

FEDERATED STATES OF MICRONESIA

TITLE 55 – GOVERNMENT FINANCE AND CONTRACTS

CHAPTER 4 – GOVERNMENT CONTRACTS

**REGULATIONS FOR INFRASTRUCTURE DEVELOPMENT PLAN
CONTRACTS (IDP Regulations)**

PART 1. GENERAL PROVISIONS

- 1.1. **Authority.** These IDP Regulations are promulgated under the authority of the 55 FSMC Section 419, and the 17 FSMC Section 101, et seq. These IDP Regulations and any amendments and appendixes hereto shall have the force and effect of law.

- 1.2. **Delegation of Authority.** Pursuant to 55 FSMC Section 419 the power to enforce the Act and these regulations is hereby delegated to the Secretary of the Department of Transportation, Communication and Infrastructure.

- 1.3. **Purpose and Applicability.** The purpose of these regulations is to implement the Federated States of Micronesia (“FSM”) Infrastructure Development Plan (“IDP”) and the provisions of 55 FSMC Section 419 as they apply to infrastructure projects funded by Section 211(b) of the Compact of Free Association, as Amended, (“CFA”) as amended from time to time. These regulations establish and use processes of international and local competitive bidding for all applicable construction contracts which are transparent, fair, efficient, flexible, result-oriented, incentive conscious, capable of continuous improvement based upon experience, and which are sensitive to the logistical and other challenges facing potential responsible contractors and subcontractors in performing major infrastructure development activities in the unique geography of the Federated States of Micronesia.

These regulations only apply to: 1) Infrastructure projects funded by the infrastructure sector grant funding described in Article II, Section I of the

CFA and 2) when agreed to by the state and national governments and the donor organization or development assistance entity, to such other Infrastructure Development Plan projects funded by foreign donor organizations or other development assistance entities by explicit agreement. These regulations do not apply to projects, contracts and grants made available under or through the CFA that have been properly sub granted to the State Governments, unless the application of these regulations is specifically set out in any such sub granting agreement . These regulations do not repeal the procurement provisions in the Financial Management Regulations promulgated under Title 55 FSMC Section 410 et. seq. which remain applicable to all non-Infrastructure Development Plan construction contracts. Any procurement of applicable projects initiated, and any contracts so awarded, prior to the effective date of Public Law 14-48, which established 55 FSM Section 419, shall be governed by the relevant national or state procurement law and regulations and the Fiscal Procedures Agreement.

1.4. Definitions. For purposes of these regulations, the following terms shall have the following meaning, however, any and all laws of the Federated States of Micronesia are applicable and supercede any definitions contained herein:

- A) ADVERTISEMENT.** A public announcement, as required by local law, inviting bids for work to be performed and materials to be furnished.
- B) ARCHITECT AND ENGINEERING SERVICES.** Professional services associated with project management, research, development, design and construction, alteration, or repair of real and personal property, as well as those incidental services that members of these professions and those in their employ may logically or justifiably perform, including: studies, investigations, surveys, evaluations, consultations, planning, programming, conceptual designs, plans and specifications, cost estimates, inspections, shop drawing reviews, sample recommendations, pre-design planning, operation and maintenance services which includes start-up, training, preparation of operation and maintenance manuals, and other related services.
- C) AWARD.** The acceptance, by the Owner, of the successful bidder's proposal.

- D) BID.** A response to an invitation for bids that must be sealed, responsive to the invitation, and for monetary value.
- E) BIDDER.** Any individual, partnership, firm, or corporation, acting directly or through a duly authorized representative, who submits a proposal or bid for the work contemplated.
- F) CHANGE ORDER.** A written order to the Contractor covering changes in the plans, specifications, or proposal quantities and establishing the basis of payment and contract time adjustment, if any, for the work affected by such changes. The work, covered by a change order, shall relate to the contract.
- G) COERCIVE PRACTICE.** Any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm, directly or indirectly, to persons or their property to influence their participation in a procurement process or affect the execution of a contract. The harming, directly or indirectly, of persons or their property to influence their participation in a procurement process, or affect the execution of a contract, including the abuse or threatened abuse of legal process.
- H) COLLUSIVE PRACTICE.** In addition to the definition set forth in the FSM Financial Management Regulations, Section 5.13(a) and for the purposes of these regulations only, Collusive Practice is further defined as a scheme, agreement, conspiracy, or arrangement between two or more bidders, with or without the knowledge of the Contracting Officer designed to defraud and/or gain an unfair advantage over a third party, competitor bidders, or those with whom they are negotiating in order to influence the action of any party in a procurement process or the execution of a contract.
- I) CONFLICT OF INTEREST.** Title 11 of the Code of the Federates States of Micronesia shall apply to these regulations. A Conflict of Interest exists if a Public Official of the FSM National or State government, the PMU, the FSM Department of Transportation, Communications and Infrastructure or any of their respective authorized representatives willingly participates in a matter in which he or she knows or reasonably should know there exists a conflict of interest if the public official or a family member could benefit directly or indirectly from a decision on a matter over which that public official has influence or control, or if a matter over which that public official has influence or control relates in any way to: a business or property the public official directly or

indirectly owns or controls; a business or property owned or controlled, directly or indirectly, by a family member of the public official; or a business or property in which the public official has a beneficial interest of any kind, whether through a trust or otherwise. A "Public Official" means any person elected, appointed or employed to perform a governmental function on behalf of the Federated States of Micronesia, or any department, agency or branch thereof, or any allottee as defined in the Financial Management Act of 1979 or any successor law, in any official function under or by authority of any such agency or branch of government. The terms include, but are not limited to, the President, Vice President, department heads and other government employees, legislators, judges, law enforcement officers, advisors and consultants.

- J) CONSTRUCTION CONTRACT.** As used in these regulations, any contract for the construction of an Infrastructure Development Plan project, which may include purchase of equipment and supplies services related to a turn-key project.
- K) CONSTRUCTION MANAGER (“CM”).** The individual, partnership, firm, or corporation duly authorized by the Owner to be responsible for day-to-day construction management and engineering field supervision of the contract work and acting directly or through an authorized representative.
- L) CONTRACT.** The written agreement covering the work to be performed. The awarded contract shall include, but is not limited to: The Advertisement; The Contract Form; The Bid or Proposal; The Performance Bond; The Payment Bond; any required insurance certificates; The Specifications; The Plans, and any addenda issued to bidding documents.
- M) CONTRACTING OFFICER.** The term “Contracting Officer” shall mean the Secretary of the Department of Transportation, Communication and Infrastructure (“DTC&I”), Federated States of Micronesia Government, or his designee.
- N) CONTRACT ITEM (PAY ITEM).** A specific unit of work for which a price is provided in the contract.
- O) CONTRACT TIME.** The number of calendar days or working days, stated in the proposal, allowed for completion of the contract, including authorized time extensions. If a calendar date of completion is stated in the proposal, in lieu of a number of

calendar or working days, the contract shall be completed by that date.

