



AMERICAN SAMOA
COMMUNITY COLLEGE

PROCUREMENT RULES

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AMERICAN SAMOA COMMUNITY COLLEGE
PROCUREMENT RULES

I. GENERAL PROVISIONS

13.0101 Short Title

The rules codified in this chapter shall be known and cited as the "American Samoa Community College Procurement Rules."

13.0102 Authority

The rules in this chapter are promulgated pursuant to the authority granted under ASCA "Section" 12.0214 and ASCA "Section" 16.2002(7).

13.0103 Purpose

The purpose of this chapter is to prescribe uniform rules necessary to fully implement ASCA "Section" 12.0214 and ASCA "Section" 16.2002(7).

13.0104 Definitions

As used in this chapter, the words in this section shall have the following meanings unless the context otherwise requires:

- A. "ASCC" means the American Samoa Community College.
- B. "Board" means the Board of Higher Education, which is the governing body of the American Samoa Community College.
- C. "Chief Procurement Officer" means the head of the procurement office for the American Samoa Community College.
- D. "Construction" means the process of building, altering, repairing, improving, or demolishing of a structure or building, or improvements commonly known as "capital improvements". It does not include the routine maintenance of existing structures, buildings, or real property.
- E. "Contract" means all types of agreements, regardless of what they may be called, for procurement.

- F. "Contracting Officer" means the contracting officer for the American Samoa Community College.
- G. "Contractor" means a person having a contract with the American Samoa Community College.
- H. "Division" means a unit of the ASCC operation as a whole, headed by either a dean or a director who reports directly to the President.
- I. "Employee" means an individual receiving a salary or wages from the American Samoa Community College.
- J. "Goods" means all property, including but not limited to equipment, materials, supplies, and other tangible personal property of any kind or nature, printing, insurance, leases of real and personal property, and sale or other disposal of real and personal property of any kind or nature.
- K. "Grant" means the furnishing by the government of assistance, whether financial or otherwise, to any person to support a program authorized by law.
- L. "Invitation for bids" means all documents, whether attached or incorporated by reference, utilized for soliciting bids.
- M. "Person" means an individual, sole proprietorship, partnership, joint venture, corporation, other unincorporated association, or private legal entity.
- N. "President" means the President of the American Samoa Community College.
- O. "Procurement" means buying, purchasing, renting, leasing or acquiring construction, goods, or services. It also includes all functions that pertain to the obtaining of construction, goods or services, including description of requirements, selection and solicitation of sources, preparation and award of contracts and all phases of contract administration. It does not include employment contracts with individuals to be supervised by ASCC employees.
- P. "Reasonable", in reference to a bidder, means a person whose bid is equitable, fair, and suitable, and is not excessive or inappropriate in any material respect.
- Q. "Responsible", in reference to a bidder, means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.
- R. "Responsive", in reference to a bidder, means a person who has submitted a

bid which conforms in all materials respects to the invitation for bids.

- S. "Rules" mean rules which have been adopted under authority of this chapter in accordance with the provisions of the Administrative Procedures Act, ASCA "Section" 4.1001 et. seq.
- T. "Services" means the furnishing of time, labor, or effort by a person other than an employee, and not involving the delivery of a specific end product other than reports, plans, and incidental documents.

13.0105 Requirement of Good Faith

This chapter requires all parties involved in the negotiation, execution, performance, or administration of ASCC contracts to act in good faith.

13.0106 Applicability

- A. Except as otherwise specified by law this chapter applies to every expenditure of public funds including federal assistance, moneys and enterprise funds under any contract. This chapter also applies to the disposal of ASCC goods and properties.
- B. This chapter does not apply to either grants by ASCC or assignments by ASCC to specific divisions, departments, programs or other bodies within ASCC such as the Student Government Association, clubs, etc.
- C. This chapter may not prevent any ASCC body, such as those referenced in 13.0106(B), from complying with the terms and conditions of any grant, gift, bequest, or cooperative agreement except that no such agreement shall be used to authorize sole-source procurement in violation of 13.0115 (E)(2)(a).
- D. Where there is a discrepancy between the provisions of this Chapter and the laws of the Territory, the laws shall have precedence over these rules. These rules shall have precedence over executive orders or other executive branch issuances.

II. PROCUREMENT ORGANIZATION

13.0108 Chief Procurement Officer

- A. The President shall be the Chief Procurement Officer.

B. All rights, duties, and authority relating to the procurement of construction, goods, services, and the management, control, warehousing, sale, and disposal of construction, goods and services are vested in and exercised by the Chief Procurement Officer.

Ⓒ The Chief Procurement Officer is authorized to:

1. Develop, for approval by the Board, rules and procedures governing the internal functions of his/her office. - "
2. Adopt and maintain rules governing the procurement, management, control, and disposal of all construction, goods, and services procured by ASCC. A separate manual of all procedures shall be maintained or caused to be maintained by the Chief Procurement Officer. The manual of rules and procedures shall be open to inspection and copying during normal business hours.
3. Except as otherwise specifically provided in this Chapter, in accordance with rules adopted:
 - a. procure or supervise procurement of all construction, goods, and services needed by ASCC;
 - b. exercise general supervision and control over all inventories of goods belonging to ASCC;
 - c. sell, trade, or otherwise dispose of goods, surplus to the ASCC, and serve as the ex-officio member of the ASCC Committee for Surplus Property responsible for acquiring surplus federal property under the Federal Property and Administrative Services Act, as amended; and
 - d. establish and maintain programs for the inspection, testing, and acceptance of construction, goods, and services.
4. Assist in providing technical assistance, including training, necessary to ensure uniform implementation of the rules of this chapter.
5. Supervise the conduct of management reviews to monitor compliance with the rules in this Chapter and initiate corrective action, as required.

13.0109

Decentralized Procurement Authority

A. Delegation of Authority. The Chief Procurement Officer may delegate

authority to execute and administer contracts to a procurement officer who is responsible for administering procurement on behalf of ASCC under the provisions of this Chapter. The Chief Procurement Officer may delegate authority to supervise and control inventories belonging to ASCC. The Chief Procurement Officer may also suspend, limit, or revoke any delegation of authority made under the provisions of this subsection.

13.0110 Board Review

The Board shall review and approve the procurement of all construction, goods, and services which exceed \$25,000 prior to the execution of the contracts. The Board may also review contracts of lesser value at its discretion. /

13.0111 Duties of the Attorney General and Legal Counsel

- A. The Attorney General, or such officer as the Attorney General may designate, may serve as legal counsel and provide legal services to the Chief Procurement Officer. ASCC may otherwise retain legal counsel to provide legal services to the Chief Procurement Officer.
- B. The Attorney General or such other legal counsel, shall approve all ASCC contracts for the procurement of construction, goods, and services exceeding \$10,000 as to legal sufficiency prior to execution.

13.0112 Duties of the Chief Procurement Officer

The Chief Procurement Officer shall develop, issue and maintain procedures governing the preparation and initiation of requisitions for the purchase of construction, goods, and services by ASCC in conformity with these rules.

13.0113 Duties of the ASCC Budget Officer

The Budget Officer shall certify as to the availability of funding for all requisitions involving the expenditure of public funds, irrespective of source.

- A. It shall be the policy of ASCC to identify in advance, to the extent feasible, planned purchases and procurement actions for each fiscal year to:
 - 1. Avoid the purchase of unnecessary or duplicative goods or services;
 - 2. Consider consolidating or breaking out procurement requirements to obtain a more economical purchase;

3. Consider lease versus purchase alternatives to determine the most economical approach; and
 4. Insure adequate resources are available and sufficient time is allotted to insure delivery of needed goods and services.
- B. The head of each Division initiating requisitions shall submit to the Chief Procurement Officer, by October 1st of each year, a list of purchases planned for the fiscal year, except for small purchases, which list shall include:
1. A description of the purchase;
 2. Estimated dollar amount;
 3. Required delivery date; and
 4. Estimated date for requisition initiation.
- C. The list of planned purchases shall be updated on a quarterly basis by the head of each Division initiating the requisitions.

13.0114

Definitions

As used in this article, the following definitions shall apply:

- A. "Bidding time" means the time between the issuance of solicitation and opening of bids or the due date for proposals.
- B. "Cost-reimbursement contract" means a contract under which a contractor is reimbursed for costs which are allowable and allocated in accordance with the contract terms and a fee, if any.
- C. "Firm-fixed-price contract" means a contract under which a contractor agrees to perform the work required for a price which is not subject to any adjustment.
- D. "Offeror" means a person who has submitted a proposal in response to a request for proposal.
- E. "Purchase description" means the words used in solicitation to describe the construction, goods, or services to be procured.
- F. "Request for proposals" means all documents utilized for soliciting proposals under the negotiation method of procurement.

