(1) Adjustments in price pursuant to clauses promulgated under subsection (a) of this section 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 costs 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 a unilateral determination by the Navajo Nation of the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as computed by the Navajo Nation in

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accordance with applicable sections of the regulations promulgated by the Budget and Finance Committee.

(2) A contractor shall be required to submit cost or pricing data if any adjustment in contract price is proposed.

(c) Additional Contract Clauses. The Budget and Finance Committee shall promulgate regulations requiring the inclusion in Navajo Nation construction contracts of clauses providing for appropriate remedies and covering the following subjects:

(1) liquidated damages as appropriate;

(2) specified excuses for delay or nonperformance;

(3) termination of the contract for default; and

(4) termination of the contract in whole or in part for the convenience of the Navajo Nation.

(d) Modification of Required Clauses. The Director, Division of Finance, Purchasing Department or the head of a Purchasing Agency may vary the clauses promulgated by the Budget and Finance Committee under subsection (a) and subsection (c) of this section for inclusion in any particular Navajo Nation construction contract, provided that any variations are supported by a written determination that states the circumstances justifying such variations, and provided that notice of any such material variation be stated in the Invitation for Bids or Request for Proposals.

12 N.N.C. §345 Fiscal Responsibility. Every contract modification, change order, or contract price adjustment under a construction contract with the Navajo Nation in excess of 10% of the original contract amount shall be subject to prior written certification by the fiscal officer of the entity responsible for funding the project or the contract, or other official responsible for monitoring and reporting upon the status of the costs of the total project budget or contract budget, as to the effect of the contract modification, change order, or adjustment in contract price on the total project budget or the total contract budget. In the event that the certification of the fiscal officer or other responsible official discloses a resulting increase in the total project budget and/or the total contract budget, the Procurement Officer or authorized designee shall not execute or make such contract modification, change order, or adjustment in contract once unless sufficient funds are available therefore, or the scope of the project or contract is adjusted so as to permit the degree of completion that is feasible within the total project budget and/or total contract budget as it existed prior to the contract modification, change order, or adjustment in contract price under consideration; provided, however, that with respect to the validity, as to the contractor, of any executed contract modification, change order, or adjustment in contract price which the contractor has reasonably relied upon, it shall be presumed that there has been compliance with the provisions of this section.

12 N.N.C. §346 Architect-Engineer and Land Surveying Services. (a) Applicability. Architect-engineer and land surveying services shall be procured as provided in this section except as authorized by 12 N.N.C. §334 (Small Purchases), 12 N.N.C. 6335 (Emergency Procurement), and 12 N.N.C. §336 (Sole Source Procurement).

(b) Policy. It is the policy of the Navajo Nation to publicly announce all requirements for architect-engineer and land surveying services and to negotiate contracts for architect engineer

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and land surveying services on the basis of demonstrated competence and qualification for the type of services required, and at fair and reasonable prices.

(c) Architect-Engineer Selection Committee. In the procurement of architect-engineer and land surveying services, the Director, Division of Finance, Purchasing Department or the head of a Purchasing Agency shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. The Director, Division of Finance, Purchasing Department and a representative of Navajo Design and Engineering Services shall comprise the Architect-Engineers Selection Committee for each architect engineer and land surveying services contract over \$250,000. The Selection Committee for architect-engineer and land surveying services contracts under this amount shall be established in accordance with regulations promulgated by the Budget and Finance Committee. The Selection Committee shall evaluate current statements of qualifications and performance data on file with the Navajo Nation, together with those that may be submitted by other firms regarding the proposed contract. The Selection Committee shall conduct discussions with no less than three firms (if at least three firms respond to the solicitation) regarding the contract and the relative utility of alternative methods of approach for furnishing the required services, and then shall select therefrom, in order of preference, based upon criteria established and published by the Selection Committee, no less than three of the firms (if at least three firms respond to the solicitation) deemed to be the most highly qualified to provide the services required.

(d) Negotiation. The Procurement Officer shall negotiate a contract with the highest qualified firm for architect-engineer or land surveying services at compensation which the Procurement Officer or authorized designee determines in writing to be fair and reasonable to the Navajo Nation. In making this decision, the Procurement Officer or authorized designee shall take into account the estimated value, the scope, the complexity, and the professional nature of the services to be rendered. Should the Procurement Officer or authorized designee be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price the Procurement Officer or authorized designee determines to be fair and reasonable to the Navajo Nation, negotiations with that firm shall be formally terminated, The Procurement Officer shall then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the Procurement Officer or authorized designee shall formally terminate negotiations. The Procurement Officer or authorized designee shall then undertake negotiations with the third most qualified firm. Should the Procurement Officer or authorized designee be unable to negotiate a contract at a fair and reasonable price with any of the selected firms, the Procurement Officer or authorized designee shall select additional firms in order of their competence and qualifications, and the Procurement Officer or authorized designee shall continue negotiations in accordance with this section until an agreement is reached.