- P) **CONTRACTOR.** The individual, partnership, firm, or corporation primarily liable for the acceptable performance of the work contracted and for the payment of all legal debts pertaining to the work who acts directly or through lawful agents or employees to complete the contract work.
- Q) **CORRUPT PRACTICE.** The offering, giving, receiving, or soliciting, directly or indirectly, of any thing of value to influence the action of any party in the procurement process or the execution of a contract, as defined in 11 FSMC Chapter 5.
- R) **DAY.** , The word “day” is defined as a calendar day beginning at 00:01 A.M. and ending at 12:00 P.M. With regard to deadlines in these regulations it does not include legal holidays designated by local law, or Saturdays or Sundays. If a deadline falls on a legal holiday, Saturday or Sunday, the deadline will run until the end of the next day, which is not one of the aforementioned days.
- S) **ENGINEER.** The individual, partnership, firm, or corporation duly authorized by the Owner to be responsible for engineering, design and development of the contract work and acting directly or through an authorized representative.
- T) **EQUIPMENT.** All machinery, together with the necessary supplies for upkeep and maintenance, and also all tools and apparatus necessary for the proper construction and acceptable completion of the work.
- U) **EXTRA WORK.** An item of work not provided for in the awarded contract as previously modified by change order or supplemental agreement, but which is found by the Engineer to be necessary to complete the work within the intended scope of the contract as previously modified.
- V) **FEDERAL SPECIFICATIONS.** The Federal Specifications and Standards, and supplements, amendments, and indices thereto as are prepared and issued by the General Services Administration of the United States Government, as well as pertinent titles and statutes of the United States Code required by the Federal Aviation Administration, the Department of Transportation, or any other United States governmental agency.
- W) **FRAUDULENT PRACTICE.** Any device, scheme, artifice, course of business, or any other practice that is used to create a

- misrepresentation or omission of a material fact in order to influence a procurement process or the execution of a contract.
- X) FSM CITIZEN BIDDER.** A business in which at least fifty-one percent (51%) of the interest therein is owned by an FSM citizen or citizens, as defined by FSM law; and which has been a resident of the FSM for the one year immediately prior to submission of its bid; and which has paid FSM Gross Revenue Tax for the one year immediately prior to the submission of its bid; and which shall commit in its bid that twenty five-percent (25%) of all workers employed at all times at the job site shall be FSM citizens, and that twenty-five (25%) of all materials and supplies to be used shall be purchased from within the FSM.
- Y) INFRASTRUCTURE DEVELOPMENT PLAN** (referred to as the “**IDP**”) The document entitled “Federated States of Micronesia Infrastructure Development Plan FY 2004-2023” and such successor document and amendments thereto.
- Z) INSPECTOR.** An authorized representative of the Construction Manager assigned to make all necessary inspections and/or tests of the work performed or being performed, or of the materials furnished or being furnished by the Contractor.
- AA) INTENTION OF TERMS.** Whenever, in these specifications or on the plans, the words "directed," "required," "permitted," "ordered," "designated," "prescribed," or words of the like import are used, it shall be understood that the direction, requirement, permission, order, designation, or prescription of the Owner is intended; and similarly, the words "approved," "acceptable," "satisfactory," or words of like import, shall mean approved by, or acceptable to, or satisfactory to the Owner, subject in each case to the final determination of the Owner. Any reference to a specific requirement of a numbered paragraph of the contract specifications or a cited standard shall be interpreted to include all general requirements of the entire section, specification item, or cited standard that may be pertinent to such specific reference.
- BB) JOINT VENTURE.** An ad hoc association of firms that pool their resources and skills to undertake a large or complex contract in the role of “Contractor,” with all firms (partners in the JV) being legally liable, jointly and severally, for the execution of the contract in the event of a partner’s withdrawal.
- CC) LOWEST RESPONSIVE BIDDER.** The lowest prequalified bidder whose offer adequately responds in quality, fitness, and

capacity to all requirements of the proposed work called for by the contract.

- DD) MANAGEMENT CONTRACTOR.** A firm, acting in the role of “Contractor,” that does not normally perform contract construction work directly, but manages the work of other (sub) contractors, while bearing full responsibility and risk for price, quality, and timely performance of the work contract.
- EE) NOTICE TO PROCEED.** A written notice to the Contractor to begin the actual contract work on a previously agreed to date. If applicable, the Notice to Proceed shall state the date on which the contract time begins.
- FF) OWNER.** In all contracts entered into pursuant to these regulations, the term Owner shall mean the party of the contracting agency signatory to the contract. With respect to projects, the Owner is: 1) the National Government of the Federated States of Micronesia, or 2) the National Government of the Federated States of Micronesia acting on behalf of and in consultation with the respective State Government or other entity in reference to CFA funded or supported projects or projects funded or supported from other donors for such State or other entity, represented by the Department of Transportation, Communications and Infrastructure (“DTC&I”) with the National Government of the Federated States of Micronesia acting as a designated owner on behalf of a State or other entity until completion of the project and transfer and acceptance of the ownership of such project to the State or other entity. When used to designate a person, the term “Owner” shall mean the President of the Federated States of Micronesia. The Secretary of DTC&I is his duly authorized representative.
- GG) PREQUALIFICATION.** An assessment made by the Owner of the appropriate level of experience and capacity of firms expressing interest in undertaking a particular contract or subcontract before inviting them to bid or participate.
- HH) PAYMENT BOND.** The form of security approved by the Owner that is furnished by the Contractor and his/her surety as a guaranty that he will pay in full all bills and accounts for materials and labor used in the construction of the work.
- II) PERFORMANCE BOND.** The form of security approved by the Owner that is furnished by the Contractor and his/her surety as a guaranty that the Contractor will complete the work in accordance with the terms of the contract.

- JJ) PLANS.** The official drawings or exact reproductions which show the location, character, dimensions and details of the work to be done and which are to be considered as a part of the contract, in conjunction with the specifications.
- KK) PREQUALIFIED CONTRACTOR.** A Contractor identified by the Owner on its List of Prequalified Contractors for IDP Projects, as that list may be amended from time to time. The Owner may maintain separate lists of Prequalified Contractors for different types of IDP contracts and a Contractor shall be deemed Prequalified only for the type(s) of IDP contract for which it is listed.
- LL) PREQUALIFIED SUBCONTRACTOR.** A Subcontractor identified by the Owner on its List of Prequalified Subcontractors for IDP Projects, as that list may be amended from time to time. The Owner may maintain separate lists of Prequalified Subcontractor for different types of IDP contracts and a Subcontractor shall be deemed Prequalified only for the type(s) of IDP contract for which it is listed.
- MM) PROJECT.** The agreed scope of work for accomplishing specific infrastructure development. This may include construction as well as procurement of equipment and supplies essential to a turnkey infrastructure development project.
- NN) PROJECT MANAGEMENT UNIT (PMU).** For purposes of these regulations, this means the procurement, engineering and construction management unit within the FSM Department of Transportation, Communication & Infrastructure and is the authorized representative of the Secretary of DTC&I primarily responsible for IDP projects funded through the CFA and directly managed, controlled and supervised by the Secretary of DTC&I.
- OO) PROPOSAL GUARANTY.** The security furnished with a proposal to guarantee that the bidder will enter into a contract if the Owner accepts his/her proposal.
- PP) POSTQUALIFICATION.** An assessment of the appropriate level of experience and capacity of firms made by the PMU during the evaluation of bids to ensure that the lowest-evaluated, responsive, eligible bidder is qualified to perform the contract.
- QQ) SPECIFICATIONS.** A part of the contract containing the written directions and requirements for completing the contract work. Standards for specifying materials or testing that are cited in the contract specifications by reference shall have the same force and

effect as if included in the contract physically. If by some error the Plans and the Specifications conflict, the Specifications prevail and should be followed.

