

## **CHAPTER 11**

### **CONSTRUCTION MANAGEMENT AT RISK**

#### **11.1 RELATED STATUARY AUTHORITY**

- 11.1.1** SC Code §§ 8-13-700 through 8-13-795 of the Ethics, Government Accountability and Campaign Reform Act of 1991 establishes the Rules of Ethical Conduct for public employees.
- 11.1.2** SC Code § 11-35-1520(3) requires notices be published in South Carolina Business Opportunities.
- 11.1.3** SC Code § 11-35-1530 outlines the use of Competitive Sealed Proposals.
- 11.1.4** SC Code § 11-35-1710 allows for solicitations to be cancelled when it is in the best interest of the State.
- 11.1.5** SC Code § 11-35-1830 addresses cost or pricing data for contracts and change orders awarded by RFP.
- 11.1.6** SC Code § 11-35-2910(2) defines the Construction Manager Agent as a business to provide construction management services, but not construction.
- 11.1.7** SC Code § 11-35-2910(3) & (5) defines the Construction Manager at-risk as a business and the Construction Management at risk as a project delivery method.
- 11.1.8** SC Code § 11-35-3005(3) allows firms that have participated in a report or study used in the preparation of design requirements to qualify as a member of a proposing team unless the participation provides the firm a substantial competitive advantage.
- 11.1.9** SC Code § 11-35-3010 requires the agency to make a written determination of the project delivery method that is most advantageous to the State and submit it for approval by the State Engineer.
- 11.1.10** SC Code § 11-35-3015(3) requires contracts for construction management at risk to be procured as provided in either § 11-35-1520 (Competitive Sealed Bidding) or § 11-35-1530 (Competitive Sealed Proposals).
- 11.1.11** SC Code § 11-35-3023 allows the prequalification of offerors with the approval and supervision of OSE.
- 11.1.12** SC Code § 11-35-3024(4) and SC Regulation 19-445.2095(G) requires the State Engineer's Office to oversee the evaluation process for the procurement of construction if factors other than price are considered in the evaluation of a proposal.
- 11.1.13** SC Code § 11-35-3030(4) limits the amount of retention that can be withheld from progress payments to three and one-half percent.
- 11.1.14** SC Code § 11-35-3210 defines construction management agent as a construction related professional service subject to the qualification based selection.
- 11.1.15** SC Code § 11-35-4210 defines the right of protest to a prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with a solicitation.
- 11.1.16** SC Code § 40-11-320 provides the licensure requirements for a Construction Manager.
- 11.1.17** SC Regulation 19-445.2010(C) & (D) provides that prior to award or notice of intent, state personnel shall not furnish source selection information to anyone other than the procurement officer.
- 11.1.18** SC Regulation 19-445.2095(G) through (J) provides the procedures for competitive sealed proposals and the delay in posting award.
- 11.1.19** SC Regulation 19-445.2097(B) allows for the cancellation of a solicitation prior to award.
- 11.1.20** SC Regulation 19-445.2145(N) defines the Construction Management at Risk process.
- 11.1.21** SC Regulation 19-445.2097 provides reasons and exceptions for the rejection of proposals

#### **11.2 DEFINITIONS**

- 11.2.1** "Construction Management at-Risk" (CM-R) is a project delivery method in which the Agency awards separate contracts, one for architectural and engineering services to design the project and the second to a CM-R for both construction management services and construction of the project facility according to the design. The CM-R is normally hired at or shortly after the time the architect/engineer (A/E) is hired and begins providing construction management services at that time. A decision and request to hire a CM-R after completion of a significant percentage of the design eliminates major potential benefits of CM-R and will be evaluated by OSE accordingly for the best interest of the State but not to unduly limit competition.
- 11.2.2** "Construction Manager Agent" (CM/A) contracts, unlike CM-R, provide only construction management services and do not assume any of the responsibility or risk for construction of the project. The Procurement Code treats CM/A as a construction related professional service subject to the qualification based selection requirements of the Procurement Code. Therefore, an Agency desiring to procure the services of a CM/A must use the procedures outlined in Chapter 4 of this manual.

- 11.2.3** “Construction management services” (CM) are the provision of the management activities required to plan, schedule, coordinate, and manage the construction plan of a project in a manner that contributes to the control of time, cost and quality of construction. CM services typically include oversight of the following:
- A. Project Schedules,
  - B. Project Cost Control,
  - C. Constructability of the Project,
  - D. Project Management,
  - E. Building Technology (e.g., building materials, equipment and systems),
  - F. Bidding and Negotiation of Construction Contracts, and
  - G. Construction.

### **11.3 SPECIAL CONSIDERATIONS FOR CM-R**

- 11.3.1** Firms seeking CM-R work must be registered both as a construction manager and as a general contractor with the SC Contractor’s Licensing Board. The CM-R’s General Contractor’s license must have a license group designation that will allow the CM-R to provide Performance Bonds and Labor and Material Payment Bonds for the full construction value of the project.
- 11.3.2** The fees awarded to both the A/E and the CM-R (for the pre-construction services portion of the CM-R’s services) must represent fair and equitable compensation for the actual services required of each. The form and amount of compensation for the construction portion of the CM-R’s services must reflect the degree to which the Agency and the CM-R share the risks and rewards of project cost overruns and under-runs.
- 11.3.3** The Basic Services to be performed by the A/E in a CM-R delivery method varies from those performed in a Design-Bid-Build. Therefore, the contract used for the A/E services is the AIA B133, SCOSE Edition. The agency and A/E should become familiar with the services required by the B133 and negotiate accordingly.
- 11.3.4** Construction phase services are subject to the limitations on retainage in the Procurement Code.