Methods of Source Selection

- A. It is the policy of ASCC to conduct all purchases and procurement actions in a manner that provides maximum open free competition.
- B. Unless otherwise authorized by law, all ASCC contracts shall be executed by competitive sealed bidding, in accordance with 13.0115(D), except as provided in:
 - 1. Subsection 13.0115(C) for small purchases;
 - 2. Subsection 13.0115(E) for negotiation; or
 - 3. Subsection 13.0115(F) for emergency procurement.
- C. Small purchases. Any procurement not exceeding \$10,000 including purchases made using imprest funds shall be made using simplified small purchase procedures promulgated by the Chief Procurement Officer. Procurement requirements may not be artificially divided so as to constitute a small purchase under this subsection and circumvent other source selection rules required under this section.
- D. Competitive Sealed Bidding.
 - 1. Conditions for use. Contracts shall be awarded by competitive sealed bidding except as provided in 13.0115(B). For this method to be used, the following conditions shall be present:
 - a. A clear, complete, accurate and realistic purchase description or specification for the good or service to be procured is available;
 - b. The purchase description or specification does not contain unnecessarily restrictive requirements or features which may unduly limit the number of bidders;
 - c. Two or more responsible bidders are willing and able to submit bids for the procurement; and
 - d. The procurement requirements can be defined with sufficient accuracy so that a firm-fixed-price contract can be executed, and selection of the successful bidder can be made principally on the basis of price.
 - 2. Invitation for Bids. An invitation for bids shall be issued and shall include:
 - a. Invitation for bids number:

- b. Date of issuance:
 - c. Name, address, and location of issuing office including room and building where bids must be submitted:
 - d. Date, hour, and place of bid opening;
 - e. A purchase description and/or specification for the goods or services to be procured in sufficient detail to permit full and open competition and allow bidders to properly respond to the invitation. Descriptions and specifications shall conform to the requirements in 13.0122:
 - f. Quantity of goods or services to be furnished:
 - g. Time, place, and method of delivery or performance requirements:
 - h. All requirements bidders must fulfill and other factors (if any) to be used in evaluating bids:
 - i. Clauses required by 13.0125(D) or 13.0128;
 - j. Bonding requirements for construction as required by 13.0125(D);
 - k. Local preference evaluation factors when required by 13.0132; and
 - l. Optional Form (OF) 17, sealed bid label.
3. Public Notice. Public notice of the invitation for bids shall be made at least one week prior to the issuance date of the invitation. Such notice shall be furnished to all suppliers of the goods or services being procured who have requested to be included in bidders mailing lists; shall be published in a newspaper of general circulation in American Samoa, and foreign newspapers if required; and displayed at the office of the Chief Procurement Officer, the U.S. Post Office, and at other appropriate public places. The notice shall contain:
- a. Invitation for bids number;
 - b. Adequate description of the types and quantities of goods and services to be furnished; and
 - c. Information on how to obtain copies of the invitation for bid, including any charges as required by 13.0125(A).

4. Bidding time: A reasonable time for prospective bidders to prepare and submit bids shall be allowed in all invitations, consistent with the needs of ASCC. A bidding time of 30 calendar days shall be provided, unless the Chief Procurement Officer determines a shorter period is reasonable and necessary.
5. Bidders Mailing List. A list of potential bidders and suppliers requesting copies of invitations for bids in response to public notices shall be compiled and maintained by the Chief Procurement Officer.
6. Bid Receipt. Bids, when received at the location specified in the invitation for bids, prior to the time set for opening, shall be kept unopened and secure in a locked receptacle. Bids which are opened by mistake shall be resealed in the envelope and the person who opened the bid shall write his signature and title on the envelope and deliver it to the Chief Procurement Officer. No information contained in the bid shall be disclosed prior to bid opening.
7. Bid opening. The bid opening official designated by the Chief Procurement Officer shall determine when the time established for bid opening in the invitation for bids has arrived and shall so declare to those present including at least one or more witnesses from ASCC. All bids received prior to the time set for bid opening shall then be publicly opened, read aloud to the persons present, and recorded as to the name of the bidder and the amount of each bid.
8. Recording of Bids. The invitation for bids number, bid opening date, names and addresses of bidders, prices bid, and bid evaluation as may be required by 15.0132, shall be entered in an abstract or record and shall be open to public inspection by interested persons. The record shall be completed as soon as practicable after the bid opening and the bid opening official shall certify the accuracy of the record.
9. Bid Acceptance and Evaluation. Bids shall be unconditionally accepted without alteration or correction except as authorized under paragraph (10) or (11) of this subsection. Bids shall be evaluated based on the requirements set forth in the invitation for bids, which may include criteria as is necessary to reasonably permit a determination as to the acceptability of the bid. No criteria may be used in bid evaluation that are not set forth in the invitation for bids.
10. Bid Rejection. A bid may be rejected for any of the following reasons, as determined in writing by the Chief Procurement Officer:
 - a. Failure to conform to essential requirements of the invitation for bids such as specifications or time of delivery;

b. Imposition of conditions or restrictions in the bid which modify requirements of the invitation or limit the bidders liability to ASCC. For example, bids shall be rejected in which the bidder:

- I. Protects against future changes in conditions, such as increased costs:
- II. Fails to state a price and indicates that price shall be the price in effect at time of delivery:
- III. States a price but qualifies it as subject to price in effect at time of delivery; or
- IV. Limits the rights of ASCC under any invitation for bids provision. A low bidder may be requested to delete objectionable limitations from a bid provided such conditions do not affect price, quantity, quality, or delivery of the goods or services offered.

c. Unreasonableness as to price:

d. A low bid from a non-responsible bidder as determined in accordance with 13.0117.

e. Failure to furnish a bid security as required by 13.0125.

11. Correction or withdrawal of bids; Cancellation of Awards. Correction or withdrawal of inadvertently erroneous bids, before or after award, or cancellation of awards or contracts based on such bid mistakes must be supported by a written determination made by the Chief Procurement Officer and approved by the Attorney General or other legal counsel. After bid opening, no changes in bid price or other provisions of bids prejudicial to the interest of ASCC or fair competition shall be permitted. A suspected bid mistake requires ASCC to request confirmation of the bid. Where there is an appearance of an obvious mistake, the bidder shall be requested to reconfirm the bid prior to award. In such an instance, if the bidder alleges an error, ASCC shall only permit correction of the bid or withdrawal of the bid in accordance with subparagraph (A) or (B) below.

a. Correction of Bids. Correction of a bid shall only be permitted when:

- I. An obvious clerical mistake is clearly evident from examining the bid document. Examples of such mistakes are: obvious misplacement of a decimal point; errors in extension of unit

prices; errors in addition; and obvious mistakes in designation of a unit; or

- II. The otherwise low bidder alleges a mistake and the intended bid is evident from the bid document or is otherwise supported by clear and convincing evidence in the form of bid worksheets or other information which supports the bid intended and the bid, as corrected, remains the low bid. A low bidder may not be permitted to correct a bid mistake resulting from an error in judgment.
- b. Withdrawal of bids. Withdrawal of a bid shall only be permitted where the otherwise low bidder alleges a mistake and there is clear and convincing evidence as to the existence of a mistake but not as to the bid intended.
 - c. Cancellation of awards. Cancellation of awards or contracts shall only be permitted when:
 - I. Evidence as to the existence of the mistake is not discovered until after award;
 - II. There exists no clear and convincing evidence to support the bid intended; and
 - III. Performance of the contract at the award price would be unconscionable.
12. Award. A contract shall be awarded with reasonable promptness by written notice to the lowest reasonable, responsive, responsible bidder whose bid fully meets the requirements of the invitation for bids and the rules set forth in this chapter. Unsuccessful bidders shall be promptly notified.
13. Negotiation after Opening of Bids. After the opening of bids, if all bids exceed available funds, and the bid of the lowest responsive and responsible bidder does not exceed those funds by more than 5% and time and economic considerations preclude re-solicitation of the work at a reduced scope, the Chief Procurement Officer is authorized to negotiate an adjustment of the bid price, including changes in invitation for bid requirements, with the lowest responsive and responsible bidder in order to bring the bid price within the amount of the available funds. The negotiation of the price and changes in bid requirements shall be documented in a written determination made by the Chief Procurement Officer and included in the contract file.