- RR) SUBCONTRACTOR.** An individual, partnership, firm, or corporation selected and retained by the Contractor to perform a specified portion of a works contract.
- SS) SUPERINTENDENT.** The Contractor's executive representative who is present on the work during progress, authorized to receive and fulfill instructions from the Owner, and who shall supervise and direct the construction.
- TT) SURETY.** The corporation, partnership, or individual, other than the Contractor, executing payment or performance bonds which are furnished to the Owner by the Contractor.
- UU) SUPPLEMENTAL AGREEMENT.** A written agreement between the Contractor and the Owner covering work that would increase the total amount of the awarded contract or any major contract item. An increase in work is outside the scope of the originally awarded contract: such work could be the result of a change in conditions.
- VV) WORKS.** The total work involvement in a construction contract, including the "Permanent" Works or finished product as specified, and the "Temporary" Works required by the Contractor for the execution and completion of the contract.
- WW) WORK.** The furnishing of all labor, materials, tools, equipment, and incidentals necessary or convenient to the Contractor's performance of all duties and obligations imposed by the contract, plans, and specifications.
- XX) WORKING DAY.** A working day shall be any day other than a legal holiday, Saturday, or Sunday on which the normal working forces of the Contractor may proceed with regular work for at least 6 hours toward completion of the contract. Unless work is suspended for causes beyond the Contractor's control, Saturdays, Sundays and holidays on which the Contractor's forces engage in regular work, requiring the presence of an inspector, will be considered as working days.
- YY) WRITING.** For the purposes of these regulations, any authenticated handwritten, typed, or printed communication, including telex, cable, electronic mail, and facsimile transmission, with proof of receipt when, and in the form, requested by the sender.

PART 2. CONTRACT TYPES

- 2.1. Four Contract Types.** There are four types of construction contracts: Contract A-1, Contract A-2, Contract B, and Contract C, as described in subparts 2.2, 2.3, 2.4 and 2.5. All IDP projects subject to these regulations shall utilize these contract forms. No time and material contracts shall be utilized unless there is a determination by the Contracting Officer that no other Contract is suitable and only if the Contract provides a ceiling price that the Contractor exceeds at its own risk. There shall be no contracts that are based on the cost plus percentage of cost, or percentage of construction cost methods of contracting.
- 2.2. Contract A-1.** Contract A-1 is the contract form to be used for single or multiple projects at single or multiple locations, in excess of three million dollars (U.S. \$3,000,000), and designated for a major design-bid-build project with a traditional bid format from a detailed set of plans and specifications which must utilize in writing at the time of submitting the bid, FSM citizen Prequalified Subcontractors in subcontracts for at least twenty percent (20%) of the total Contract Sum. The contract form to be used is contained in Appendix A-1. Pre-Qualified contractors shall be required to post a bid security at the time of bidding equivalent to five (5%) of the bid. The successful bidder shall be required to post a performance bond equivalent to one hundred percent (100%) of the bid as a condition upon award. The contract shall be for a fixed price with provision for cost modification by negotiated change order or force account. An award of this contract is contingent upon receiving at least two qualified bids.
- 2.3. Contract A-2.** Contract A-2 is the contract form to be used for single or multiple projects at single or multiple locations, in excess of three million dollars (U.S. \$3,000,000), and designated for a design-build format which must utilize in writing at the time of submitting the bid, FSM citizen Prequalified Subcontractors in subcontracts for at least twenty percent (20%) of the total Contract Sum. The contract form to be used is contained in Appendix A-2. Pre-qualified contractors shall be required to post a bid security at the time of bidding equivalent to five (5%) of the bid. The successful bidder shall be required to post a performance bond equivalent to one hundred percent (100%) of the bid as a condition upon

award. The contract shall be for a fixed price with provision for cost modification by negotiated change order or force account. An award of this contract is contingent upon receiving at least two qualified bids.

2.4. Contract B. Contract B is the contract form to be used for construction projects costing three million dollars (U.S. \$3,000,000) or less for a specific project at one site. The contract form to be used is contained in Appendix B. The project can require multiple trades such as civil, electrical, mechanical, and structural works. Pre-qualified contractors shall be required to post a bid security at the time of bidding in the amount of one percent (1%) of the bid. A Retainer shall be required to be held in lieu of a performance bond and shall not exceed twenty percent (20%) of the contract award. The award shall be made to the lowest responsive bid made by a pre-qualified contractor. The contract shall be for a fixed price with provision for cost modification by negotiated change order or force account. An award of this contract is contingent upon receiving at least two qualified bids.

2.5. Contract C. Contract C is the contract form to be used for construction projects requiring multi-delivery type contracts costing less than one million dollars (U.S. \$1,000,000) in total and less than one hundred thousand dollars (U.S. \$100,000) for any single delivery, for a period no longer than one year. The contract form to be used is contained in Appendix C. Contractors shall be required to post a bid security at the time of bidding in the amount of one percent (1%) of the bid. Individual delivery orders are not to exceed eighty thousand dollars (U.S. \$80,000). Awards are expected to be made to contractors specializing in particular works such as civil, mechanical, electrical, landscaping, or structural. Award is to be made to the lowest responsive bid for a delivery order by a pre-qualified contractor. An award of this contract is contingent upon receiving at least two qualified bids.

2.6. Required Agency Approvals. Any contract under these regulations, as well as amendments or change orders to such contracts, shall not be binding and shall not obligate government funds, until it is reviewed and approved by the allottee, or sub-allottee if applicable, or the designee of either as applicable of the funds, and the following government agencies and officials:

- A) For legality and enforceability by the FSM Department of Justice; and
- B) For Funds certification by the Department of Finance and Administration.
- C) The Secretary of the Department of Transportation, Communication & Infrastructure, or his designee.

2.7. **Contract Forms.** All of the forms and approvals contained in Appendixes A-1, A-2, B and C are incorporated herein as part of these regulations. Part 2 of each contract form is reserved for technical specifications and pertinent building standards and donor specific regulations applicable to the specific project or delivery designated in the contract.