### **11.4 SOURCE SELECTION METHOD**

- 11.4.1** The Procurement Code provides that the CM-R may be selected using either competitive sealed bidding or competitive sealed proposals; however:
- A. the use of competitive sealed bidding would require substantially complete design documents and a significantly late selection of the CM-R. Such an approach would so negate many of the primary benefits normally supporting a determination to use the CM-R project delivery method that it is hard, if not impossible, to imagine a determination that meets statutory and regulatory requirements calling for such an approach.
  - B. the industry standard is for an early selection of the CM-R using competitive sealed proposals.
  - C. this document assumes an early selection of the CM-R and only considers using the competitive sealed proposal source selection method.
- 11.4.2** The competitive sealed proposal source selection method is referred to throughout this document as the Request for Proposal (RFP) process and as discussed herein will consist of a two-phase selection process which includes both the Request for Qualifications (RFQ) and RFP procedures.
- 11.4.3** In accordance with the requirements of Chapter 3 of this Manual, the Agency shall provide the State Engineer with a written determination that the use of CM-R will be the most advantageous to the State for the specific project. Upon approval by the State Engineer, the Agency will choose personnel to serve as the Selection Committee to conduct the RFQ/RFP process.
- 11.4.4** The RFQ/RFP process for selecting the most qualified CM-R involves a significant amount of time by the Selection Committee. As part of their determination, an Agency should consider the time required and the level of staffing needed to make the selection process successful.

### **11.5 SELECTION COMMITTEE STRUCTURE AND STAFFING FOR THE RFQ/RFP PROCESS**

#### **11.5.1 Selection Committee Structure**

- A. The Selection Committee (Committee) consists of personnel, voting and non-voting, organized to evaluate qualifications and proposals. They will make a selection based on their evaluations and assist the Agency Project Manager in reporting their decision to the final approving authority (Agency Head or a designee) at a management level above the Agency Project Manager.

- B. The Committee is chaired by a non-voting Chairman appointed by the State Engineer and typically will be the OSE Project Manager assigned to the project.
- C. Voting and non-voting committee members are selected by the Agency Head or his designee and should include the Agency Project Manager and other state employees that are qualified to evaluate the qualifications/proposals. OSE must concur with all Committee appointments.
- D. Technical advisors, usually non-voting members of the Committee, may be required to assist the Committee in the evaluation of Qualification Statements or Proposals.
- E. The Committee should be comprised of a minimum of five voting members. While there is not a maximum number of voting or non-voting members on the Committee, it should be noted that as the number of members increases, so does the difficulty to schedule Committee meetings and interviews for selection.

#### 11.5.2 Selection Committee Membership

- A. The voting members of the Committee shall be state employees. For the purpose of meeting this requirement, members of Agency Boards acting in their official capacity are considered state employees.
- B. Committee members are subject to the Ethics, Government Accountability and Campaign Reform Act of 1991. Committee members should become familiar with the requirements of this act and avoid any conflict of interest.
  - 1. Each Committee member must sign a Confidentiality & Conflict of Interest Policy (SE-414) as a means of confirming their acceptance of their responsibilities.
  - 2. The Agency should also have other persons involved in the decision making process sign an SE-414. For example, the Agency Head is not a member of the Committee but has final say over the Committee's decision, so they must sign a SE-414. The same is true for members of a Board of Trustees and administrative associates who assist in document preparation and handling.
- C. The Committee must comply with the Freedom of Information Act; however, Committee members must not disclose confidential information derived from proposals and negotiations submitted by competing offerors during the selection process. There is a summary of the requirements of this act in Chapter 1.
- D. There are no requirements for who may be appointed to a committee. The following could be possible committee members:
  - 1. A member of the board or commission governing the Agency;
  - 2. The Agency head (Secretary, Executive director, President, or like officer) or their designee;
  - 3. One representative of the division, department, or Program Agency for which the project is being built;
  - 4. Agency Project Manager; and/or
  - 5. Agency Facilities Director or his designee.

#### 11.5.3 Changes in Selection Committee Membership

An Agency may only make changes in the membership of the Committee with the approval of the Agency Head and OSE.

#### 11.5.4 Selection Committee Duties

- A. Agency Head or their designee, acting as the final selection authority, has the following duties:
  - 1. Direct the Agency's efforts during the entire source selection process;
  - 2. Review and approve the Selection Plan;
  - 3. Appoint members of the Committee other than the Chair; and
  - 4. Review and approve the Committee's final report for selection and recommendation. The Agency Head may choose to reject the Committee's final choice by directing the Agency Project Manager to cancel the solicitation prior to award in accordance with the procedures set forth in SC Regulation 19-445.2097(B).
- B. Agency Project Manager, subject to the policies and procedures of a specific agency, has the following duties:
  - 1. Prepare and submit a draft of the Selection Plan to the Committee for its review;
  - 2. Prepare and submit the final Selection Plan to the Agency Head for concurrence and the OSE Chairman for approval;
  - 3. Assure that each Committee Member and any other appointed participant signs and returns an SE-414 before they are provided access to source selection information;