E. Negotiation

1. Competitive

a. Conditions for Use. Contracts may be awarded by competitive negotiation when the Chief Procurement Officer determines in writing that the use of competitive sealed bidding under 13.0115(D) is not practicable because of the nature of the goods or services to be procured.

b Requests for Proposals. A request for proposals shall be issued and shall include:

I. Request for proposal number:

II. Date of issuance:

III. Name, address, and location of issuing office including address for submission of proposals:

IV. Date for submission of proposals:

V. Description of the required goods or services to be procured:

VI. Evaluation criteria to be used by ASCC in evaluating proposals on a technical and cost basis. The relative importance of the evaluation criteria shall be stated so all offerors clearly understand the basis for award:

VII. Instructions for offerors to use in submitting technical and cost proposals, including number of copies required:

VIII. Quantity of goods or services to be furnished:

IX. Time, place, and method of delivery or performance requirements; and

X. Clauses required by 13.0128.

c. Public Notice. Public notice shall be made in accordance with 13.0115 (D) (3).

- d. Proposal Times. Proposal times shall conform to the requirements in 13.0115 (D) (4).
- e. Offerors Mailing List. A list of prospective offerors shall be prepared in accordance with requirements of 13.0115(D) (5).
- f. Receipt of Proposals. Proposals shall be opened and used only by ASCC personnel or agents authorized to participate in evaluation. No information contained in a proposal shall be disclosed to the public until after contract award. Proposals shall be protected so as to avoid disclosures of contents to competing offerors.
- g. Evaluation. Proposals shall be evaluated by ASCC in accordance with the evaluation criteria contained in the request for proposals. No other criteria may be used. The results of the evaluation shall be documented and a determination shall be made by the Chief Procurement Officer of those responsible offerors whose proposals are reasonably susceptible of being selected for award. The determination shall be included in the contract file.
- h. Discussions. Discussions shall be conducted with those responsible offerors whose proposals are determined by the Chief Procurement Officer to have a reasonable chance of being selected for award. These discussions shall be conducted for the purpose of obtaining clarification from the offeror on its proposal to ensure full understanding of, and responsiveness to, the request for proposal requirements. Discussions shall be conducted individually with each offeror and care shall be exercised to ensure that no information derived from competing offerors' proposals is disclosed. All offerors with whom discussions are conducted shall be afforded the same time period to revise their proposals and submit a best and final offer to ASCC based on the discussions.
- i. Final Offers. Best and final offers received from offerors shall be evaluated by ASCC using the evaluation criteria contained in the request for proposals and the results shall be documented and included in the contract file.
- j. Award. Award shall be made to the responsible offeror whose proposal is determined in writing by the Chief Procurement Officer to be most advantageous to ASCC considering price and the evaluation criteria contained in the request for proposal. Unsuccessful offerors shall be promptly notified.

2. Noncompetitive.

- a. Conditions for Use. Contracts may be awarded without competition when the Chief Procurement Officer determines in writing that award of a contract is not feasible under small purchase, competitive sealed bidding, or competitive negotiation procedures and that there is only one source available to furnish the required construction, goods, or services. The written determination shall be prepared by the requisition initiator and shall contain the following information:
 - I. The unique capabilities of the source that are required, why they are required, and the degree of consideration given to other sources;
 - II. The facilities or equipment of the source that are required, why they are required and if they are unavailable from other sources;
 - III. Whether the work is a continuation of a contract work previously performed by the source and the additional time, expense, or duplication of effort required to bring another source up to that level;
 - IV. Whether drawings or specifications suitable for competitive sealed bidding or competitive negotiation are available. If unavailable, explain why and the time and expense required to develop them; and
 - V. Other sources given consideration and specific reasons why they lack qualifications required for the procurement.

F. Emergency procurement

1. Conditions for use. Notwithstanding any other provision of this chapter, the Board may make or authorize ASCC to make an emergency procurement when there exists a threat to public health, welfare, or safety under emergency conditions as defined under section 26.0105 (d) ASCA. An emergency procurement must be as competitive as practicable under the circumstances.
2. Documentation. A written determination describing the basis for the emergency, the extent of competition obtained, and the basis for selection of a particular contractor shall be prepared, reviewed by the Attorney General or other legal counsel, and approved by the Board

before contract award. The determination shall be included in the contract file.

13.0116

Cancellation of Solicitations

An invitation for bids or request for proposals may be cancelled, and any or all bids or proposals may be rejected, when such action is determined in writing by the Chief Procurement Officer to be in the best interest of ASCC based on:

- A. Inadequate or ambiguous specifications contained in the solicitation;
- B. Specifications which have been revised;
- C. Goods or services being procured which are no longer required;
- D. Inadequate consideration given to all factors of cost to ASCC in the solicitation;
- E. Bids or proposals received indicate that the needs of ASCC can be satisfied by a less expensive good or service; or
- F. All otherwise acceptable bids or proposals received are at unreasonable prices; or
- G. Bids were collusive (see 13.0138 (I)).

13.0117

Qualifications and Duties

- A. Responsibility of Bidders and Offerors. Awards shall be made only to responsible contractors.
 - 1. Responsibility factors. To be determined responsible, a prospective contract must:
 - a. Have adequate financial resources to perform the contract, or the ability to obtain them;
 - b. Be able to comply with the required delivery or performance schedule;
 - c. Have a satisfactory performance record;
 - d. Have satisfactory record of integrity and business ethics;

- e. Have the necessary organization, experience, and skills, (or the ability to obtain them), required to successfully perform the contract;
 - f. Have the necessary production, construction, and technical equipment and facilities, (or the ability to obtain them); and
 - g. Be otherwise qualified and eligible to receive an award under applicable laws and rules.
2. Obtaining information. Prior to award, the Chief Procurement Officer or other procurement officer delegated authority to execute and administer a contract shall obtain information from the bidder or offeror necessary to make a determination of responsibility using the factors in paragraph (1) of this subsection. The unreasonable failure of a bidder or offeror to promptly supply information regarding responsibility may be grounds for a non-responsibility determination under paragraph (4) of this subsection. Information furnished by a bidder or offeror pursuant to this paragraph may not be disclosed outside of the office of the Chief Procurement Officer without prior written consent by the bidder or offeror.
3. Responsibility determination. The signing of a contract shall constitute a determination that the prospective contractor is responsible.
4. Non-responsibility determination. When a bid or proposal on which a contract award would otherwise be made is rejected because the prospective contractor is found to be non-responsible, a written determination shall be signed by the Chief Procurement Officer or other procurement officer delegated authority to execute the contract and shall state the basis for the determination. The determination shall be placed in the contract file.
- B. Pre-qualification. Prospective suppliers of goods or services may be pre-qualified for particular types of construction, goods, and services when determined necessary by the Chief Procurement Officer. Opportunity for qualification before solicitation shall be afforded to all suppliers. Solicitation mailing lists of potential contractors shall include but shall not be limited to pre-qualified suppliers.

13.0118

Types of Contracts

- A. Use of a cost-plus-a-percentage-of-cost and percentage of construction cost method of contracting are prohibited.
- B. Normally, a firm-fixed-price contract shall be used unless use of a cost reimbursement contract is justified under subsection (C) of this section.
- C. A cost reimbursement contract may be used when the Chief Procurement Officer determines in writing that:
 - 1. Uncertainties in the work to be performed make the cost of performance too difficult to estimate with the degree of accuracy required for a firm-fixed-price contract:
 - 2. Use of a firm-fixed-price contract could seriously affect the contractor's financial stability or result in payment by ASCC for contingencies that never occur: or
 - 3. Use of a cost reimbursement contract is likely to be less costly to ASCC than any other type due to the nature of the work to be performed under the contract.
- D. The Chief Procurement Officer shall develop, issue, and maintain procedures for the preparation of contract documents.

V. SPECIFICATION

13.0119

Definitions

As used in this article, the following definition shall apply:

- A. "Specification" means any description of the physical or functional characteristics, or of the nature of a supply, service, or construction item. It may include a description of any requirement for inspecting, testing, or preparing a good, service, or construction item for delivery.

13.0120

Duties of the Chief Procurement Officer

- A. The Chief Procurement Officer shall be responsible for monitoring the use of specifications for construction, goods, and services to be procured.

- B. The Chief Procurement Officer may delegate this responsibility in writing to an official who has been delegated authority to execute and administer contracts.