PART 3. PRE-QUALIFICATION PROCESS

3.1. **Pre-qualification of Contractors.** All contractors shall be pre-qualified before submitting any bids, except that at the option of the Owner, the application for prequalification can be simultaneously submitted with the bid package for any project so specified in the Invitation for Sealed Bids. Each of the four contract types has separate pre-qualification documents and application forms which must be completed in full and submitted by the contractor. Once pre-qualified for Type A-1 and A-2 contract projects, the contractor remains pre-qualified for five years provided the contractor submits an annual report each year showing satisfactory compliance with the pre-qualification requirements. Once pre-qualified for Type B and C contract projects, the contractor remains pre-qualified for two years, and there is no annual report requirement during those two years. The pre-qualification documents and application forms to be used as to each of the four contract types are contained in Appendixes “A-1 Pre-Qual”; “A-2 Pre-Qual”; and “A-1 & A-2 Subcontractor Pre-Qual and B & C Pre-Qual”.

3.2. **Invitation for Pre-qualification.** For Type A-1 and A-2 contract projects, the Invitation for Prequalification (“IFP”) shall be advertised for at least forty five (45) days prior to the submission date, in newspapers and trade journals regularly published in the Federated States of Micronesia, Guam and Hawaii, appropriate US government procurement and contracting websites and shall also be posted on the dedicated PMU

website for no less than forty five (45) days prior thereto. For Type B and C contract projects, the Invitation for Prequalification shall be advertised no less than thirty (30) days in the newspaper and radio appropriate to the State in the FSM where the project is to occur, and shall be posted in state government offices and the Department of Transportation, Communication and Infrastructure office, and on the dedicated PMU website.

- 3.3. Pre-Qualification Documents.** The Pre-Qualification documents shall be in the English language, and shall contain instructions for the applicant(s). The documents shall contain information on the alternative dispute resolution procedures provided herein and shall warrant that the pre-qualification is for multiple projects and locations. Deadlines for submission may be extended, and amendments to the documents may be permitted by the Department of Transportation, Communication and Infrastructure, upon written notice given to all applicants. The Pre-Qualification Documents are found in Appendixes “A-1 Pre-Qual”; “A-2 Pre-Qual”; and “A-1 & A-2 Subcontractor Pre-Qual and B & C Pre-Qual”.
- 3.4. Applications.** The Application forms shall be completed in the English language, and are contained in the Appendixes “A-1 Pre-Qual”; “A-2 Pre-Qual”; and “A-1 & A-2 Subcontractor Pre-Qual and B & C Pre-Qual”.
- 3.5. Pre-Qualification Meeting and Requests for Clarification.** There will be a Pre-Qualification meeting conducted by the Department of Transportation, Communication and Infrastructure (“DTC&I”) in the respective State approximately twenty (20) days prior to the deadline for submission of the application for all contractors seeking pre-qualification to explain the process and answer preliminary questions. If further clarification is necessary, a contractor may file a written Request for Clarification as to any requirement of the pre-qualification documents. The DTC&I must receive such requests at least fourteen (14) days before the submission deadline for submission of the application. The DTC&I must respond in writing to all questions raised at the Pre-Qualification meeting and after the meeting, to all written requests within five (5) days after receipt of such requests. A copy of all written clarifications must be sent to all applicants.

3.6. Evaluation Committee. Evaluation of the pre-qualification applications submitted by potential contractors shall be conducted by a special committee formed by the Secretary of DTC&I, which shall include a non-voting observer from the FSM Department of Justice. An applicant is allowed to obtain information related to the committee's evaluation of its application only. The Evaluation Committee seeks to achieve a target of at least five (5) prequalified contractors for the A-1 and A-2 Contracts, and at least fifteen (15) prequalified contractors for the B and C Contracts.

3.7. Evaluation Criteria. In reviewing an applicant's submission for pre-qualification, the committee shall consider the following:

A) Mandatory Requirements for all Contractors, all contract types:

1. Legal capacity to enter into a contract with the FSM National Government.
2. (the rest will be renumbered)
3. No conflict of interest.
4. Never been suspended or disbarred by any US government agency and/or in the FSM.
5. Ability to perform responsibly and successfully under the terms and conditions of the procurement.
6. Past compliance with public policy.
7. Financial and technical resources.

B) Mandatory requirement for all Contractors for Type A-1 and A-2 contract projects:

1. Performance bonding capacity in excess of \$30,000,000.
2. Designation by name of subcontractor(s) at the time of bidding, in writing, of FSM citizen Prequalified Subcontractors for at least twenty percent (20%) of the total Contract Sum.

C) The following criteria is to be weighted equally for Type A-1 and A-2 Contract types:

1. Past performance of recent and relevant projects within the last ten years preceding the application. A maximum of ten projects shall be considered.
2. Experience and qualification of key personnel.
3. Project management techniques.
4. Subcontracting plan to use FSM citizen subcontractors.
5. Evidence of business registration in the FSM.

D) The following criteria is to be weighted equally for Type B and C Contract types:

1. Past performance of recent and relevant projects, within the FSM and commensurate with FSM standards within the last ten years preceding the application.
2. Experience of key personnel.
3. Project management techniques, within the FSM and commensurate with FSM standards.
4. Subcontracting plan to use FSM citizen subcontractors.
5. Evidence of business registration in the FSM.

3.8. Notification to Applicants. The DTC&I shall give written notice to all applicants of all the pre-qualified contractors and the types of contracts each is pre-qualified to bid upon.

3.9. Disqualification and Requalification. Once prequalified under this process, a contractor may bid on multiple or successive contracts of the type for which the contractor is prequalified. The DTC&I reserves the right to require requalification at any time and to disqualify any

contractor at any time for failure to perform and/or failure to maintain qualification. An applicant may be disqualified for the failure to perform or for quality issues arising under the contracts, or for failure to demonstrate qualification, but the applicant can reapply at any time. The DTC&I may also require a pre-qualified contractor to resubmit for requalification at any time if there is a reasonable basis for belief that the contractor has failed to comply with any of the mandatory requirements set forth above. Contractors who are pre-qualified for type A-1 and A-2 contracts are required to submit annual reports demonstrating the availability of key personnel or substitutions thereof, disclosing any grounds for disqualification, and continuing confirmation of available bonding capacity. The failure to submit the annual reports from such contractors can be grounds for a change in the pre-qualification status.

PART 4. COMPETITIVE BIDDING PROCESS

- 4.1. Open Bidding Required.** Free and open competitive bidding by sealed bids, as described in this part of the regulations, shall be required before the awarding of any project or construction contract for Infrastructure Development Plan projects, except as provided in subpart 6.1 herein.
- 4.2. Certification of Project Scope.** No announcements for bidding or for letting of a contract for any IDP project shall be made until the project has been: 1) received written approval and acceptance from the relevant state(s) involved and been certified by the PMU of DTC&I, and 2) forwarded to the funding source for approval and, 3) official notification has been received by the Federated States of Micronesia from the funding source that an account for the project has been established. All pending land lease or title issues must be resolved within one hundred twenty (120) days of certification through this completed process and before any announcement or invitation for bids, unless otherwise authorized in writing by the Owner upon consultation with the state(s) and the donor agency.
- 4.3. Packaging of Multiple Projects.** The Contracting Officer has the discretion to package two or more projects for competitive bidding under a single award of contract, in consultation with the Owner and respective State government(s) and, if necessary, the donor organization or development assistance entity, if determined in writing that it is in the

best interests of the Owner and respective State government(s) as well as in the public interest.