4. Prepare advertisements for South Carolina Business Opportunities (SCBO) and any other publications;
  5. Post notices of Committee meetings in accordance with the Freedom of Information Act (FOIA) open meeting requirements;
  6. Prepare the RFQ and/or RFP outline;
  7. Coordinate the preparation and issuance of the RFQ and/or RFP with the OSE Chairman and Committee;
  8. Issue amendments to the RFQ or RFP with the OSE Chairman;
  9. Schedule Selection Committee Meetings;
  10. Conduct a pre-submittal conference (optional) in accordance with established procedures, meeting minutes and attendance;
  11. Receive and register responding firms responding to the RFQ;
  12. Summarize the RFQ evaluation data by the Committee to determine prequalified firms;
  13. Notify firms individually of successful prequalification and notify unsuccessful firms individually;
  14. Safeguard confidential information and materials, including proposals and amendments;
  15. Determine offeror responsiveness and responsibility;
  16. Conduct and control all discussions and negotiations with offerors;
  17. Maintain written records of all discussions and negotiations with offerors;
  18. Prepare the Selection Committee's report and recommendation to the Agency Head; and
  19. As requested, conduct the debriefing for unsuccessful offerors.
- C. The Committee Chair is a non-voting member appointed by the State Engineer. The Committee Chair's duties are to:
1. Assist the Agency Project Manager in scheduling and conducting Committee meetings and deliberations;
  2. Provide overall supervision, planning direction, and execution of the Committee's activities;
  3. Assist the Agency Project Manager in the determination of responsibility and responsiveness on individual proposals; and
  4. Prepare the summary of the voting Committee member's raw evaluation data in response to the RFP.
- D. Voting Members' duties are to:
1. Independently review each proposal against the Plan criteria for the RFQ and RFP;
  2. Attend all Committee meetings;
  3. Participate in the prequalification selection for the RFQ; and
  4. Participate in the interview of each prequalified firm and complete an evaluation taking into account both the written technical proposal and the interview presentation.
- E. Technical Advisors, Non-Voting Members
1. The Agency Head may appoint outside technical advisors with special expertise not available on the Committee but essential to the selection process.
  2. The Agency should use technical advisors in discrete areas such as reviewing technical aspects of proposals to assure compliance with the technical requirements of the RFP.
  3. The Agency should not give technical advisors access to information concerning overall Committee activities that is not required for them to perform their advisory duties. Technical advisors should not attend Committee meetings as specifically requested by the Committee Chair.

#### 11.5.5 Conflicts of Interest

- A. The Committee Chair must instruct the committee members and technical advisors of the Procurement Code's requirements for ethical conduct, and require each member to sign an SE-414 stating that they have read and understand those standards of conduct and that they do not have an actual or apparent conflict of interest relating to the proposed acquisition.

- B. If a committee member has an actual or apparent conflict of interest related to a proposal under evaluation, the Chair must remove that member and, if a sufficient number of voting members do not remain, request the Agency Head to replace them with another.
- C. If a committee member has a current or past relationship with an offeror but does not believe the relationship creates a conflict of interest or is not sure, the member must notify the Committee Chair of the relationship for a determination as to whether or not an actual conflict of interest exists.

## 11.6 SELECTION COMMITTEE MEETINGS

- 11.6.1. Every meeting of public bodies must be open to the public unless closed pursuant to SC Code § 30-4-70. A Committee is a body subject to this requirement. Every meeting of the Committee must be publicly announced at least twenty-four hours before the meeting pursuant to SC Code § 30-4-80.
- 11.6.2. When a meeting is held to discuss source selection information such as ranking statements of qualifications and proposals, the meeting will open publicly and any item on the agenda which is not protected source selection information will be addressed publicly.
- 11.6.3. Thereafter, the Committee should adjourn to go into executive session to discuss source selection information. The public must be excluded from these executive sessions with no exceptions.

## 11.7 SELECTION PLAN FOR THE RFQ/RFP PROCESS

### 11.7.1 The Selection Plan

- A. The Selection Plan (Plan) is the document that:
  - 1. Explains how the Agency will solicit statements of qualifications and proposals from contractors and evaluate those statements and proposals in order to make the selection decision;
  - 2. Establishes the required qualifications and the relative importance of those qualifications;
  - 3. Outlines how the Agency will conduct negotiations;
  - 4. Identifies the Chair and members of the Committee; and
  - 5. Establishes milestone dates for the completion of the selection process.
- B. The Plan is the Agency's statement to itself and to others as to how it intends to acquire what it needs. It distinguishes what is important from what is not and, by assigning weights, defines how important these distinctions are.
- C. The Plan is never shared with an offeror or potential offeror.

### 11.7.2 Minimum Requirements

The Plan must include the following, as a minimum:

- A. Description of the facility to be constructed;
- B. Description of the duties and responsibilities of the Committee. Include the nominations for Committee by attaching a roster of personnel by name, title, and agency to the Plan;
- C. Schedules and key events or milestones that will occur between the time the Committee is organized and its adjournment, including proposed pre-solicitation activities such as the drafting and issuance of South Carolina Business Opportunities (SCBO) announcements or the convening of a pre-submittal conference;
  - Note:** The Procurement Code requires adequate public notice of the RFQ. Therefore, the Plan should address not only the publication in SCBO, but how the Agency intends to develop interest in the project other than through advertising in SCBO.
- D. Description of the contract to be used;
- E. Statement of the RFQ and RFP evaluation factors and their relative importance; and
- F. Description of the evaluation process, methodology, and techniques.

### 11.7.3 Preparation and Approval of the Plan

- A. The Agency Project Manager prepares and submits the Plan to the OSE Chairman and Committee for review.
- B. The reviewed Plan is finalized and submitted to the Agency Head for approval.
- C. The approved Plan must be reviewed and approved by the Committee Chairman before the Agency issues a solicitation or holds a pre-submittal conference.

## **11.8 REQUEST FOR QUALIFICATIONS (RFQ)**

**11.8.1** The RFQ is part of a pre-qualification process. Agencies shall request approval from OSE to limit participation in a solicitation for CM-R to those businesses that are prequalified.

**11.8.2** To prequalify offerors, the Agency must determine in writing that prequalification is justified due to the nature of the project. The determination for prequalification shall be included in the written determination of project delivery method discussed above.

**11.8.3** The decision to not prequalify a particular firm is protestable. The standard of review is the same as for a determination of non-responsibility.

**11.8.4** If only one prospective offeror is qualified, the prequalification process must be canceled. In this event, the Agency may start the process over or publicly advertise a request for proposals from all interested parties.

### **11.8.5 Request for Qualifications**

**A.** The Agency must prepare an RFQ that will clearly communicate to potential offerors both the Agency's needs and the relative importance of the evaluation factors the Committee will use in evaluating a business's qualifications. The numerical weighting or ranking of each factor should not be communicated to the offerors. The RFQ should not include the Selection Plan.