13.0121 Maximum Practicable Competition

All specifications shall be written to promote overall economy for the purposes intended, encourage maximum competition in satisfying ASCC's minimum needs, and shall not be unduly restrictive of competition.

13.0122 Use of Specifications

- A. Specifications shall not be written so as to specify a particular product, or particular feature of a product peculiar to one manufacturer unless that particular product, or feature is essential to ASCC's requirements and products or other companies lacking the particular feature would not meet the minimum needs of ASCC.
- B. Specifications shall, whenever practicable, include a description of the qualitative nature of the construction material, good, or service to be procured and, when necessary, set forth those minimum essential standards and characteristics to which it must conform to satisfy its intended use.
- C. When it is impracticable or uneconomical to make a clear and accurate description of the required good or service, a "brand name or equal" description may be used as provided in 13.0123 as a means to define the performance or other salient characteristics of the requirement.

13.0123 Brand Name or Equal Provision

- A. "Brand name or equal" descriptions shall be used only when it is determined that it is impracticable or uneconomical to make a clear, accurate, and detailed description of ASCC's requirements without referring to a particular product.
- B. "Brand name or equal" descriptions used in specifications shall set forth those salient physical, functional, or other characteristics of the referenced product which are determined to be essential to meet the minimum needs of ASCC. Such descriptions shall include:
 - 1. Complete identification of the item required.

2. Applicable model, make, or catalog number for each brand name referenced, and identity of the commercial catalog in which it appears.
3. Name of manufacturer, producer, or distributor of each brand name product referenced and address; and
4. Instructions for bidders or offerors to furnish for an "equal" product to be offered, the name of the product, manufacturer, model number, and all other information required for ASCC to determine that the offered product fully meets the salient characteristic requirements listed in the "brand name or equal" description.

13.0124

✓ Specifications Prepared by Architects and Engineers

The requirements of this article shall apply to all specifications prepared by architects and engineers for public contracts.

VI. PROCUREMENT OF CONSTRUCTION AND ARCHITECT-ENGINEER SERVICES

13.0125

Construction

A. Invitations for bids.

1. Deposit. The Chief Procurement Officer, or other procurement officer delegated authority to execute and administer contracts, shall determine the amount of deposit required for potential bidders to obtain the invitation for bids.
2. Contents. The invitations for bids shall be prepared in accordance with 10.231 (d) (2). In addition, the following additional items shall be included in the form prescribed by the Chief Procurement Officer.
 - a. Notice to bidders. General information regarding project information.
 - b. Instructions to bidders. Information on the preparation of bids, bid security requirements (see 13.0115(B)), and forms and certifications to be submitted with the bid.
 - c. General conditions. Standard contract clauses governing the performance of work.

- d. Special conditions. Special contract clauses depending on the nature and dollar amount of the work to be performed.
- e. Technical specifications. Specifications governing the technical aspects of the work to be performed.
- f. Local bidder preference. Evaluation of local bidder preference as required under 13.0132.

B. Bid security.

- 1. Requirement. Bid security shall be required for all competitive sealed bidding construction contracts where performance and contract bonds are required. Bid security shall be on a bid bond (GSA Standard Form 24), in cash, by certified check, cashier's check, or other form acceptable to ASCC. The surety company shall hold a certificate of authority from the U.S. Secretary of the Treasury as an acceptable surety or otherwise be approved by ASCC prior to bid submission or opening.
- 2. Amount. Bid security shall be in an amount equal to at least 10% of the amount of the bid or other amount as specified in the invitation for bids depending upon the source of funding.
- 3. Rejection of bid. Failure to furnish bid security, when required by the invitation, shall result in rejection of the bid in accordance with 13.0115 (D)(10)(e).

C. Contract, Performance, Payment and other Bonds.

- 1. Contract Bond. A contract bond is required in cash, certified check, cashier's check, or with sureties certified by ASCC on GAS Form PUB WKS-49 or other similar form satisfactory to ASCC when the amount of the contract does not exceed \$100,000.
- 2. Performance and Payment Bonds. A performance bond and payment bond are required in cash, certified check, cashier's check or with sureties certified by ASCC on GAS Form PUB WKS-49 or other similar form satisfactory to ASCC when the contract exceeds \$100,000.
- 3. Amount. The contract, performance, and payment bonds shall be in an amount sufficient to protect ASCC's interest as determined by Chief Procurement Officer.

4. Other Bonds. Other bonds, such as labor and materials bonds, may be required in order to protect ASCC's interest. Such bonds shall be required as determined by the Chief Procurement Officer or other procurement officer delegated authority to execute and administer construction contracts.

D. Required Contract Provisions. The following clauses shall be included in all construction contracts as prescribed:

1. For contracts exceeding \$10,000, "Termination for Convenience" (Appendix A);
2. For contracts exceeding \$10,000, "Termination for Default" (Appendix B1);
3. For contracts exceeding \$10,000, "Equal Opportunity" (Appendix C);
4. "Anti-kickback Statute" (Appendix D);
5. When required by federal grant program legislation and the contract exceeds \$2,000, "Davis Bacon Act" (Appendix E);
6. Where applicable for contracts in excess of \$2,000, "Contract Work Hours and Safety Standards Act" (Appendix F);
7. For contracts over \$100,000, "Clean Air and Water" (Appendix G) unless this requirement has been waived by EPA;
8. Prohibition against gratuities and kick-backs as required by 13.0138 (F);
9. Prohibition against contingent fees as required by 13.0138 (G);
10. Prohibition against collusion as required by 13.0138 (I).

- E. Fiscal Responsibility. Every contract modification, change order, or contract price adjustment under a construction contract shall be subject to prior written certification by the ASCC Chief Financial Officer, as to the effect of the contract modification, change order, or adjustment in contract price on the total project budget or the total contract budget. In the event that the certification of the ASCC Chief Financial Officer discloses a resulting increase in the total project budget and/or the total contract budget, such contract modification, change order, or adjustment in contract price shall not be made unless sufficient funds are available therefore, or the scope of the project or contract is adjusted so as to permit the degree of completion that is

feasible within the total project budget and or total contract budget as it existed prior to the contract modification, change order, or adjustment in contract price under consideration; provided, however, that with respect to the validity, as to the contractor, of any executed contract modification, change order, or adjustment in contract price which the contractor has reasonably relied upon, it shall be assumed that there has been compliance with the provisions of this subsection.

13.0126

Architect - Engineer Services

- A. Applicability. Architect-engineer services shall be procured as provided in this section except as authorized by 13.0115(C) (small purchases), 13.0115(E) (non-competitive negotiation) or 13.0115(F) (emergency procurement).
- B. Policy. It is the policy of ASCC to publicly announce all requirements for architect-engineer services and negotiate contracts on the basis of demonstrated competence and qualifications at a fair and reasonable price.
- C. Selection. The Chief Procurement Officer or other procurement officer delegated authority to execute and administer contracts shall maintain files of current statements of qualifications of architect-engineer firms. After public announcement of a requirement for architect-engineer services, current statements shall be reviewed together with those that may be submitted by other firms in response to the announcement. Discussions shall be conducted with at least three of the firms regarding the contract requirements and technical approach and a selection made therefrom, in order of preference, of no less than three firms determined to be the most highly qualified to perform the service required.
- D. Negotiation. The Chief Procurement Officer or other procurement officer delegated authority to execute and administer contracts shall negotiate a contract with the highest qualified architect-engineer firm at a price determined to be fair and reasonable to ASCC. If a fair and reasonable price cannot be negotiated, negotiations shall be terminated and negotiations shall be undertaken with the second highest qualified firm. If a fair and reasonable price cannot be negotiated, negotiations shall be terminated and negotiations shall be undertaken with the third highest qualified firm. If a fair and reasonable price cannot be negotiated with any of the selected firms, the Chief Procurement Officer or other procurement officer delegated authority to execute and administer contracts shall select additional firms in order of competence and qualifications and continue negotiations until a fair and reasonable price is agreed upon.

13.0127

Duties of the Chief Procurement Office

The Chief Procurement Office may promulgate additional contract provisions as required for construction or architect-engineer contracts.