4.4. Invitation for Sealed Bids. The open bidding process shall be initiated by the Contracting Officer, who shall publish a call for sealed bids containing, at a minimum, the following information:

- A) In clear terms, the project subject to bid;
- B) The address and deadline for the submission of bids;
- C) The date, time and place for the opening of bids;
- D) The name and address of the Contracting Officer;
- E) The Citizen Bidder Preference definition as set forth herein;
- F) The amount of the Citizen Bidder Preference as set forth herein;
- G) Directions for obtaining copies of any documents such as plans, drawings, and specifications;
- H) The requirements of subpart 4.5.1 herein;
- I) A sworn certification by the bidder as contained in subpart 4.5.3 herein, certifying that the bid is the result of independent price determination;
- J) Bonding and insurance requirements as set forth herein, and
- K) All other requirements as contained in the Bid Documents.
- L) Solicitation Period. The solicitation period during which sealed bids will be accepted from prequalified bidders shall last for a period of no less than 45 days from notification for A-1 and A-2 type Contracts and no less than 30 days from notification for B and C type Contracts.

4.4.1. Sealed Bids. All bids submitted to the Contracting Officer in response to the Invitation for Sealed Bids must be sealed in an inner envelope, and in addition to the bid itself contain the following information:

- A) All information, documents and executed certifications as required by the Bid Documents for the contract for the particular project bid upon, as found in Appendixes A, B, C or D;
- B) The name of, and a detailed description of the nature and scope of work to be performed by, each joint contractor or subcontractor to be engaged by the contractor, and evidence of prequalification as to each contractor, joint contractor and subcontractor;
- C) With respect to a bidder seeking a Citizen Bidder Preference, a statement of submission of bid as a Citizen Bidder and sufficient documentation to demonstrate eligibility to receive the Citizen Bidder Preference.

4.4.2. Product Descriptions. Purchase descriptions, as well as other forms of specifications, must accurately reflect the needs of the project scope and design. Purchase descriptions used in competitive procurement shall not specify a product having features which are peculiar to the product of one manufacturer, and thereby preclude consideration of a product of another company, unless it has been determined in writing by the user that those particular features are essential to the project's requirements, and that similar products of other companies lacking those features would not meet the minimum requirements for the product or service.

4.4.3. Certification of Independent Price Determination. Each bidder must declare under penalty of perjury in a certification document submitted along with the bid that:

- A) The prices in the bid have been arrived at independently without consultation, communication, or agreement with any other bidder, offeror, or competitor for the purpose of restricting or limiting competition;
- B) The prices in the bid have not been knowingly disclosed by the bidder and will not knowingly be disclosed by the bidder prior to opening; and

- C) No attempt has been made or will be made by the bidder to induce any other individual, partnership, firm or corporation to submit or not to submit a bid for the purpose of restricting or limiting competition.

4.4.4. Bidder Responsibility for Examination of Plans, Specification, Site of Work, etc.

The bidder shall examine carefully the site of work contemplated and the proposal, plans, specifications, supplemental specifications, special provisions, all addenda issued, all applicable contract and bid documents and bond forms, all applicable laws and regulations and any other sources of information necessary to make a knowing and fully informed bid. There will be a Pre-Bid Meeting conducted by the Department of Transportation, Communication and Infrastructure (“DTC&I”) in the respective State approximately thirty (30) days prior to the deadline for submission of the bid for type A-1 and A-2 projects, and 15 days for type B and C projects, where questions and concerns can be addressed. If further clarification is necessary, a bidder may file a written Request for Information as noted below in Section 4.4.5. Thereafter, submission of a bid shall be considered as a warranty that the bidder has made the necessary examination and agrees to and is satisfied with the conditions to be encountered in performing the work. Once a bid is submitted, the Bidder is bound by his bid.

4.4.5. Request for Information and Issuing Addenda and Interpretations.

Discrepancies, omissions, error, or doubts as to the meaning of drawings and specifications should be communicated in writing to the Contracting Officer for interpretation and must be received by the Contracting Officer no later than fifteen (15) days prior to the date fixed for bid opening. Any interpretation, if made, whether at the Pre-Bid meeting or thereafter as well as any supplemental instructions will be in the form of a written addendum to the specifications, will be mailed to all pre-qualified bidders at the respective addresses furnished for such purposes, ten (10) calendar days prior to the date fixed for bid opening, and will be placed on the PMU website. Failure of any bidder to receive any such addenda or interpretation shall not relieve such bidder from any obligation under its bid as submitted. All addenda so issued shall become part of the contract documents.

- 4.5. Receipt of Bids.** All pertinent bids, including modifications, shall be submitted to the Contracting Officer at the address contained in the Invitation for Sealed Bids as described in subpart 4.3 herein. Bids must be received prior to the time set for opening, and shall be maintained in a locked receptacle at the office of the Contracting Officer, and shall not be opened prior to the public opening described in subpart 4.7 herein. Prior to bid opening, information concerning the identity and number of bids received shall be made available only to the the Secretary of the Department of Transportation, Communication and Infrastructure. Unidentified bids may be opened solely for the purpose of identification and then only by the Contracting Officer. If a sealed bid is opened by mistake, the person who opened the bid will immediately document his signature and position title and date of opening on the envelope and will deliver it to the Contracting Officer. The Contracting Office will immediately document the incident and will write on the envelope an explanation of the opening, the date and time opened, the invitation for bid number, and his signature. Bids opened by mistake or for identification purposes shall be resealed in the envelope and no information contained therein shall be disclosed prior to the public bid opening.
- 4.6 Modification or Withdrawal of Bids.** Bids may be modified or withdrawn by written notice received by the Contracting Officer not later than the time set for opening of the bids. Modifications or withdrawals received after the time set for opening bids shall not be considered prior to selection. However, if the successful bidder had submitted a late modification, such modification shall be reviewed by the Contracting Officer and if in the judgment of the Contracting Officer it makes the terms more favorable to the FSM Government, it shall be considered.
- 4.7. Bid Opening.** Bids shall be opened publicly, in the presence of all bidders who choose to attend, not less than forty-five (45) days after the final day of advertisement and public notice described in subpart 3.2 herein for A-1 and A-2 type Contracts and thirty (30) days for B and C type Contracts. The bid opening shall take place at the time and place as stated in the Announcement for Sealed Bids as described in subpart 4.4 herein. All bids received may be inspected by any bidder.
- 4.7.1 Selection Committee.** A special committee formed by the Secretary of DTC&I and a non-voting observer from the FSM Department of Justice,

which may, at the discretion of the Secretary of DTC&I, be the Evaluation Committee referenced in Section 3.6 of these regulations, shall act as the Selection Committee for bids and shall be present at the Bid Opening and conduct all bid openings and recording of bids.