CONTRACT ADMINISTRATION

12 N.N.C. §350 Contract Clauses and Their Administration. (a) Contract Clauses. The Budget and Finance Committee may promulgate regulations permitting or requiring the inclusion of clauses providing for adjustments in prices, time of performance, or other contract Provisions as appropriate covering the following subjects:

(1) the unilateral right of the Navajo Nation to order in writing;

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- (A) changes in the work within the scope of the contract; and
(B) temporary stopping of the work or delaying performance; and
(2) variations occurring between estimated quantities of work in a contract and actual quantities.
- (b) Price Adjustments.
- (1) Adjustments in price pursuant to clauses promulgated under subsection (a) of this section 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 costs 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 a unilateral determination by the Navajo Nation of the costs attributable to the events or situations under such clauses with adjustment of profit or fee, all as computed by the Navajo Nation in accordance with applicable sections of the regulations promulgated by the Budget and Finance Committee.
- (2) A contractor shall be required to submit cost or pricing data if any adjustment in contract price is proposed.
- (c) Additional Contract Clauses. The Budget and Finance Committee may promulgate regulations including, but not limited to, regulations permitting or requiring the inclusion in Navajo Nation contracts of clauses providing for appropriate remedies and covering the following subjects:
- (1) liquidated damages as appropriate;
(2) specified excuses for delay or nonperformance;
(3) termination of contract for default; and
(4) termination of the contract in whole or in part for the convenience of the Navajo Nation.
- (5) Modification of Clauses. The Director, Division of Finance, Purchasing Department or authorized designee or the head of a Purchasing Agency may vary the clauses promulgated by the Budget and Finance Committee under subsection (a) and subsection (c) of this section for inclusion in any particular Navajo Nation contract; provided that any variations are supported by a written determination that states the circumstances justifying such variation and provided that notice of any such material variation be stated in the Invitation for Bids or Request for Proposals.
- (d) Cancellation Due to Unavailability of Funds in Succeeding Fiscal Periods. When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be cancelled and the contractor shall be reimbursed for the reasonable value of any non-recurring costs incurred but not amortized in the price of the supplies or services delivered under the contract. The cost of cancellation may be paid from any appropriations available for such purposes.

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12 N.N.C. §351 Right to Inspect Plant. The Navajo Nation 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 Navajo Nation.

12 N.N.C. §352 Right to Audit Records. (a) Audit of Cost or Pricing Data. The Navajo Nation may, at reasonable times and places, audit the books and records of any person who has submitted cost or pricing data 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 years from the date of final payment under the contract, unless a shorter period is otherwise authorized in writing.

(b) Contract Audit. The Navajo Nation 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 five years from the date of final payment under the prime contract and by the subcontractor for a period of five years from the date of final payment under the subcontract, unless a shorter period is otherwise authorized in writing.

12 N.N.C. §353 Types of Contracts. Subject to the limitations of this section, any type of contract which will promote the best interests of the Navajo Nation may be used; provided that the use of a cost-plus-a-percentage-of cost contract is prohibited.

12 N.N.C. §354 Multi-Term Contracts. Unless otherwise provided by law, a contract may be entered into for any period of time deemed to be in the best interests of the Navajo Nation provided the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds for completion of the contract.

12 N.N.C. §355 Cost Principles Regulations Required. The Budget and Finance Committee shall promulgate regulations setting forth cost principles which shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under contract provisions which provide for the reimbursement of costs, provided that, such cost principles may be modified by contract.

LEGAL AND CONTRACTUAL REMEDIES

12 N.N.C. §360 Authority to Resolve Protested Solicitations and Awards, (a) Right to Protest. Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may Protest to the Director, Division of Finance, Purchasing Department or the head of a Purchasing Agency. The protest shall be submitted in writing within 14 days after such aggrieved person knows or should have known of the facts giving rise thereto.

(b) Authority to Resolve Protests. The Director, Division of Finance, Purchasing

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Department, the head of a Purchasing Agency, or a designee of either officer, with the approval of the Attorney General's Office, shall have the authority to settle and resolve a protest of an aggrieved bidder, offeror, or contractor, actual or prospective, concerning the solicitation or award of a contract.

(c) Decision. If the protest is not resolved by mutual agreement, the Director, Division of Finance, Purchasing Department, the head of a Purchasing Agency, or a designee of either officer shall promptly issue a decision in writing. The decision shall:

(1) state the reasons for the action taken; and

(2) inform the protestant of its right to administrative review as herein provided,

(d) Notice of Decision. A copy of the decision under subsection (c) of this section shall be mailed or otherwise furnished immediately to the protestant and any other party intervening.