VII. PROCUREMENT OF GOODS AND SERVICES

13.0128

Required Contract Provisions

The following clauses shall be included in all contracts for goods and or services as prescribed:

- A. For contracts in excess of \$10,000. "Termination for Convenience" (Appendix A):
- B. For contracts in excess of \$10,000. "Termination for Default" (Appendix B2):
- C. For contracts in excess of \$10,000. "Equal Opportunity" (Appendix C):
- D. For contracts in excess of \$2,500 which involve employment of mechanics or laborers, "Contract Work Hours and Safety Standards Act" (Appendix F):
- E. For negotiated contracts. "Examination of Records" (Appendix I):
- F. For contracts over \$100,000. "Clean Air and Water" (Appendix G):
- G. For contracts involving research, development, experimental or demonstration work. "Patents" (Appendix J):
- H. Prohibition against gratuities and kickbacks as required by 10.260 (f):
- I. Prohibition against contingent fees as required by 10.260 (g).
- J. Prohibition against collusion as required by 10.260 (I).

13.0129

Duties of the Chief Procurement Officer

The Chief Procurement Officer may promulgate additional contract provisions as are required for contracts for goods and services. The Chief Procurement Officer may require bid bonds and performance and payment bonds on contracts other than construction contracts upon a written determination that such additional security is necessary to protect ASCC's interest.

SOCIOECONOMIC PROGRAMS

13.0130

Policy

It shall be the policy of ASCC to use its procurement rules to promote local business investment, activity, and competitiveness with other non-local businesses by decreasing cash outflow and assisting to overcome the limitations of size, isolation from the mainstream of commercial and financial activities, lack of diversified industrial bases, and inadequate availability of venture capital which have stymied business development. ASCC shall encourage economic activities and business development to the maximum extent feasible without compromising effective and efficient ASCC procurement practices including competition.

13.0131

Definitions

As used in this article, the following definitions apply:

- A. "Local bidder" for procurement of goods and services means an individual, sole proprietorship, partnership, joint venture, corporation, other unincorporated association, or private legal entity which:
1. Has a valid American Samoa business license and, if required, a foreign corporation permit to transact business in American Samoa;
 2. Has its principal place of business in American Samoa;
 3. Has owned, operated, or maintained an office, store, warehouse, or other facility in American Samoa for at least six months; and
 4. has, or has the ability to obtain, necessary technical support services, as may be required, for timely installation, maintenance, warranty, and repair of the goods to be furnished in the bid.
- B. "Local bidder" for procurement of construction means a sole proprietorship which is wholly owned by an American Samoan or a permanent resident as defined in 41.0202 ASCA, or a partnership, joint venture, or other unincorporated association which is wholly owned by those persons or a corporation which is majority owned by those persons and has submitted a bid in response to an invitation for bids for construction.
- C. "Off-island bidder" means a person submitting a bid in response to an

invitation for bids who does not qualify as a "local bidder" as defined in (a) and (b) above.

13.0132

Local Bidder Preference and Evaluation

A. Construction Procurement

1. For construction procurement where the contract value is estimated by ASCC at \$100,000 or less, the procurement may be set aside and restricted to local bidders only. Bids received from off-island bidders may be rejected.
2. For all construction procurement where the contract value is estimated by ASCC to exceed \$50,000, bids from off-island bidders shall be evaluated after bid opening so as to give preference to responsive, responsible and reasonable local bidders by application of the following schedule of add-on percentages to the bid amount submitted by the lowest responsive, responsible, and reasonable off-island bidder:

<u>Contract Value</u>	<u>Local Add-On Percentage</u>
\$-0 - up to \$10,000	25%
More than \$10,000 up to \$50,000	12%
More than \$50,000 up to \$100,000	10%
More than \$100,000 up to \$200,000	5%
More than \$200,000	0%

- C. If, after the addition of the applicable add-on percentage amount according to subsection (a) or (b) above, the bid submitted by the lowest responsive, responsible, and reasonable local bidder is equal to or less than the evaluated bid (amount of bid plus add-on percentage of the bid) of the lowest responsive, responsible, and reasonable off-island bidder, then the local bidder shall be awarded the contract.
- D. Procurement requirements may not be artificially divided or combined so as to circumvent the provisions of this section.

- E. The Board may suspend or reduce a local preference set forth in this section if it finds that such action is desirable or necessary in the public interest as a result of financial or economic conditions affecting directly or indirectly the ASCC generally, for a period or periods not exceeding 18 months in total. The preferences suspended or reduced must be fully restored until permanent modifications are proposed to the Legislature.

13.0133

Responsibilities

The Chief Procurement Officer and other procurement officers delegated authority to execute and administer ASCC contracts shall be responsible for monitoring contract performance in accordance with the terms, conditions and specifications of the contract.

13.0134

Contract File Documentation

For each contract awarded, an official contract file shall be established and contain the following information:

- A. Purchase requisition;
- B. Public notice;
- C. Bid or offeror's mailing list;
- D. Invitation for bids or request for proposals;
- E. Bid abstract or record;
- F. Determination of non-responsibility, when applicable;
- G. Evaluation results (negotiated procurement);
- H. Notice of award to unsuccessful bidder or offerors;
- I. Contract;
- J. Noncompetitive determination (when applicable);
- K. Emergency procurement determination (when applicable);
- L. Cost-reimbursement contract determination (when applicable);

M. Basis for cost or price

13.0135

Disputes and Appeals

- A. Definition. "Dispute" means any disagreement between contractors or potential contractors and ASCC regarding the Chief Procurement Officer's decision on mistakes-in-bidding, source selection, contract interpretation, or termination for convenience or default.
- B. Requirements. All such disputes shall be submitted in writing to the Chief Procurement Officer. The Chief Procurement Officer shall acknowledge receipt of the dispute within 5 working days of receipt and shall render a final decision within 30 working days after receipt of the dispute.
- C. Appeals. Appeals of the Chief Procurement Officer's final decision in a dispute may be made within 60 days of the date of the decision provided such appeal is submitted in writing to the Board. The Board shall appoint a committee of at least three persons knowledgeable of procurement to review appeals and recommend appropriate action to the Board. ~~None of the committee members shall have participated in the action under appeal. At least one of the committee members shall be a qualified attorney.~~ Hearing procedures and documentation shall be as set forth in these rules, and the Administrative Procedure Act, Section 4.1001 et. seq. A final decision on the appeal shall be made by the Board within 90 days of the appeal.
- D. Limitation. A termination for default may only be converted to a termination for convenience as a result of a finding by the Board on behalf of the appellant.

X. ETHICAL CONDUCT STANDARDS FOR ASCC EMPLOYEES AND CONTRACTORS.

13.0136

Policy

Public employment is a public trust. In governmental contracting, public employees shall discharge their duties impartially so as to assure fair competitive access to ASCC procurement by responsible contractors and conduct themselves in manner as to foster public confidence in the integrity of ASCC.

13.0137

Definitions

As used in this article, the following definitions shall apply:

- A. "Confidential information" means any information which is available

to an employee only because of the employee's status as an employee of ASCC and is not a matter of public knowledge or available to the public on request.

- B. "Conspicuously" means written in such special or distinctive format, print, or manner that a reasonable person against whom it is to operate ought to have noticed it.
- C. "Direct or indirect participation" means involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity.
- D. "Financial interest" means:
 - 1. Ownership of any interest or involvement in any relationship from which, or as a result of which, a person within the past year has received, or is presently or in the future entitled to receive compensation; or
 - 2. Holding a position in a business such as an officer, director, trustee, partner, employee, or the like, or holding any position of management.
- E. "Gratuity" means a payment, loan, subscription advance, deposit of money, service, or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is received.

13.0138

Standards of Ethical Conduct

- A. Ethical Standards for Employees. Any attempt to realize personal gain through ASCC employment by conduct inconsistent with the proper discharge of the employee's duties is a breach of a public trust. In order to fulfill this ethical standard, employees must meet the requirements of this section.
- B. Ethical Standards for Contractors. Any effort to influence any public employee to breach the standards of ethical conduct set forth in this section is also a breach of ethical standards.
- C. Employee Disclosure Requirements:
 - 1. Disclosure of Benefit received from Contract. Any employee who has, or obtains any benefit from any ASCC contract with a business in

which the employee has a financial interest shall report such benefit to the ASCC Chief Procurement Officer or designee.

2. Failure to Disclose Benefit Received. Any employee who knows or should have known of such benefit and fails to report such benefit is in breach of the ethical standards of this section.