4.7.2 Recording of Bids. The bid opening date, general description of the project bid upon, names of bidders, prices bid, and any other information required for bid evaluation, shall be entered in an abstract or record which shall be available for public inspection. The record or abstract shall be completed as soon as possible after the bids have been opened and read. The Contracting Officer shall certify the accuracy of the record or abstract. If the Invitation for Sealed Bids is cancelled before the time set for the bid opening, this fact shall be recorded.

4.8. FSM Citizen Bidder Preferences. For selection purposes only, the bids of prequalified eligible FSM Citizen Bidders shall be reduced in accordance with the following formula:

- A) For all bids for Contracts to be awarded under Subpart 2.4, (Contract B, construction projects costing three million dollars (U.S. \$3,000,000) or less for a specific project at one site), the amount of the bid of each citizen bidder shall be reduced by ten percent (10%).
- B) For all bids for Contracts to be awarded under Subpart 2.5, (construction projects requiring multi-delivery supply contracts costing less than one million dollars (U.S. \$1,000,000) in total and less than one hundred thousand dollars (U.S. \$100,000) for any single delivery, for a period no longer than one year), the amount of the bid of each citizen bidder shall be reduced by fifteen percent (15%).
- C) For all bids for Contracts to be awarded under Subpart 2.2 and 2.3 (single or multiple projects at single or multiple locations, in excess of three million (U.S. \$3,000,000)) there shall be no citizen bidder preference, except for the requirement that the contractor utilize FSM citizen Prequalified Subcontractors in subcontracts for at least twenty percent (20%) of the total Contract Sum.

4.9. Rejection of Bids. The Contracting Officer may reject any bid if there is a sound documented reason. The Contracting Officer shall reject any bid which does not comply with the requirements of the Invitation for Sealed Bids as set forth in subpart 4.4 and the Bid Documents issued as Appendixes “A-1 Pre-Qual”; “A-2 Pre-Qual”; and “A-1 & A-2 Subcontractor Pre-Qual and B & C Pre-Qual” for the project bid upon. Other documented reasons for rejection include:

- A) **Unresponsive.** Any bid that fails to conform to the essential requirements of the Invitation for Sealed bids, such as specifications, delivery or performance schedule, shall be rejected as unresponsive.

- B) **Impermissible Limitations or Conditions.** A bid shall be rejected where the bidder imposes conditions that would modify requirements of the invitation for sealed bids or limit his liability to the government so as to give an advantage over other bidders. For example, bids shall be rejected in which the bidder:
 - 1. Attempts to protect himself against future changes in conditions such as increased costs.
 - 2. Fails to state a price and, in lieu thereof, states that price shall be the “price in effect at the time of delivery”.
 - 3. States a price but qualifies such price as being subject to “price in effect at the time of delivery”.
 - 4. The bidder limits the rights of the government under any contract clause.

- C) **Price.** Any bid may be rejected if the Contracting Officer determines in writing that it is unreasonable as to price.

- D) **Debarred.** Any bid received from any person or firm debarred or ineligible shall be rejected if the period of debarment or ineligibility has not expired.

- E) **Failure to submit Bid Guarantee.** The bid shall be rejected if a bid guarantee is required and the bidder fails to furnish it in

accordance with the requirements of the invitation for sealed bid and the requirements of these regulations.

- F) **Failure to Maintain Prequalified Status.** The bid shall be rejected if the bidder has failed to maintain his prequalified status.
- G) **Public Interest.** The Contracting Officer may in good faith reject any bid for reasons other than those listed above when he determines it is in the public interest to do so.

4.10. Award of Contract. The Contracting Officer shall award the contract for the project being bid upon to the lowest responsible bidder, pursuant to the discretionary powers contained in subpart 4.11 herein. The award shall be made within 60 days after the opening of the bids. If contract is awarded and the successful bidder fails to execute the contract and file acceptable bonds within 15 calendar days, after the bidder has received notice that the contract has been awarded to him, the Contracting Office may, at its option, annul the award of the contract to the successful bidder and declare a forfeiture of the bid guarantee, and may then award the contract to the next lowest responsible bidder or advertise anew for bids pursuant to these regulations. All contracts entered into by the Owner shall be signed by the Secretary of DTC&I and shall follow all procedures mandated by the code of the FSM.

4.11. Discretionary Powers of the Contracting Officer. In the selection of the lowest responsible bidder, the Contracting Officer may:

- A) If the lowest bid is rejected, accept the next lowest remaining responsible bidder or advertise anew for bids pursuant to these regulations;
- B) If two or more bids are the same and lowest, accept the one that is most advantageous to the program of the Infrastructure Development Plan, or accept the bidder currently with the least work volume with the FSM National or State Government; or
- C) Negotiate with the lowest responsible bidder, and only with that bidder, to reduce the scope of work and to award the contract at a price which reflects the negotiated reduction.

4.11.1. Minor Informalities or Irregularities in Bids. A minor irregularity is one that is merely a matter of form and not of substance or pertains to some immaterial or inconsequential defect or variation of a bid, the correction of waiver of which would not be prejudicial to other bidders. A defect is inconsequential when its significance as to price, quantity, quality, delivery or performance is trivial or negligible when compared with the total cost or scope of the work procured. The bidder shall be given an opportunity to cure any minor irregularity or inconsequential defect, or to waive the deficiency whichever is most advantageous to the Owner.

4.11.2. Mistakes before Award. Mistakes include all error other than minor irregularities as described in subpart 4.11.1. In all cases where there is reason to believe that a mistake may have been made, the bidder shall be contacted to verify the bid and to call attention to the suspected mistake. If the bidder claims that a mistake has been made, the matter shall proceed as follows:

- A) The authority to correct bids is limited to bids that, as submitted, are responsive to the invitation for bids, and may not be used to make them responsive.
- B) The Contracting Officer prior to the award may correct any clerical mistake, apparent on the face of the bid.
- C) If there is clear and convincing evidence that a mistake was made and if the bidder requests permission to withdraw the bid, then the bid shall be withdrawn.
- D) The foregoing notwithstanding, if there is clear and convincing evidence of a mistake in the bid as actually intended to be submitted by the bidder, and if the bid, both as corrected and uncorrected, is the lowest received, then the Contracting Officer may correct the bid and not permit its withdrawal.
- E) If there is clear and convincing evidence of a mistake in the bid as actually intended to be submitted by the bidder, and if a correction would result in displacing one or more lower acceptable bids, then the bid shall be corrected upon the bidder's request, otherwise it shall be withdrawn.

- F) If the evidence is insufficient to support any action as described above, then the bid shall stand as submitted.