(e) Finality of Decision. A decision under subsection (3) of this section shall be final and conclusive, unless fraudulent or the person adversely affected by the decision appeals administratively in accordance with 12 N.N.C. §§362 and 363.

(f) Stay of Procurement During Protests. In the event of a timely protest under subsection (a) of this section, or under 12 N.N.C. §§362 and 363, the Navajo Nation shall not proceed further with the solicitation or with the award of the contract until the Director, Division of Finance, Purchasing Department, after consultation with the Attorney General's Office (or Office of Legislative Counsel, in the case of a Legislative Branch procurement) and the head of the Using Agency or the head of a Purchasing Agency, makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the Navajo Nation.

12 N.N.C. §361 Authority to Debar or Suspend. (a) Authority. After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the Director, Division of Finance, Purchasing Department or the head of a Purchasing Agency, after consultation with the Using Agency and the Attorney General (or Office of Legislative Counsel, in the case of a Legislative Branch procurement) shall have authority to debar a person for cause from consideration for award of contracts. The debarment shall not be for a period of more than three years. The same officer, after consultation with the Using Agency and the Attorney General (or Office of Legislative Counsel, in the case of a Legislative Branch Procurement) shall have authority to suspend a person from consideration for award of contracts if there is probable cause for debarment. The suspension shall not be for a period exceeding three months. The authority to debar or suspend shall be exercised in accordance with regulations promulgated by the Budget and Finance Committee.

(b) Causes for Debarment or Suspension. The causes for debarment or suspension include the following:

(1) conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;

(2) conviction for embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a Navajo Nation contractor;

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(3) conviction under antitrust statutes arising out of the submission of bids or proposals;
(4) violation of contract provisions, as set forth below, of a character which is regarded by the Director, Division of Finance, Purchasing Department or the head of a Purchasing Agency, with concurrence of the Attorney General (or Office of Legislative Counsel, in the case of a Legislative Branch procurement) to be so serious as to justify debarment action:

(A) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or
(B) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts: provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment; and

(5) any other cause which the Director, Division of Finance, Purchasing Department or the head of a Purchasing Agency, with the approval of the Attorney General, or Office of Legislative Counsel, in the case of a Legislative Branch procurement, determines to be so serious and compelling as to affect responsibility as a Navajo Nation contractor, including debarment by another governmental entity for any cause listed in regulations of the Budget and Finance Committee.

(c) Decision. The Director, Division of Finance, Purchasing Department or authorized designee or the head of a Purchasing Agency shall issue a written decision to debar or suspend. The decision shall:

(1) state the reasons for the action taken; and

(2) inform the debarred or suspended person involved of his or her rights to administrative review as provided in this Article.

(d) Notice of Decision. A copy of the decision under subsection (c) of this section shall be mailed or otherwise furnished immediately to the debarred or suspended person and any other party intervening.

(e) Finality of Decision. A decision under subsection (3) of this section shall be final and conclusive, unless fraudulent or the person adversely affected by the decision appeals administratively in accordance with 12 N.N.C. §§362 and 363.

12 N.N.C. §362 Administrative Review. The Office of Hearings and Appeals shall have the jurisdiction to hear and decide appeals of decisions under this Code.

12 N.N.C. §363 Scope of Administrative Review. (a) The Office of Hearings and Appeals shall have jurisdiction to review and determine de novo:

(1) any protest of a solicitation or award of a contract by an aggrieved actual or prospective bidder or offeror, or a contractor; and

(2) any appeal by an aggrieved party from a determination by the Director, Division of Finance, Purchasing Department, the head of a Purchasing Agency, or a designee of either officer authorized by this Code.

(b) Time Limitation on Filing an Appeal. The aggrieved person shall file his or her appeal within 20 days of the receipt of a decision.

(3) Decision. The decision of the Office of Hearings and Appeals shall make a

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determination based on the preponderance of the evidence on the issue of whether the actions of the Division of Finance, Purchasing Department or other Purchasing Agency were consistent with the provisions of this Act and the procurement regulations promulgated by the Budget and Finance Committee. The solicitation or award of a contract shall be upheld unless it is shown by a preponderance of the evidence that the actions of the Division of Finance, Purchasing Department or other Purchasing Agency violated a specific provision of this Act or the procurement regulations promulgated by the Budget and Finance Committee.

12 N.N.C. §364 Presumed Finality of Decisions. Determinations by the Office of Hearings and Appeals shall be final and conclusive.

COMPLIANCE WITH FEDERAL REQUIREMENTS

12 N.N.C. §370 Compliance with Federal Requirements. Where a procurement involves the expenditure of federal assistance or contract funds, the Division of Finance, Purchasing Department shall comply with such federal law and authorized regulations which are mandatorily applicable and which are not presently reflected in this Code.