D. Employee Conflict of Interest:

1. Policy. It shall be a breach of ethical standards for any employee to participate directly or indirectly in a procurement when the employee knows that:
 - a. The employee or employee's relative by consanguinity or affinity of the third degree or closer has a financial interest pertaining to the procurement.
 - b. A business or organization in which the employee, or employee's relative by consanguinity or affinity of the third degree or closer has a financial interest pertaining to the procurement; or
 - c. Any other person, business, or organization with whom the employee or employee's relative by consanguinity or affinity of the third degree or closer is negotiating or has an arrangement concerning prospective employment is involved in the procurement.
2. Discovery of Actual or Potential Conflict of Interest, Disqualification, and Waiver. Upon discovery of an actual or potential conflict of interest, an employee shall promptly file a written statement of disqualification and shall withdraw from further participation in the transaction involved.

E. Use of Confidential Information. It shall be a breach of ethical standards for any employee or former employee knowingly to use confidential information for actual or anticipated personal gain, or for the actual or anticipated gain of any other person.

F. Prohibition Against Gratuities and Kickbacks.

1. Gratuities. It shall be a breach of ethical standards for any person to offer, give, or agree to give any employee or former employee, or for any employee or former employee to solicit, demand, accept, or agree to accept

from another person, a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, or preparation of any part of a program requirement or a purchase, request, influencing the content of any specification or procurement standard rendering advice, investigation, auditing or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other particular matter, pertaining to any program requirement or a contract or subcontract, or to any solicitation or proposal therefor.

2. Kickbacks. It shall be a breach of ethical standards for any payment, gratuity, or offer of employment to be made by or on behalf of a subcontractor under a contract to the prime contractor or higher tier subcontractor or any person associated therewith, as an inducement for the award of a subcontract or order.
3. Contract clause. The prohibition against gratuities and kickbacks prescribed in this subsection shall be conspicuously set forth in every contract and solicitation therefor.

G. Prohibition against Contingent Fees.

1. Contingent fees. It shall be a breach of ethical standards for a person to be retained, or to retain a person, to solicit or secure an ASCC contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for retention of bona fide employees or bona fide established commercial selling agencies for the purpose of securing business.
2. Representation of Contractor. Every person, before being awarded an ASCC contract, shall represent, in writing, that such person has not retained anyone in violation of this subsection. Failure to do so constitutes a breach of ethical standards.
3. Contract Clause. The representation prescribed in this subsection shall be conspicuously set forth in every contract and solicitation therefor.

H. Restrictions on Employment.

1. Present Employees. It shall be a breach of ethical standards for any employee who is participating directly or indirectly in the procurement process to become or be employed by any person contracting with ASCC.

2. Restrictions on Former Employees in Matters Connected with their Former Duties.

a. Permanent Disqualification of Former Employee Personally Involved in a Particular Matter. It shall be a breach of ethical standards for any former employee knowingly to act as a principal, or as an agent for anyone other than ASCC in connection with any:

I. Judicial or other proceeding, application, request for a ruling, or other determination:

II. Contract:

III. Claim: or

IV. Charge or Controversy:

in which the employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, investigation, or otherwise while an employee, where ASCC is a party or has a direct and substantial interest.

b. One Year Representation Restriction Regarding Matters for which a Former Employee was Officially Responsible. It shall be a breach of ethical standards for any former employee, within twelve months after cessation of the former employee's official responsibility, knowingly to act as a principal, or as an agent for anyone other than ASCC, in connection with any:

I. Judicial or other proceeding, application, request for a ruling, or other determination.

II. Contract:

III. Claim: or

IV. Charge or controversy:

in matters which were within the former employee's official responsibility, where the government is a party or has a direct or substantial interest.

3. Disqualification of Business When an Employee has a Financial Interest. It shall be a breach of ethical standards for a business in which an employee has a financial interest knowingly to act as a principal, or as an agent for anyone in connection with any:

- a. Judicial or other proceeding; application, request for ruling, or other determination;
- b. Contract;
- c. Claim; or
- d. Charge or controversy.

in which the employee either participates personally and substantially through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of the employee's official responsibility, where ASCC is a party or has a direct and substantial interest.

4. Selling to ASCC within Six Months after Termination of Employment is Prohibited. It shall be a breach of ethical standards for any former employee to sell or attempt to sell supplies, services, or construction to ASCC for six months following the date when employment ceased.

The term "sell" as used herein means signing a bid, proposal, or contract; negotiating a contract; contacting any employee for the purpose of obtaining, negotiating, or discussing changes in specifications, price, cost allowances, or other terms of a contract; settling disputes concerning performance of a contract; or any other liaison activity with a view toward the ultimate consummation for a sale although the actual contract therefor is subsequently negotiated by another person; provided, however, that this subsection is not intended to preclude a former employee from accepting employment with private industry solely because the former employee's employer is a contractor with ASCC, nor shall a former employee be precluded from serving as a consultant to ASCC.

I. Collusion Between Bidders Offerors.

1. Policy. Collusion or secret agreement between bidders or offerors for purpose of securing an advantage to the bidders or offerors against the authorizing agent in the awarding of contracts is prohibited. The authorizing agent may declare the contract void if he finds sufficient evidence after a contract has been let that the contract was obtained by a bidder offeror or bidders offerors by reason of collusion or secret agreement among the bidders offerors to the disadvantage of ASCC.
2. Representation of Contractor. Every person, before being awarded an ASCC contract, shall represent, in writing, that such person has not directly or indirectly entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of competition in connection with the bid or proposal submitted.
3. Contract Clause. The representation prescribed in this subsection shall be conspicuously set forth in every contract and solicitation therefor.

J. Prohibition Against Employee Use and Contractor Acceptance of Purchase Requisitions.

1. Policy. Only valid purchase orders and contracts awarded pursuant to this chapter constitute legal and binding documents between ASCC and its contractors. ASCC shall not make payment to a contractor who delivered goods or services as a result of receipt and acceptance of a purchase requisition, unless such purchase was authorized by this chapter.

2. Notice. All purchase requisitions used by ASCC shall contain a prominent notice on the face of the requisition from which sets forth the prohibition in this subsection.
3. Employee Liability. Unless otherwise authorized by this chapter, any employee who uses or attempts to use a purchase requisition to obtain goods or services directly from a contractor without first obtaining a valid purchase order or contract may be held personally liable and responsible for the amount of the goods and services.
4. Ratification. Employee purchases for ASCC without the use of a valid purchase order or contract are improper and illegal. Such actions may be ratified in exceptional circumstances by the Chief Procurement Officer when such action is determined to be in the interest of ASCC.

13.139

Civil Penalties

- A. An employee who violates a provision of this chapter or the rules is subject to adverse action, including but not limited to reprimand, suspension without pay, or termination of employment, in addition to other penalties prescribed by law.
- B. A person other than an employee who violates a provision of this chapter or the rules shall be subject, by the Procurement Officer with which that person is dealing directly at the time of the violation, to written warning of reprimand, termination of contract or transaction, or suspension from being a contractor or subcontractor under an ASCC contract in addition to the penalties prescribed by law.
- C. All proceedings under this section must be in accordance with due process requirements, including but not limited to reasonable notice and opportunity for hearing, and must be conducted in accordance with the hearing procedures prescribed by the Administrative Procedures Act, 4.1001 ASCA et. seq., and the rules.

APPENDIX A

TERMINATION FOR CONVENIENCE

(a) ASCC may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in ASCC's interest. The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying the extent of termination and the effective date.

(b) After receipt of a Notice of Termination, and except as directed by the Contracting Officer, the Contractor shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this clause:

(1) Stop work as specified in the Notice.

(2) Place no further subcontracts or orders referred to as subcontracts in this clause for materials, services, or facilities except as necessary to completed the continued portion of the contract.

(3) Terminate all subcontracts to the extent they relate to the work terminated.

(4) Assign to the ASCC, as directed by the Contracting Officer, all right, title, and interest of the Contractor under the subcontracts terminated, in which case ASCC shall have the right to settle or to pay any termination settlement proposal arising out of those termination.

(5) With approval or ratification to the extent required by the Contracting Office, settle all outstanding liabilities and termination settlement proposals arising from the termination of

subcontracts; the approval or ratification will be final for purposed of this clause.

(6) As directed by the Contracting officer, transfer title and deliver to ASCC (i) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced or acquired for the work terminated, and (ii) the completed or partially completed plans, drawings, information, and other property that, if the contract had been completed, would be required to be furnished to ASCC.

(7) Complete performance of the work not terminated.

(8) Take any action that may be necessary, or that the Contracting Officer may direct, for the protection and preservation of the property related to this contract that is in the possession of the Contractor and in which ASCC has or may acquire an interest.