**B.** The RFQ must:

- 1.** Contain a description of the general scope of work to be acquired.
- 2.** Advise prospective offerors how they may apply for consideration including how their statements of qualifications should be organized and arranged.
- 3.** Inform potential offerors of the evaluation factors that the Agency will consider in evaluating statements of qualifications and their relative importance. The evaluation factors should at a minimum include:
  - a.** Past performance and references from designers and owners;
  - b.** Description of the firm's CM-R project management approach;
  - c.** Bonding capacity/financial stability; and
  - d.** Related experience on CM-R projects of similar size and scope.
- 4.** Set forth the deadline for submission of statements of qualifications.

### **11.8.6 Solicitation**

**A.** Using the Invitation for Construction Management at Risk Services (SE-410), the Agency must advertise in SCBO for interested firms to provide pre-construction and construction management services for the project.

**B.** The Agency Project Manager will prepare the SE-410 and submit it in MS Word format to the OSE Project Manager. OSE will review the SE-410 and send an approved copy to SCBO and the Agency.

**C.** The SE-410 must give adequate public notice to prospective offerors so that all who wish may receive the RFQ.

**D.** The SE-410 must state as explicitly as possible the nature and the scope of the project and provide notice of any pre-submittal conference that is being held.

### **11.8.7 Pre-Submittal Conference (optional)**

**A.** The Agency may conduct a Pre-Submittal Conference to explain the project and the requirements of the RFQ to interested firms. Conducting a pre-submittal conference at the RFQ stage may allow the Agency to gauge interest in the project, and solicit input from potential offerors regarding how best to address complex aspects of the project thus promoting competition.

**B.** When the Agency determines that a Pre-Submittal Conference is in its best interest, the Agency must place the notification in the SE-410.

**C.** The Agency must furnish all prospective offerors identical information in connection with the proposed acquisition. The Agency may not use remarks and explanations at the conference to modify or qualify the terms of the RFQ. If the Agency wishes to modify or qualify the terms of the RFQ, it must do so by written amendment.

**D.** The Agency must make a complete record of the conference and make the record a part of its procurement file.

**E.** The Agency Project Manager and Committee Chairman will represent the agency at the conference with the Agency Project Manager conducting the conference. All other members of the Committee should not be in attendance at the conference.

### **11.8.8 Receipt and Opening of Statement of Qualifications**

**A.** The rules governing non-disclosure of procurement and confidential information applies to the receipt of statements of qualifications.

- B. The Agency should date and time stamp statements of qualifications upon receipt; however, unlike proposals the Agency is not required to secure and publicly open statements of qualifications.
- C. The Agency Project Manager may open statements of qualifications upon receipt and, with a witness, record the names of the firms that have responded to the RFQ and any modifications on the Register of Responding Firms for CM-R (SE-411). The Agency shall not make the SE-411 open to public inspection until after the issuance of an award or notification of intent to award, whichever is earlier.
- D. Following the registering of firms, the Agency Project Manager may immediately start performing reference checks and determining the responsiveness and responsibility of offerors.

#### **11.8.9 Evaluation and Ranking of Prospective Offerors**

- A. The Committee meeting must comply with the Open Meeting requirements of law when ranking prospective offerors.
- B. The Committee must evaluate the statements of qualifications and rank prospective offerors from most qualified to least qualified. The Committee should rank firms following the evaluation factors found in the RFQ.
- C. After evaluating the statements of qualifications, the Agency Project Manager shall conduct discussions with the Committee to review the strengths and weaknesses of the firms. By consensus of the voting Committee members, the Agency Project Manager shall create a list of the firms considered to be the most qualified to participate in the RFP process.
- D. The Agency Project Manager shall record the reasons for each firms' qualification on the Selection Committee Report for RFQ Prequalification - CM-R (SE-412) to support the Committee's determination of the ranking of the firms.

#### **11.8.10 Number of Firms Pre-Qualified**

- A. The Agency must solicit proposals from at least the three most qualified prospective offerors by means of a Request for Proposal. The Agency may solicit proposals from additional prospective offerors in order of ranking.
- B. The Agency's determination of how many proposals to solicit is not protestable.

#### **11.8.11 Notification**

- A. After ranking prospective offerors and determining which offerors it will solicit proposals from, the Agency Project Manager shall send a letter individually to each pre-qualified offeror indicating the following:
  - 1. Notice is hereby given that the Agency Selection Committee has, in accordance with the SC Code § 11-35-3023, the Manual for Planning and Execution of State Permanent Improvement Projects, and the solicitation documents, reviewed the qualifications of interested firms and determined (firm name) to be qualified to present a proposal for this project;
  - 2. Attached is a copy of the Request for Proposals (RFP), which your firm should review and follow as you prepare to submit your response. The RFP provides the expected organization of your proposal, the criteria the Committee will use to evaluate your response, and the date your response is due to the Agency.
  - 3. Upon receipt and review of the responses to the RFP's, the Agency will conduct interviews with each pre-qualified offeror. Your firm is scheduled to be interviewed on (date), at (time), in the (conference room and building name). Please be prepared to provide a (?) minute presentation and allow (?) minutes for Committee questions.
- B. The Agency Project Manager shall send a letter individually to each prospective offeror that was not pre-qualified indicating the following:
  - 1. Notice is hereby given that the Agency Selection Committee has, in accordance with the SC Code § 11-35-3023, the Manual for Planning and Execution of State Permanent Improvement Projects, and the solicitation documents, reviewed the qualifications of interested firms. Unfortunately, this is to inform you that (firm name) was determined not to achieve prequalification for advancement to the RFP process;
  - 2. In accordance with SC Code § 11-35-4210, any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract must submit an intent to protest. At a later date, you will receive a copy of the Notice of Intent to Award CM-R Contract (SE-470) as the notice of intended award.
- C. Prospective offerors are notified of their status only and are not notified of the status of any other prospective offeror or how many prospective offeror's submitted statements of qualifications.
- D. A copy of the letters sent to successful and unsuccessful offerors should be placed in the Agency's file.