4.11.3. Disclosure of Mistakes after Award. Mistakes include all errors other than minor irregularities, and include mistakes made by any party to the procurement process. Cancellation or reopening the bidding process usually involves the loss of time, effort, and money spent by the Owner and the bidders in carrying out the procurement process. Awards should not be cancelled or rebid due to mistakes in the process or in the bid unless cancellation or rebidding is clearly in the public interest, such as where the project to be bid upon has been reclassified or packaged together with other similar projects and therefore a whole new solicitation and contract form is required. Changes in scope, design and amount in themselves are insufficient to warrant cancellation or rebidding unless the category of contract (i.e. A-1, A-2, B or C) is changed to a different category with different legal, prequalification and bonding requirements.

- A) When a mistake in a bid is not discovered until after the award, the mistake may be corrected by contract amendment or supplemental agreement if correcting the mistake would make the contract more favorable to the Owner without changing the essential requirements of the contract.
- B) No other corrections or changes may be made unless there is clear and convincing evidence that a mistake in the bid or Invitation to Bid was made, and either that the mistake was mutual or that the unilateral mistake made by the bidder was so apparent that as to have charged the Contracting Officer with notice of the probability of the mistake. In that event, the Contracting Officer may make a determination to rescind the contract or to reform the contract:
 - 1. by deleting the item or items involved in the mistake; or
 - 2. by increasing the price if the contract price, corrected, does not exceed that of the next lowest acceptable bid.
- C) Mistakes disclosed after award shall be processed as follows:

1. The Contractor shall be requested to supply evidence to support the alleged error;
2. If the contractor supplies such evidence, the Contracting Officer shall prepare a written report including the pertinent facts of the bidding process, the evidence supplied by the contractor, other evidence considered by the Contracting Officer, and the opinion or course of action chosen and the reasons therefore.

4.11.4. Bids Exceed Funds, or Funds Available are Increased after Award.

- A) If all bids exceed the available funds and the bid of the lowest responsive and responsible bidder does not exceed those funds by more than 10 percent, and time or economic considerations preclude resolicitation at a reduced scope, the Contracting Officer may negotiate an adjustment of the bid price, including changes in bid requirements, with the lowest responsible bidder in order to bring the bid price within the amount of available funds. The negotiation shall be documented in writing and attached to the bidding documents and procurement record.
- B) If after award, due to mistake by the Owner, the scope and design of the project is substantially changed primarily as to pricing, and time or economic considerations preclude resolicitation with amended specifications, the Contracting Officer may negotiate an adjustment of the bid price, including changes in bid requirements, with the lowest responsible bidder in order to bring the bid price within the pricing required by the scope and design. The negotiation shall be documented in writing and attached to the bidding documents and procurement record.

4.12. Prohibition on Corrupt Practices, Collusion or Advance Disclosure.

All parties and contractors, and subcontractors, including beneficiaries of Infrastructure Development Plan projects as well as bidders, suppliers and contractors for Infrastructure Development Plan contracts shall observe and be bound by the highest standard of ethics during the procurement and execution of such contracts, as set forth herein and consistent with 11 FSMC Section 510 et seq. and 32 FSMC et seq. The Contracting Officer shall have authority to investigate and enforce the

following, in conjunction with referral to the appropriate authorities for any reasonable suspicion that a crime or crimes have been committed:

- A) In the event of a determination that any bidder has engaged, directly or through an agent, in any agreement or collusion among bidders or prospective bidders, the effect of which is to limit or restrain freedom of competition among bidders, including but not limited to price fixing and/or bid rigging, agreeing any manner to bid at any fixed price or to refrain from bidding, the bids of any such bidder or bidders participating in the agreement shall be voided and the prequalification status of the bidder or bidders shall be subject to suspension or revocation; and
- B) In the event of any disclosure by any person of the terms of a sealed bid before the time of opening bids as set forth in subpart 4.8, the bid proceedings shall be declared void and the bidding process shall begin anew; and
- C) In the event of a determination that any bidder has, directly or through an agent, engaged in corrupt, fraudulent, collusive, or coercive practices in competing for the Contract, the bid shall be rejected and the prequalification status of the bidder shall be subject to suspension or revocation.

4.13. Bonding Requirements. Pursuant to the requirements of Article VI (1)(j)(13) (i-iii) of the “Agreement Concerning Procedures for the Implementation of United States Economic Assistance provided in the Compact of Free Association, as amended, Between the Government of the United States of America and the Government of the Federated States of Micronesia” (The Fiscal Procedures Agreement), the minimum bonding requirements for all Compact of Free Association funded or supported Infrastructure Development Plan projects, or such other projects as required by the conditions of funding, shall be as follows:

- A) **Bid Security.** Each bidder shall guarantee an equivalent of five percent (5%) of the bid price for A-1 and A-2 contracts and one percent (1%) of the bid price for B and C contracts pursuant to a bid guarantee that complies with the requirements of this subsection. The bid guarantee shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument

accompanying the bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified. Examples of sufficient Bid Guarantees are, but not limited to:

1. Cash
2. Certificate of Deposit issued by an FDIC insured Bank and made payable to the “FSM Treasury”.
3. Certified check issued by an FDIC insured Bank and made payable to “FSM Treasury”
4. Cashiers Check issued by an FDIC insured Bank and made payable to “FSM Treasury”
5. Bidder’s bond executed by the bidder and an approved surety insurer, authorized to do business in the United States or the FSM, and made payable on demand to “FSM Treasury”; and
 - i If the bidder is a partnership, all partners must sign the bond or evidence of a formal partnership agreement must be submitted.
 - ii If the bidder is a corporation, evidence in the form of a corporate resolution authorizing the corporate representative to execute the bond must be submitted.
 - iii If the bidder is a joint venture, all parties to the joint venture must sign the bond or evidence in the form of a joint venture agreement must be submitted showing the authority of the bidder to sign the bond on behalf of the joint venture.

All Bid Guarantees, except those of the three lowest bidders, shall be returned immediately following the opening of the bids and checking and evaluation of the bids. The successful bidder’s bid guarantee shall be returned after a satisfactory performance bond and payment bond has been provided to the Contracting Officer and the contract has been executed. The retained bid guarantees of the other two bidders shall

be returned within seven working days after execution of the contract with the successful bidder.

- B) **Performance Bond.** The contractor shall execute a Performance Bond for one hundred percent of the Contract price, for Contracts specified in subparts 2.2 and 2.3. A performance bond is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract. The payee of such bond shall be listed as "FSM National Government" and the FSM National Government shall be entitled to all rights of enforcement upon such bond in the event of failure of the Contractor to perform its obligations under the contract.

- C) **Payment Bond.** The contractor shall execute a Payment Bond for one hundred percent of the Contract Price, for contracts specified in subparts 2.2 and 2.3. A Payment Bond is one executed in connection with a Contract to assure the lawful payment of all persons supplying labor and materials in the execution of the contract. The payee of such bond shall be listed as "FSM National Government" and the FSM National Government shall be entitled to all rights of enforcement, for the benefit of all persons supplying labor and materials to the contractor, upon such bond in the event of failure of the Contractor to pay all persons supplying labor and materials in the execution of the contract.