(9) Use its best efforts to sell, as directed or authorized by the Contracting Officer, any property of the types referred to in subparagraph (6) above; provided, however, that the Contractor (i) is not required to extend credit to any purchaser and (ii) may acquire the property under the conditions prescribed by, and at prices approved by, the Contracting Officer. The proceeds of any transfer or disposition will be applied to reduce any payments to be made by ASCC under this contract, credited to the price or cost of the work, or paid in any other manner directed by the Contracting Officer.

APPENDIX A

(c) The Contractor shall submit to the Contracting Officer a list, certified as to quantity and quality, of termination inventory not previously disposed of, excluding items authorized for disposition by the Contracting Officer. The Contractor may request ASCC to remove those items or enter into an agreement for their storage. Within 15 days, ASCC will accept title to those items and remove them or enter into a storage agreement. The Contracting Officer may verify the list upon removal of the items, or if stored, within 45 days from submission of the list, and shall correct the list, as necessary, before final settlement.

(d) After termination, the Contractor shall submit a final termination settlement proposal to the Contracting Officer in the form and with the certification prescribed by the Contracting Officer. The Contractor shall submit the proposal promptly, but no later than 1 year from the effective date of termination, unless extended in writing by the Contracting Officer upon written request of the Contractor within this 1 year period. However, if the Contracting Officer determines that the facts justify it, a termination settlement proposal may be received and to submit the proposal within the time allowed, the contracting officer may determine, on the basis of information available, the amount, if any, due the Contractor because of the termination and shall pay the amount determined.

(e) Subject to paragraph (d) of this appendix, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount to be

paid because of the termination. The amount may include a reasonable allowance for profit on work done. However, the agreed amount, whether under this paragraph (e) may not exceed the total contact price as reduced by (1) the amount of payments previously made and (2) the contract price of work not terminated.

APPENDIX B1

TERMINATION FOR DEFAULT (CONSTRUCTION)

If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within such time, ASCC may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event ASCC may take over the work and prosecute the same to completion, by contract or otherwise, and may take possession of and utilize in completion, by contract or otherwise, and may take possession of and utilize in completing the work such as materials, appliances, and plant as may be on the site of the worked and necessary therefor. Whether or not the Contractor's right to proceed with the work is terminated, he and his sureties shall be liable for any damage to ASCC resulting from his refusal or failure to complete the work within the specified time.

If ASCC so terminates the Contractor's right to proceed, the resulting damage will consist of the fixed and agreed liquidated damages if stipulated elsewhere in this contract until such reasonable time as may be required for final completion of the work together with any increased costs occasioned ASCC in completing the work.

If ASCC does not so terminate the Contractor's right to proceed, the resulting damage will consist of the

fixed and agreed liquidated damages if stipulated elsewhere in this contract until the work is completed or accepted.

The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:

(1) The delay in the completion of the work arises from causes other than normal weather beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public enemy, acts of ASCC in either its semi-autonomous status or contractual capacity, acts of another contractor to ASCC in the performance of a contract with ASCC, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather for American Samoa taking into consideration that approximately 200 inches of rainfall annually is normal, or delays of subcontractors or suppliers arising from causes other than normal weather beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers;

(2) The Contractor, within 10 days from the beginning of any such delay notifies the Contracting Officer in writing of the cause of delay.

The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension, and his finding of facts shall be final and

APPENDIX B1

conclusive on the parties, subject only to appeal.

If, after notice of termination of the Contractor's right to proceed under the provisions of this Section, it is determined for any reason that the Contractor was not in default under the provisions of this section, the rights and obligations of the parties shall be the same as if a Notice of Termination for Convenience had been issued.

The rights and remedies of ASCC provided in this section are in addition to any other rights and remedies provided by law or under this contract.

APPENDIX B2

TERMINATION FOR DEFAULT (GOODS AND SERVICES)

(1) Default. If the Contractor refuses or fails to perform any of the provisions of this contract with such diligence as will ensure its completion within the time specified in this contract, or any extension thereof, otherwise fails to timely satisfy the contract provisions, or commits any other substantial breach of this contract, the ASCC procurement officer may notify the Contractor in writing of the delay or non-performance; and if not cured in ten days or any longer time specified in writing by the ASCC Procurement Officers, such officer may terminate the Contractor's right to proceed with the contract or such part of the contract as to which there has been delay or a failure to properly perform. In the event of termination in whole or in part the ASCC procurement officer. The Contractor shall continue performance of the contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services.

(2) Contractor's Duties.

Notwithstanding termination of the contract and subject to any directions from the ASCC procurement officer, the Contractor shall take timely, reasonable, and necessary action to protect and preserve property in the possession of the Contractor in which ASCC has an interest.

(3) Compensation. Payment for completed supplies delivered and accepted shall be at the contract price.

Payment for the protection and preservation of property shall be in an amount agreed upon by the Contractor and ASCC procurement officer. ASCC may withhold from amounts due the Contractor such sums as the procurement officer deems to be necessary to protect ASCC against loss because of outstanding liens or claims costs incurred in procuring similar goods and services.

(4) Excuse for Nonperformance or Delayed Performance. Except with respect to defaults of subcontractors, the Contractor shall not be in default by reason of any failure in performance of this contract in accordance with its terms (including any failure by the Contractor to make progress in the prosecution of the work hereunder which endangers such performance) if the contractor has notified the procurement officer within 15 days after the cause of the delay and the failure arises out of causes such as, acts of God, acts of the public enemy, acts of ASCC and any other governmental entity in its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes or other labor disputes, freight embargoes, or unusually severe weather. If the failure to perform is caused by the failure of a subcontractor to perform or to make progress, and if such failure arises out of causes similar to those set forth above, the contractor shall not be deemed to be in default, unless the

APPENDIX B2

supplies of services to be furnished by the subcontractor were reasonably obtainable from other sources in sufficient time to permit the contractor to meet the contract requirements.

Upon request of the contractor, the procurement officer shall ascertain the facts and extent of such failure, and, if such officer determines that any failure to perform was occasioned by any one or more of the excusable causes, and that, but for the excusable cause, the contractor's progress and performance would have met the terms of the contract, the delivery schedule shall be revised accordingly, subject to the rights of ASCC under the clause entitled "Termination for Convenience".

(5) Erroneous Termination for Default. If, after notice of termination of the contractor's right to proceed under the provisions of this clause, it is determined for any reason that the contractor was not in default under the provisions of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience, be the same as if the notice of termination had been issued pursuant to such clause.

(6) Additional Rights and Remedies. The right and remedies provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

APPENDIX C

EQUAL OPPORTUNITY

(The following clause is applicable unless this contract is exempt under the rules, regulations, and relevant orders of the Secretary of Labor (41 CFR. Ch.60)).

During the performance of this contract, the contractor agrees as follows:

(a) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation, and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this equal opportunity clause.

(b) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(c) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under this equal opportunity clause, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(e) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the contractor's non-compliance with the Equal Opportunity clause

APPENDIX D

ANTI-KICKBACK STATUTE

The contractor shall comply with the Copeland "Anti-Kick Back" Act (18 USC 874) as supplemented in Department of Labor Regulations (29 CFR Part 3).

TITLE 18, U.S.C., Section 874:
"874, Kick-Back from public works employees; Whoever by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever induces any person employed in the construction, prosecution, completion or repair of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, to give up any part of the compensation to which he is entitled under his contract of employment, shall be fined not more than \$5,000.00 or imprisoned not more than five years, or both."

APPENDIX E

DAVIS-BACON ACT

The following clause must be included in all construction contracts which are subject to the Davis-Bacon Act provisions:

(1) Minimum wages. (i) All mechanics and laborers employed or working upon the site of the work, or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29CFR Part 3)), the full amounts due at time of payment computed at wage determination decision of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics and the wage determination decision shall be posted by the contractor at the site of the work in a prominent place where it can be easily seen by the workers. For the purpose of this clause, contributions made or costs reasonably anticipated under section 1 (b) (2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of 29 CFR 5.5(a) (1) (iv). Also for the purpose of this clause, regular contributions made or costs incurred for more than a weekly period under plans, funds, or programs, but,

covering the particular weekly period, are deemed to be constructively made or incurred during such weekly period.

(ii) The contracting officer shall require that any class of laborers or mechanics, including apprentices and trainees, which is not listed in the wage determination and which is to be employed under the contract, shall be classified or reclassified conformably to the wage determination and a report of the action taken shall be sent by the federal agency to the Secretary of Labor. In the event the interested parties cannot agree on the proper classification or reclassification of a particular class of laborers and mechanics, including apprentices and trainees to be used, the question accompanied by the recommendation of the contracting officer shall be referred to the Secretary for final determination.