AMENDMENT

12 N.N.C. §371 Amendment

This Act may be amended by the Navajo Nation Council at any time.

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AMENDMENTS TO 2 N.N.C. §§185(B), 222, 223 and 1013

2 N.N.C. §185(B)

B. The Committees, boards and commission shall have the following authority regarding contracts and grants within the area of their oversight:

1. ~~Contracts of grants, Intergovernmental Agreements, including prime contracts and grants from federal, state, county or local governments,~~ Intergovernmental Agreements, including prime contracts and grants from federal, state, county or local governments, which provide funds to the Navajo Nation for the provision of assistance to Navajos or persons residing within the Navajo Nation are subject to final authorization, review, approval and acceptance by the Intergovernmental Relations Committee.

2. Contracts or subcontracts which expend funds held by the Navajo Nation shall be entered into pursuant to the Navajo Nation Procurement Code to the extent that they are for purchase of goods or services by the Navajo Nation, Small purchases, emergency procurements, and sole source Procurements do not require standing committee approval. Procurement contracts which exceed the small purchase limitation shall be approved by the Committee, board or commission, but only to the extent or in such amounts as are available and provided in the approved budget of the Navajo Nation.

2 N.N.C. §222

All contracts or agreements entered into pursuant to the Navajo Nation Procurement Code, to the extent applicable, or approved by the Navajo Nation Council, or its Committees acting under authority to approve contracts or agreements shall be executed in the following manner:

A. The President or the Vice-President of the Navajo Nation or their designee shall execute contracts or agreements pertaining to the Executive Branch;

B. The Chief Justice of the Navajo Nation of the Navajo Nation or their designee shall execute contracts or agreements pertaining to the Judicial Branch; and

C. The Speaker of the Navajo Nation Council of the Navajo Nation or their designee shall execute contracts or agreements pertaining to the Legislative Branch.

D. The Chapter President of the Navajo Nation shall execute contracts or agreements pertaining to the Chapter

2 N.N.C. §223

Except as otherwise provided, any contract authorized to be executed on behalf of the Navajo Nation shall meet the following conditions:

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A. All contracts involving the expenditure of funds shall expressly state that the liability of the Navajo Nation under such contract is contingent upon the availability of appropriations by the Navajo Nation Council to carry out the same.

B. All contracts must be entered into pursuant to the Navajo Nation Procurement Code or be otherwise approved by the Navajo Nation Council or appropriate Committee, before being executed on behalf of the Navajo Nation.

C. All contracts shall have sufficient funds appropriated and available.

D. Contracts shall not waive the sovereign immunity of the Navajo Nation or its entities unless approved by two-thirds (2/3) vote of the full membership of the Navajo Nation Council. This provision shall not apply to authority to waive immunity properly delegated.

E. All contracts, including those entered into pursuant to the Navajo Nation Procurement Code, shall comply with the Business Procurement Act, 12 N.N.C. §1501 et seq., the Employment Preference Act, 15 N.N.C. §601 et seq., Business Preference Act, 5 N.N.C. §201 et seq., and rules and regulations promulgated thereto.

F. All contracts shall be awarded only after public advertisement and bidding unless otherwise authorized as small purchases, emergency purchases or sole source purchases under the Navajo Nation Procurement Code, or are Intergovernmental Agreements approved by the Navajo Nation Council or its standing committees.

G. All change orders, modifications or amendments of contracts utilizing Navajo Nation funds shall not exceed ~~10%~~ 20% of the accepted bid. if the ~~10%~~ 20% cap is exceeded by any change orders, modifications or amendments, such change orders, modification or amendment shall be subject to the provisions of §223(F) above.

~~2 N.N.C. §1013~~

~~All contracts let by the Navajo Nation shall comply with the following requirements:~~

~~A. There shall be public advertisement or notice requesting bids or proposals and stating the qualifications or specifications.~~

~~B. Bids or proposals shall be accepted only from competent, experienced, bondable and certified contractors under terms and conditions which will:~~

- ~~1. Complete the contract within the applicable time requirements and allotted funds;~~
- ~~2. Comply with the Navajo Nation Employment Preference Act.~~
- ~~3. Comply with the Navajo Nation Business Preference Law.~~
- ~~4. Comply with all laws and regulations of the Navajo Nation.~~

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~~C. Contracts shall be awarded to the lowest qualified bidder.~~

~~D. Exceptions to these requirements shall be allowed if authorized by rules and regulations duly approved by the Navajo Nation Council or appropriate Standing Committees.~~

~~E. Contracts not complying with the requirements herein shall be deemed void and not be binding on the Navajo Nation.~~

~~F. A performance bond or retainage shall be required on all construction contracts.~~

~~G. The office letting the contract shall be responsible for the maintenance of all records and the accounting control of the contract. Such records shall be open to the Controller and the Auditor General at all times.~~