- D) **Bonding or Surety Companies.** The Owner shall maintain a list with contact details of bonding or surety companies who issue performance and payment bonds for construction contracts.

- E) **Other Security.** In lieu of a bond, the contracting Officer can accept irrevocable letters of credit, guaranty agreements, or other sufficient forms of security which satisfy the requirements of 4.14(b) and (c).

- F) **Retainage.** For contracts under Subpart 2.4 and 2.5, no performance or payment bonds shall be required but the Contracting Officer shall require retainage of no less than twenty percent of the full contract price.

PART 5 – PETITIONING AGENCY ACTIONS; ALTERNATIVE DISPUTE RESOLUTION PROCEDURES AND LEGAL REVIEW

These regulations follow Title 17 FSMC Section 108 et seq. for the purposes of hearings for any person aggrieved by the Contracting Officer's action in any part of awarding a contract or pre-qualifying a bidder in accordance with these regulations. For disputes regarding any portion of a contract's performance, these regulations introduce mandatory Alternative Dispute Resolution (ADR) to resolve such disputes. In the event a contract dispute cannot or is not resolved through ADR, there is a mechanism for judicial processes. All contracts under these IDP Regulations shall have mandatory provisions contained therein which subject the contracting parties to the exclusive personal and subject matter jurisdiction of the FSM Supreme Court and a binding election for the Regulations and Laws of the Federated States of Micronesia.

- 5.1. Agency Actions.** Any person aggrieved by the actions of the Contracting Officer, the PMU or DTC&I is entitled to all the rights, procedures and protections under Title 17 FSMC, Chapter 1. These include the right to judicial review of the hearing officer's findings of fact and decision as provided in 17 FSMC Section 111.
- 5.2. Restrictions on actions under subpart 5.1.** The provisions of subpart 5.1 of these regulations apply only to disputes not related to the performance of a contract let under these regulations.
- 5.3. Mandatory requirements for subpart 5.1.** Any protest that could or should be brought under subpart 5.1 of these regulations must proceed to finality according to Title 17 FSMC, Chapter 1 before the matter can be reviewed by a court of law.

Where a written protest against making an award is received, the award shall not be made until the matter is resolved unless the Contracting Officer determines in a written statement that:

- A)** The procurement is urgently required and funding is subject to lapse if the procurement is not made; or
- B)** Delivery or performance will be unduly delayed by the failure to make the award promptly; or

C) A prompt award will be advantageous to the government.

5.4. **Challenge of Contract Award.** Any citizen taxpayer in the Federated States of Micronesia may seek to enjoin a public contract awarded under these regulations to the same extent and in the same manner as such remedy is available to bona fide unsuccessful bidders on the contract under these procurement procedures.

5.5. **Contract Disputes; Alternative Dispute Resolution (ADR) Procedures.** Disputes between the Owner and any contractor arising under any contracts awarded pursuant to these regulations shall be subject to mandatory ADR procedures. These procedures for ADR shall be agreed upon by the parties but shall follow a recognized, yet simplified process similar to those proposed by the American Arbitration Association and the International Chamber of Commerce. The basic ADR which is mandatory under these regulations is as follows:

A) The claimant shall file a “Notice of Alternative Dispute Resolution Process” (Notice) with the Contracting Officer.

B) The Notice shall contain an election of mediation. Mediation generally involves a neutral, objective third party to assist the parties in pursuit of their own resolution.

C) The parties will agree on a mediator to hear their matter. If a mediator cannot be agreed upon by the parties, they will each choose one representative to meet with the other(s) to choose a mediator for the case. No person shall serve as a mediator in any dispute in which that person has any financial or personal interest in the result of the mediation. The mediator shall disclose any circumstances likely to create a presumption of bias or interest in the outcome of the proceedings, or prevent a prompt meeting with the parties.

D) The parties, in the presence of the mediator, will set a prompt schedule for submission of documents to the mediator. Parties at mediation will be represented by a person with authority to settle the case. A mediator may conduct separate private meetings with each party in order to improve the mediator’s understanding of the respective positions of each party.

- E) Mediation shall be terminated if a settlement agreement is executed, if the mediator finds that no further efforts are worthwhile, or if any party, by written declaration, refuses to mediate any further. In the event of a settlement, the parties shall file the appropriate notice with the Contracting Officer and a copy of the settlement. Any settlement reached through mediation shall be binding on the parties. The Supreme Court of the Federated States of Micronesia shall have full power and authority to enforce the settlement agreement and shall have continuing jurisdiction until all terms of the settlement agreement are finalized.
- F) Costs of mediation will be split equally among the parties.
- G) In the event of an unresolved mediation of a disputed matter, the claimant may proceed with civil litigation in the FSM Supreme Court under the regulations and laws of the Federated States of Micronesia.

5.6 **Mandatory Requirements under Subpart 5.5.** Any and all contract disputes under these regulations that could or should be litigated shall proceed to finality according to Subpart 5.5 prior to bringing a civil litigation action in the Court.

5.7 **Effect of Alternative Dispute Resolution.** The courts of the Federated States of Micronesia shall recognize and give full force and effect to the dispute resolution methods contained in Part 5 in accordance with Public Law No. 14-48.

PART 6 - EXEMPTIONS

6.1. **Exemption from Competitive Bidding.** The Contracting Officer may exempt a project from the competitive bidding process in limited circumstances as set forth below, such as noncompetitive proposals through solicitation of only one source or when competition is determined inadequate after soliciting a number of sources. This method shall be used only when the award of a contract is not feasible by the competitive sealed bidding process and one of the following circumstances is applicable:

- A) the item or service is available only from a single source;
- B) public exigency or emergency will not permit a delay resulting from competitive solicitation;
- C) competition is determined to be inadequate after the solicitation of a number of sources; or
- D) the public interest would not be served by following the bidding process due to the type or complexity of the financial, logistical, legal or technical arrangements that must be met, and the situation is critical or unique.

6.2. Exemption from FSM Citizen Bidder subcontractor requirements. If the Contractor in good faith and through best efforts is unable to identify FSM citizen Prequalified Subcontractors with capacity and capability to perform the Work sufficient to meet the 20% requirement set forth in Subparts 2.2, 2.3, 2.4 and 2.5, the Contractor shall include such subcontractors to their maximum feasible capacity and capability, shall indicate the percentage of the total Contract Sum represented by such subcontractors, shall provide the Contracting Officer with a written explanation of its efforts to identify such subcontractors and its reasons for lack of success in meeting the 20% requirement, and shall request approval by the Contracting Officer of that lesser percentage. The Contracting Officer will investigate thoroughly before granting any such exemption from the 20% requirement. Failure of the Contracting Officer to reply promptly shall not be deemed to constitute approval of such an exemption.