(iii) The contracting officer shall require, whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly wage rate and the contractor is obligated to pay a cash equivalent of such a fringe benefit, an hourly cash equivalent thereof to be established. In the event the interested parties cannot agree upon a cash equivalent of the fringe benefit, the question, accompanied by the recommendation of the contracting officer, shall be referred to the Secretary of Labor for determination.

Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic employed in violation of the clause set forth in subparagraph (1), in the sum of \$10 for each calendar day on which such employee was required or permitted to work in excess of 8 hours or in excess of the standard work week of 40 hours without payment of the overtime wages required by the clause set forth in subparagraph (1).

(3) Withholding for Unpaid Wages and Liquidated Damages. ASCC and/or the government may withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor, such sums as may administratively be determined to be necessary of satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in subparagraph (2).

(4) Subcontracts. The contractor shall insert in any subcontracts the clauses set forth in subparagraph (1), (2), and (3) of this paragraph and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts which they may enter into, together with a clause requiring this insertion in any further subcontracts that may in turn be made.



Labor. Employment and Training Administration, Bureau of Apprenticeship and Training. The ratio of trainees to journeymen shall not be greater than permitted under the plan approved by the Bureau of Apprenticeship and Training. Every trainee must be paid at not less than the rate specified in the approved program for his level of progress. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Bureau of Apprenticeship and Training shall be paid not less than the wage rate determined by the Secretary of Labor for the classification of work he actually performed. The contractor or subcontractor will be required to furnish the contracting officer or a representative of the Wage-Hour Division of the U.S. Department of Labor written evidence of the certification of his program, the registration of the trainees, and the ratios and wage rates prescribed in that program. In the event the Bureau of Apprenticeship and Training withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(iii) Equal Employment Opportunity. The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR Part 30.

(5) Compliance with Copeland Regulations (29 CFR Part 3). The contractor shall comply with the Copeland Regulations (29 CFR Part 3)

of the Secretary of Labor which are herein incorporated by reference.

(6) Subcontracts. The contractor will insert in any subcontracts the clauses contained in 29 CFR 5.5(a) (1) through (5) and (7) and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts which they may enter into, together with a clause requiring this insertion in any further subcontracts that may in turn be made.

(7) Contract Termination. A breach of clauses 91) through (6) may be grounds for termination of the contract.

Additional provisions which must be included are:

(1) Overtime Requirements. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any laborer or mechanic in any work week in which he is employed on such work to work in excess of 8 hours in any calendar day or in excess of 40 hours in such work week unless such laborer or mechanic receives compensation at a rate not less than one and one-half times his basic rate of pay for all hours worked in excess of 8 hours in any calendar day or in excess of 40 hours in such work week, as the case may be.

(2) Violations: Liability for Unpaid Wages; Liquidated Damages. In the event of any violation of the clause set forth in subparagraph (1), the contractor and any subcontractor responsible therefor shall be liable to any affected employee for his unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of

complete, that the wage rates contained therein are not less than those determined by the Secretary of Labor and that the classifications set forth for each laborer or mechanic conform with the work he performed. A submission of a "Weekly Statement of Compliance" which is required under this contract and the Copeland regulations of the Secretary of Labor (29CFR. Part 3) and the filing with the initial payroll or any subsequent payroll of a copy of any findings by the Secretary of labor under 29 CFR 5.5(a) (1) (iv) shall satisfy this requirement. The prime contractor shall be responsible for the submission of copies of payrolls of all subcontractors. The contractor will make the records required under the labor standards clauses of the contract available for inspection by authorized representatives of ASCC and the Department of labor, and will permit such representatives to interview employees during working hours on the job. Contractors employing apprentices or trainees under approved programs shall include a notation on the first weekly certified payrolls submitted to the contracting agencies that their employment is pursuant to an approved program and shall identify the program.

(4) Apprentices and Trainees. (i) Apprentices. Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a state apprenticeship agency recognized by the bureau, or if a person is employed in his first 90 days of probationary

employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen in any craft classification shall not be greater than the ratio permitted to the contractor as to his entire work force under the registered program. Any employee listed on a payroll at an apprentice wage rate, who is not a trainee as defined in subdivision (ii) of this subparagraph or is not registered or otherwise employed as stated above, shall be paid the wage rate determined by the Secretary of Labor for the classification of work he actually performed. The contractor or subcontractor will be required to furnish to the contracting officer or a representative of the Wage-Hour Division of the U.S. Department of Labor written evidence of the registration of his program and apprentices as well as the appropriate ratios and wage rates (expressed in percentages of the journeyman hourly rates), for the area of construction prior to using any apprentices on the contract work. The wage rate paid apprentices shall be not less than the appropriate percentage of journeyman's rate contained in the applicable wage determination.

(ii) Trainees. Except as provided in 29 CFR 5.5 trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification, by the U.S. Department of

APPENDIX G

CLEAN AIR AND WATER

(a) "Air Act," as used in this clause, means the Clean Air Act (42 USC 7401 et seq.).

"Clean air standards," as used in this clause, means:

(1) Any enforceable rules, regulations, guidelines, standards, limitations, orders, controls, prohibitions, work practices, or other requirements contained in, issued under, or otherwise adopted under the Air Act or Executive Order 11738;

(2) An applicable implementation plan as described in section 110(d) of the Air Act (42 USC 7410(d));

(3) An approved implementation procedure or plan under section 111(c) or section 111(d) of the Air Act (42 USC 7411(c) or (d)); or

(4) An approved implementation procedure under section 112(d) of the Air Act (42 USC 7412(d)).

"Clean water standards," as used in this clause, means any enforceable limitation, control, condition, prohibition, standard, or other requirement promulgated under the Water Act or contained in a permit issued to a discharger by the Environmental Protection Agency or by a state under an approved program, as authorized by section 402 of the Water Act (33 USC 1342), or by local government to ensure compliance with pretreatment regulations as required by section 307 of the Water Act (33 USC 1317).

"Compliance," as used in this clause, means compliance with:

(1) Clean air or water standards; or

(2) A schedule or plan ordered or approved by a court of competent jurisdiction, the Environmental Protection Agency, or an air or water pollution control agency under the requirements of the Air Act or Water Act and related regulations.

"Facility," as used in this clause, means any

building, plant, installation, structure, mine, vessel or other floating craft, location, or site of operations, owned, leased, or supervised by a contractor or subcontractor, used in the performance of a contract or subcontract. When a location or site of operations includes more than one building, plant, installation, or structure, the entire location or site shall be deemed a facility except when the administrator, or a designee, of the Environmental Protection Agency, determines that independent facilities are collocated in one geographical area.

"Water Act," as used in this clause, means Clean Water Act (33 USC 1251) et seq.).

(b) The contractor agrees:

(1) To comply with all the requirements of section 114 of the Clean Air Act (42 USC 7414) and section 308 of the Clean Water Act (33 USC 1318) relating to inspection, monitoring, entry, reports, and information, as well as other requirements specified in section 114 and section 308 of the Air Act and the Water Act, and all regulations and guidelines issued to implement those acts before the award of this contract;

(2) That no portion of the work required by this prime contract will be performed in a facility listed on the Environmental Protection Agency List of Violating Facilities on the date when this contract was awarded unless and until the EPA eliminates the name of the facility from the listing;

(3) To use best efforts to comply with clean air standards and clean water standards at the facility in which the contract is being performed; and

(4) To insert the substance of this clause into any nonexempt subcontract, including this subparagraph (b) (4).

History: Rule 3-84, eff. 11 Jul 84, (part).

APPENDIX I

EXAMINATION OF RECORDS

The contractor agrees that the contracting officer, the Comptroller General of the United States, or the Secretary of the Interior, or any of their duly authorized agents or representatives, shall, until the expiration of three years after final payment under this contract, have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor involving transactions related to this contract.

The contractor further agrees to include in all his subcontracts hereunder a provision to the effect that the subcontractor agrees that the contracting officer, the Comptroller General of the United States, or the Secretary of the Interior, or any of their duly authorized agents or representatives, shall, until the expiration of three years after final payment under the subcontract, have access to and the right to examine any directly pertinent book, documents, papers and records of such subcontractor, involving transactions related to this contract.

History: Rule 5-84, eff 11 Jul 84, (part).