## 11.9 REQUEST FOR PROPOSALS (RFP)

### 11.9.1 The RFP

- A. The Agency Project Manager must prepare an RFP that will clearly communicate to the pre-qualified firms the Agency's needs and the relative importance of the evaluation factors the Committee will use in evaluating the proposals. The numerical weighting or ranking of each factor should not be communicated to the offerors. The RFP should not include the Selection Plan.
- B. As a minimum, offerors shall be evaluated on the following factors:
  - 1. Qualifications of the CM-R staff to be assigned to the project;
  - 2. Related experience on projects of similar size and complexity;
  - 3. Ability to perform the requirements of the contract;
  - 4. History of on-time, on-budget, and on-schedule for previous CM-R projects;
  - 5. Proposed CM-R pre-construction and/or construction management fee (should be a factor of less than 10% of the ranking); and
  - 6. Other pertinent factors required by the Committee.
- C. The RFP must:
  - 1. Advise offerors on how their proposals should be organized and arranged;
  - 2. Provide that offerors must submit the price for Preconstruction Services and/or the Construction Management Fee (expressed as a percentage) at the time of interviews in a separate sealed envelope;
  - 3. Inform offerors of the evaluation factors for award and the relative importance assigned to each of these factors; and
  - 4. Include the paragraphs to be used in the RFP listed in the *Clauses for use on Construction Management At-Risk Projects*, found in Appendix C.

## 11.10 POTENTIAL OFFEROR'S PARTICIPATION IN A REPORT OR STUDY USED IN PREPARATION OF DESIGN REQUIREMENTS

- 11.10.1 Participation in a report or study that is used in the preparation of design requirements for a project does not disqualify a firm from participating as a member of a proposing team in a CM-R project unless the participation provides the business with a substantial competitive advantage.
- 11.10.2 A copy of a report or study that was prepared by a potential offer shall be given to all offerors.

## 11.11 RECEIPT, OPENING AND REGISTERING OF PROPOSALS

- 11.11.1 The Agency must time-stamp proposals and modifications upon receipt and hold them unopened (except as otherwise provided in the Procurement Regulations) in a secure place until the established due date.
- 11.11.2 The Agency Project Manager must open the proposals publicly in the presence of one or more State witnesses at the time and place designated in the RFP.
- 11.11.3 The Agency Project Manager should declare the arrival of the time for receipt of proposals, and verify each of the offerors submitting a proposal have been previously pre-qualified.
- 11.11.4 The Agency may not make the proposals open to public inspection until after the issuance of an award or notification of intent to award, whichever is earlier.
- 11.11.5 The Agency must not disclose the contents or the identity of competing offers during the process of opening proposals.
- 11.11.6 If members of the public appear at the opening, the Agency Project Manager should state that they will conduct the opening of proposals and verify the names in silence to protect confidential information.

## 11.12 REJECTION OF PROPOSALS AND CANCELLATION OF SOLICITATION

### 11.12.1 Rejection of Individual Proposals

- A. The Agency does not need to accept proposals unconditionally without alteration or correction, and to the extent otherwise allowed by law, the State's stated requirements may be clarified after proposals are submitted. The Agency must consider this flexibility in determining whether reasons exist for rejecting all or any part of a proposal.



- B. Reasons for rejecting proposals include but are not limited to the following:
  - 1. The business that submitted the proposal is non-responsible as determined under SC Code § 11-35-1810;
  - 2. The proposal ultimately fails to meet the announced requirements of the State in some material respect; or
  - 3. The proposed price is clearly unreasonable.
- C. The Agency must document the reasons for cancellation or rejection and make the documentation a part of the procurement file available for public inspection.

#### **11.12.2 Rejection of All Proposals – Cancellation of Solicitation Prior to Award**

- A. Unless there is a compelling reason to reject all proposals, the Agency, after receiving and opening proposals, will award a contract to the highest ranked responsible offeror or otherwise as allowed by SC Code § 11-35-1530.
- B. Should the Agency decide to cancel a solicitation after opening proposals but before award, the Agency must determine in writing that:
  - 1. Inadequate or ambiguous specifications were cited in the solicitation;
  - 2. Specifications have been revised;
  - 3. The services or construction being procured is no longer required;
  - 4. The solicitation did not provide for consideration of all factors of cost to the State, such as cost of transporting state furnished property to bidders' plants;
  - 5. All otherwise acceptable proposals received are at unreasonable prices;
  - 6. The proposals were not independently arrived at in open competition, were collusive, or were submitted in bad faith; or
  - 7. For other reasons, cancellation is clearly in the best interest of the State.
- C. If the determination is due to a change in requirements, the Agency must show in its determination that prior to opening, it made every effort to anticipate changes in requirements.
- D. Any determination to cancel the solicitation must be made in good faith. The Agency must document the reasons for cancellation or rejection and make the documentation a part of the procurement file available for public inspection.

### **11.13 INTERVIEWS AND RANKING OF PROPOSALS**

#### **11.13.1 Interviews**

- A. All interviews should occur on the same day.
- B. If the Committee will be interviewing the offerors in various locations, the Agency Project Manager should make sure that each location is similarly equipped and furnished.
- C. Each voting member of the Committee must be present for each interview. All non-voting members and technical advisors should be present for each interview.
- D. During the interviews, the Committee may evaluate the offerors only on the criteria listed in the RFP.
- E. The Committee must not discuss fees and compensation with the offerors during the interviews.

#### **11.13.2 Ranking By Individual Committee Members**

- A. Each voting member of the Committee must examine each proposal in detail to measure its contents against the evaluation factors and assign a score to each factor.
- B. At the close of all interviews, voting Committee members must complete an evaluation of all interviewed firms using the CM-R Selection Committee Member Evaluation–RFP (SE-415) with the exception of scoring the Cost Proposal. The Agency Project Manager will open the sealed envelopes that contain the cost proposal from each firm interviewed and read them aloud. Voting members will then score the Cost Proposal.
- C. If a voting committee member determines two firms to be equally qualified, the committee member must re-evaluate their rankings to break any ties in scores prior to submitting the SE-415 to the Committee Chair.
- D. Each voting member must present their signed evaluation to the Chair.

#### **11.13.3 Consensus of Selection Committee**

- A. After the voting members have separately evaluated the technical proposals including the interviews for an RFP, the Committee must meet and formulate its collective conclusions. The Committee must discuss significant variations in voting members' scores or assessments of technical merit and resolve discrepancies or fully explain them in the record.

- B. After each committee member has completed and submitted their SE-415 to the Chair, the Chair will compile the scores into a Committee ranking on the CM-R Selection Committee Summary - RFP (SE-417).
- C. If the Committee determines two firms to be equally qualified:
  - 1. The Committee must re-evaluate their rankings to break any ties in final rankings.
  - 2. If one firm is a resident firm and the other is a non-resident firm, the committee must rank the resident firm higher than the non-resident firm.

#### **11.13.4 Selection Committee Report and Recommendation**

- A. After the Committee reaches a consensus of the recommended firm, the Agency Project Manager must prepare a committee report for the Agency Head.
- B. The report must include the Committee's recommendation of the offeror the Agency should select for negotiation and award.
- C. The report must include a copy of each SE-415 and the SE-417 indicating the rank of each offeror's proposal. For each offeror, the report should provide the final score and a summary of each proposal including an assessment of the offeror's compliance with the requirements of the solicitation, any changes to the technical evaluation scores and a narrative to support the changes.
- D. The Committee must support a recommendation to negotiate and award to a higher priced offeror with a written finding that the technical superiority of the higher priced offer relative to other offers, warrants the additional cost.
- E. The Agency Head must provide written approval or rejection of the Committee's report and recommendation.

### **11.14 NEGOTIATIONS AFTER THE AGENCY HEAD APPROVAL OF THE COMMITTEE REPORT**

- 11.14.1** Upon receipt of the Agency Head's approval of the recommended firm, the Committee is adjourned and negotiations between the selected firm and the agency may proceed.
- 11.14.2** The standard form of contract for the CM-R services is the AIA Document A133, Standard Form of Agreement between Owner and Construction Manager as Constructor, SCOSE Edition, with the AIA A201 (SCOSE Edition) used as the General Conditions to the contract. The AIA A201 should be modified in accordance with the modifications listed in the *Clauses for use on Construction Management At-Risk Contracts*, found in Appendix C. The modifications may be compiled into a separate document and noted in Section 12.2.5 of the AIA A133.
- 11.14.3** Utilizing the AIA Document A133, SCOSE Edition, negotiations should consider the following:
  - A. Preconstruction Phase services including, but not limited to: participation in design progress and coordination meetings with the Owner and Architect, review of construction documents for constructability, availability of materials and labor, time requirements for construction, costs of alternative designs or materials, preliminary budgets, life-cycle data, and possible cost reductions;
  - B. The Construction Manager's Fee as a percentage of the Cost of the Work; and
  - C. The splitting of savings between the Owner and the CM-R.
- 11.14.4** Negotiated proposal revisions may affect the scope of the proposed project, so long as the changes are within the general scope of the request for proposal.
- 11.14.5** Negotiations must be controlled by the Agency Project Manager and may include an advisor to the Project Manager. An advisor that has not previously signed an SE-414 must do so prior to assisting in negotiations.
- 11.14.6** Once negotiations with an offeror begin, the Agency must attempt to successfully negotiate a "satisfactory contract" without regard to any other proposals received. Negotiations are not an opportunity to re-evaluate one offeror against another.
- 11.14.7** If the Agency concludes that a satisfactory contract cannot be negotiated with the highest ranking offeror, negotiations may be conducted with the second offeror, then the third, and so on. In no case may confidential information derived from proposals and negotiations submitted by competing offerors be disclosed.
- 11.14.8** During the negotiation process, if the Agency Project manager is unsuccessful in the first round of negotiations, he may re-open negotiations with any offeror whom he previously negotiated.
- 11.14.9** The award of the contract must be made on the basis of the evaluation factors stated in the solicitation. The basis for award must explain the results of any negotiations or the reasons any negotiations were unsuccessful with an offeror.

## **11.15 DECISION TO AWARD**

- 11.15.1** The Agency Head or its governing body makes the final selection decision based on the Committee's recommendation.
- 11.15.2** The Agency Head or its governing body may not overturn the Committee's decision unless they determine in writing that there is no rational basis for the Committee's decision, the Committee did not follow the RFP evaluation factors, or the Committee exercised its discretion in an arbitrary or capricious manner.
- 11.15.3** If the Agency Head or its governing body decides to reject the Committee's selection decision, the Agency must cancel the procurement action and start a new procurement process.
- 11.15.4** If the Agency rejects the decision of the Committee and chooses to cancel the procurement, the Agency must produce written documentation of the reason for the cancellation and place the documentation in the procurement file. Reasons to cancel may include the items listed in SC Regulation 19-445.2097(B)(1).

## **11.16 NOTICE OF INTENT TO AWARD**

### **11.16.1 Posting Requirement**

- A.** Once the Agency selection is final, it must post a Notice of Intent to Award CM-R Contract (SE-470) following concurrence by OSE.
- B.** The Agency must post the SE-470 at the time and in the location announced in the RFP. The Agency must also promptly mail a copy of the SE-470 to each offeror.
- C.** If an Agency is unable to confirm intent to award on the posting date announced in the RFP, it must post a notice on that date at the specified location stating the new date the Agency will post the SE-470.

### **11.16.2 OSE Concurrence With Posting**

- A.** OSE must concur in the posting of SE-470 prior to the Agency posting and distributing the form.
- B.** The Agency must submit a Request for Concurrence in Posting Notice of Intent to Award CM-R Contract (SE-460) to OSE with a copy of the supporting documentation as listed at the bottom of the SE-460.
- C.** The submittal must be made after the Committee's final selection, approval of final selection by the Agency Head, and completion of negotiations.
- D.** OSE will have five working days from the date of receipt of the SE-460 and all required documentation for approval. If the Agency does not receive an objection from OSE within the five working days, OSE will be deemed to have granted approval for the Agency to post the SE-470.
- E.** To expedite this process, the Agency may email the OSE Project Manager and OSE Administrative Assistant PDF copies of the SE-460 and all required documentation. The copy to the Administrative Assistant is to assist in the process if the OSE Project Manager is out of the office.

## **11.17 CONTRACT EXECUTION WAITING PERIOD**

- 11.17.1** The Agency must wait seven (7) business days after posting the SE-470 before it may execute the contract with the selected offeror. During this time, any offeror who is aggrieved by the Agency's decision may protest the contract award.
- 11.17.2** If the State Engineer receives such a protest in writing during the seven business-day period, the Agency may not execute a contract until the matter is resolved unless the Agency, in accordance with the Procurement Code, requests a lifting of the stay and the CPOC grants the request.
- 11.17.3** If the State Engineer does not receive any protests, the Agency may execute the contract on the day after the expiration of the seven business days.

## **11.18 EXECUTING THE CONTRACT**

Once all conditions precedent to executing a contract have occurred, the Agency should submit an unsigned copy of the contract to the contractor with a cover letter requiring the contractor to execute the contract and return the original contract along with the Certificates of insurance in the form of the latest edition of the ACORD 25S showing that the Contractor has insurance meeting the requirements of the RFP in place for the project within fourteen days.

## **11.19 DEBRIEFING UNSUCCESSFUL OFFERORS AFTER NOTICE OF AWARD**

- 11.19.1** When the Agency awards a contract, unsuccessful offerors may desire a debriefing with the agency by submitting a written request to the Agency Project Manager.
- 11.19.2** The Agency may provide unsuccessful offerors with a debriefing promptly upon receipt of the written request.

## 11.20 PRECONSTRUCTION SERVICES

- 11.20.1** Typically, the CM-R would be engaged during the Schematic Design phase. Following the award of the contract, the CM-R should meet with the Agency and A/E to develop a schedule to coincide with the Agency's proposed project activities and timelines. The schedule will be coordinated with the design schedule already prepared by the A/E to include the CM-R's review of design documents, design coordination meetings with the Owner and A/E, and ultimately a meeting to present and negotiate the Guaranteed Maximum Price (GMP).
- 11.20.2** During the design process by the A/E, the CM-R will conduct reviews of the design documents to:
- A. Perform constructability reviews and availability of materials and labor;
  - B. Identify project sequencing and possible "early" construction packaging for phased construction;
  - C. Evaluate major systems and make recommendations concerning the most cost-effective;
  - D. Evaluate the budget and make suggestions for cost-savings or value enhancements;
  - E. Update cost estimates and scheduling; and
  - F. Consult with subcontractors on components of the work.
- 11.20.3** At a time agreed to by the Agency and the CM-R, the CM-R shall provide the Agency with a GMP. The GMP will include the Cost of the Work, the CM-R Construction Management fee, General Conditions, CM-R contingency, and the cost of bonds and insurance.

## 11.21 NEGOTIATING THE GUARANTEED MAXIMUM PRICE (GMP)

- 11.21.1** While the intent of the CM-R process is to award a single GMP for the work, it is recognized that the process allows for phased construction, which can be awarded as separate GMPs. In such a case, an Exhibit "A" to the AIA A133, SCOSE Edition, will be required to be completed and submitted for each individual GMP. This can be problematic to the scope, the budget, and the quality of the work; therefore, the number of phases (GMPs) should be kept to a minimum.
- 11.21.2** Prior to converting the CM-R contract from the Pre-Construction services to a construction contract using Exhibit "A", the Agency must have a reasonable assurance that the proposed project will be completed within the approved construction budget. The time of this assurance will vary depending on the complexity of the work. Most often the cost estimate created by the CM-R at the Design Development stage will be the best indicator of the projects ability to remain within the approved construction budget.
- 11.21.3** The CM-R shall provide the Agency with sufficient data and cost matrices to allow the Agency to review the GMP and be prepared to negotiate with the CM-R.
- A. Negotiations may include the Cost of the Work, General Conditions, and CM-R contingency.
    - 1. Cost of the Work is the direct cost of labor and materials, including subcontractor(s) overhead and profit to perform the work.
    - 2. General Conditions are the costs associated with the CM-R establishing and manning a project office.
    - 3. CM-R Contingency is an amount available to the contractor to be used to cover increased costs incurred as a result of causes beyond its control, i.e. lost time, increases in subcontracts, acceleration, alleviate costs for defective, damaged, or nonconforming work. The CM-R contingency is not available for Owner-directed design or scope changes. Upon completion and final acceptance of the project, any unused CM-R contingency is returned to the Owner.
  - B. If negotiations are successful, the Agency will complete the following for signature by the OSE Project Manager:
    - 1. Exhibit A to the AIA A133,
    - 2. Request for Authority to Execute Exhibit A to CM-R Contract (SE-475); and
    - 3. Change Order to CM-R Contract (SE-480).
  - C. If negotiations are unsuccessful, the Agency will terminate the contract with the CM-R and proceed with the construction of the facility utilizing the Design-Bid-Build process.
- 11.21.4** Alternates should not be used in a CM-R contract. The A/E may propose alternatives during the development of the construction documents; however, the alternatives that are accepted will be incorporated into the contract price and are not priced as alternates.
- 11.21.5** Allowances should seldom be used and can be avoided by making material decisions early in the design process.

## **11.22 OSE CONCURRENCE WITH THE REQUEST FOR AUTHORITY TO EXECUTE EXHIBIT “A”**

- 11.22.1** The establishment of a GMP constitutes a change in the contract amount. The Agency shall complete and submit an SE-480.
- 11.22.2** The Agency is reminded that the use of multiple GMPs may require multiple:
- A.** Exhibit A’s to the AIA Document A133;
  - B.** Certificates of Insurance as required by the contract documents;
  - C.** Performance and Labor & Material Payment Bonds, each for not less than 100% of the amount of work awarded;
  - D.** Inspection/Material Testing Order Form (SE-955) applicable to the work awarded; and
  - E.** The Building/Construction Permit (SE-580) applicable to the work awarded.
- 11.22.3** In the case of multiple GMPs, the Agency shall complete and submit an SE-475 for the establishment of each GMP along with the pertinent data noted at the bottom of the SE-475.

## **11.23 NOTICE TO PROCEED**

The Agency may issue the Notice to Proceed – CM-R Contract (SE-490) after the contract has been signed by the Agency and a copy returned to the CM-R.

## **11.24 INSPECTION AND TESTING SERVICES**

- 11.24.1** During the construction period, OSE and any other legally constituted authorities have access to the project premises for periodic inspections. The A/E’s Basic Services may include site visits and observations of work-in-progress, Substantial Completion inspections, Final Completion inspections and other inspections per the A/E contract. Details of the A/E’s observation requirements are set forth in the A/E contract.
- 11.24.2** The Agency must procure inspection and material testing services from firms on state contract to provide tests and inspections in accordance with Chapter 1 of each of the applicable International Code Council Series of Codes and with Chapter 17 of the International Building Code using the SE-955 and the Inspection/Material Testing Order Negotiation Worksheet (SE-955A).
- 11.24.3** The requirements and procedures for using inspection and material testing services on a project are set forth in Appendix G. Statewide term contracts for inspection and material testing services, including services and fees, may be found at <https://procurement.sc.gov/files/contracts/bldginsp-s40%20october%202017.pdf>. The listing of Inspection and Testing Firms, including point of contact, phone numbers, and addresses, may be found at: [https://procurement.sc.gov/files/Copy%20of%20Inspections\\_Testing\\_Firms\\_050516%20updated%209.12.17.xls](https://procurement.sc.gov/files/Copy%20of%20Inspections_Testing_Firms_050516%20updated%209.12.17.xls)
- 11.24.4** The Agency must procure inspection/material testing services before the start of construction.
- A.** The Agency must submit the SE-955, SE-955A and the Statement of Special Inspections Responsibilities (SE-962) to the OSE Project Manager along with the Building/Construction Permit (SE-580) for OSE approval prior to construction.
  - B.** Inspection and testing firms shall use and maintain in the Contractor’s job trailer, the Project Inspection/Material Testing Log (SE-965), the Project Inspection/Material Testing Deficiency Log (SE-966), and a copy of the inspection/material testing report. Copies may be found in Appendix G of this manual.

## **11.25 BUILDING/CONSTRUCTION PERMIT**

- 11.25.1** The Agency shall insert the applicable information in the spaces provided on the Building/Construction Permit (SE-580), sign the Agency Certification and submit it to OSE along with the SE-475 for each GMP. OSE will approve the permit by signing the SE-580 and returning a signed copy to the Agency.
- 11.25.2** The Agency must submit the SE-580 along with the SE-955, SE-955A and the Statement of Special Inspections Responsibilities (SE-962) to the OSE Project Manager for OSE approval prior to construction.
- 11.25.3** If there are multiple GMPs, the Agency must submit a proposed Building/Construction Permit (SE-580) for each separate package prior to beginning work on that GMP.

## **11.26 CERTIFICATE OF INSURANCE AND PERFORMANCE AND PAYMENT BONDS**

- 11.26.1** After receiving the certificates of insurance and performance and payment bonds from the contractor, the Agency should review them to determine that they are authentic and meet the requirements of the Procurement Code, Regulations and contract.

**11.26.2** The Agency is responsible to assure that it has the required labor and material payment bond in place before permitting the contractor to start work. Failure to do so could make the Agency liable for the contractor's failure to pay its subcontractors and suppliers.

**11.27 CHANGE ORDERS**

Change Orders shall be issued utilizing the SE-480 form and the process noted in Chapter 7 of this manual.

**11.28 CHANGE DIRECTIVES**

Change Directives shall be issued utilizing the AIA Document G714 and the process noted in Chapter 7 of this manual.

**11.29 RESOLUTION OF CONSTRUCTION CLAIMS AND DISPUTES BETWEEN THE CONTRACTOR AND THE AGENCY**

Resolution of claims and disputes shall be in accordance with the process noted in Chapter 7 of this manual.

**11.30 PAYMENTS TO THE CONTRACTOR**

The application and certification for payment, progress payments, withholding payment, and retained amount of payments shall be in accordance with the process noted in Chapter 7 of this manual.

**11.31 SUBSTANTIAL COMPLETION**

The inspections and declarations for Substantial Completion shall be in accordance with the process noted in Chapter 7 of this manual.

**11.32 CERTIFICATE OF OCCUPANCY/USE**

The issuance of the Certificate of Occupancy/Use (SE-585) shall be in accordance with the process noted in Chapter 7 of this manual. If multiple GMP's are awarded, requiring the issuance of multiple Building Permits, only a final Certificate of Occupancy/Use will be issued at the completion of the facility.

**11.33 RECORD DOCUMENTS**

Record Documents shall be issued in accordance with the process noted in Chapter 7 of this manual.

**11.34 FINAL COMPLETION**

Final Completion declaration and inspection shall be in accordance with the process noted in Chapter 7 of this manual.

**11.35 CONTRACT CLOSURE AND FINAL PAYMENT**

Contract closure and final payment shall be in accordance with the process noted in Chapter 7 of this manual.

**11.36 ONE-YEAR CORRECTIVE WORK PERIOD**

Corrective work of deficiencies noted within one year after the date of Substantial Completion shall be in accordance with the process noted in Chapter 7 of this manual.

**11.37 PROJECT CLOSE OUT**

When an Agency determines that a PIP project is complete, the Agency shall submit a Form A-1 to the Capital Budget Office for approval to close out the project.