

THE OFFICE OF CONTRACTING AND PROCUREMENT

NOTICE OF PROPOSED RULEMAKING

The Chief Procurement Officer of the District of Columbia, pursuant to authority granted by section 202(a) of the District of Columbia Procurement Practices Act of 1985, as amended, (“PPA”), effective February 21, 1986 (D.C. Law 6-85; D.C. Official Code § 2-302.02(a)), and Mayor’s Order 2002-207 dated December 18, 2002, hereby gives notice of his intent to adopt the following new chapter 46 of Title 27 of the District of Columbia Municipal Regulations (Contracts and Procurements) entitled “Privatization Contracts” in not less than thirty (30) days from the date of publication of this notice in the *D.C. Register*. The Chief Procurement Officer will submit the rules to the Council of the District of Columbia for a sixty (60) day period of review pursuant to subsection 205(a) of the PPA (D.C. Official Code §2-302.05(a)), and will not take final rulemaking action until completion of the 60-day review period or Council approval of the rules by resolution before the end of the review period.

The proposed new rules are intended to help streamline and clarify the District’s procurement law with regard to privatization. These rules will define objective criteria for identifying programs or services that are appropriate for privatization and defining core or uniquely governmental responsibilities that are inappropriate for privatization; establish procedures to assist public employees to submit bids for a proposed privatization contract; and set forth guidelines for the cost analysis, economic impact analysis and performance analysis required in the law.

The following new chapter 46, Privatization Contracts, of Title 27 of the DCMR (Contracts and Procurements) will read as follows:

4600 GENERAL PROVISIONS

4600.1 The provisions of this Chapter shall apply to all privatization contracts in accordance with Section 105(b) of the District of Columbia Procurement Practices Act of 1985 (“the Act”), D.C. Official Code §2-301.05(b), as amended by §3 of the “Equity in Contracting Amendment Act of 2000”, effective April 4, 2001, D.C. Law 13-274. The Act, as amended, governs the process whereby using agencies may:

- (a) Determine if a particular function or activity is appropriate for privatization; and
 - (b) Prepare a cost analysis, a performance analysis, and an economic impact analysis.
- 4600.2 These rules also govern the process whereby prospective affected employees can create or associate with a business, and submit a bid in response to the privatization solicitation.
- 4600.3 Using agencies contemplating privatization of a function currently being performed by District government employees, through either the issuance of a contract or modification of an existing contract, shall determine whether the function is a core or uniquely governmental responsibility, as defined in §4601.
- 4600.4 A contracting officer may award a privatization contract to a private sector contractor, or modify an existing contract, only in those cases where the using agency head determines that the function under consideration is not a core or uniquely governmental responsibility.
- 4600.5 Using agencies shall prepare a cost analysis as detailed in §4602, a performance analysis as detailed in §4603, and an economic impact analysis as detailed in §4604, and submit them to the contracting officer responsible for issuing the privatization solicitation.
- 4600.6 The contracting officer shall incorporate performance measures, including but not limited to those developed in §4603, into the privatization solicitation.
- 4600.7 The contracting officer shall retain the cost analysis, performance analysis, and economic impact analysis as part of the contract file.
- 4600.8 The Mayor or independent agency head shall submit a determination and findings for the proposed privatization contract to the Council of the District of Columbia, which shall include the using agency's findings of cost analysis, performance analysis, and economic impact analysis.
- 4600.9 District government employees performing the functions under consideration for privatization may form a business entity, and submit a bid in response to the privatization solicitation as detailed in §4605.
- 4601 DETERMINING CORE OR UNIQUELY GOVERNMENTAL RESPONSIBILITIES**
- 4601.1 A using agency shall use the following methodology to determine whether a function is a core or uniquely governmental responsibility:

- (a) The function is so closely related to the highest and best interests of the citizens of the District of Columbia and the public at large that it mandates performance by District government employees; or
- (b) The function involves making decisions in applying the authority of the District government, including but not limited to the following:
 - (1) The conduct of inter- and intra-governmental relations;
 - (2) The determination of overall District government policy, District agency policy, District government program priorities, and the content and application of District government regulations;
 - (3) The approval of Freedom of Information Act (FOIA) responses or the administrative appeals of denials of FOIA requests;
 - (4) The command and control of public safety;
 - (5) The direction and control of District government employees, including:
 - (i) Hiring and firing decisions;
 - (ii) Determining compensation packages and adjustments;
 - (iii) Approving position descriptions; and
 - (iv) Establishing performance standards.
 - (6) The managing of monetary transactions and financial entitlements on behalf of the District government, including:
 - (i) Formulating and approving the District government's financial plan and budget;
 - (ii) Issuing bonds and other financial instruments;
 - (iii) Controlling and disbursing fees, royalties, duties, fines, taxes and other public funds; and
 - (iv) Controlling treasury accounts.
 - (7) The management of procurement and contractual transactions, including:

- (i) Determining goods or services to be acquired by contract;
 - (ii) Determining whether the cost of executing contracts are reasonable, allocable, and allowable;
 - (iii) Approving contract documents, including documents defining requirements, incentive plans, and evaluation criteria;
 - (iv) Approving decisions based on evaluating contractor performance, including the acceptance or rejection of goods or services;
 - (v) Awarding, administering, and terminating contracts; and
 - (vi) Approving change orders to contract performance or contract quantities.
- (8) Determining which District government owned or controlled real and personal property shall be disposed, and the process to be used.

4602 COST ANALYSIS

- 4602.1 Before the issuance of the solicitation for a privatization contract, the using agency shall calculate both the total and the per-unit cost to the District government of providing the good or service.
- 4602.2 The using agency shall generally use the costs for providing the good or service for the last completed fiscal year.
- 4602.3 If the using agency incurred extraordinary costs in providing the good or service in the last completed fiscal year, the using agency shall instead calculate total costs using the previous three-year average cost.
- 4602.4 If the using agency uses the previous three-year average cost, the using agency shall provide a written justification for doing so to the contracting officer as part of the cost analysis. The written justification shall include an enumeration and explanation of the extraordinary cost.
- 4602.5 The using agency shall calculate the total cost to the District government of providing the good or service by totaling the costs of the items listed below:
- (a) Salaries and wages for District government employees currently providing the good or service under consideration for privatization, including but not limited to:

- (1) Scheduled or planned raises or promotions;
 - (2) Fringe benefits;
 - (3) Shift differentials;
 - (4) Premium payments;
 - (5) Overtime; and
 - (6) Any other known or planned pay adjustments.
- (b) Materials and supplies associated with providing the good or service, including office supplies and equipment, consumable materials and other minor equipment;
- (c) Major capital equipment, depreciated in accordance with generally accepted accounting principles as outlined by the Government Accounting Standards Board; and
- (d) General and administrative overhead, and any other direct or indirect costs associated with the good or service, including but not limited to:
- (1) Rent;
 - (2) Debt payment;
 - (3) Facilities maintenance;
 - (4) Equipment maintenance;
 - (5) Utilities;
 - (6) Insurance;
 - (7) Training; and
 - (8) Travel costs.

4602.6 The using agency shall calculate the per unit cost of providing the good or service using the following means:

- (a) If the privatization contract is for goods, the using agency shall divide the total cost by the number of units of the goods.

- (b) If the candidate privatization activity is for services with regular or easily defined outputs, the using agency shall divide the total cost by the number of outputs provided.
 - (c) If the candidate privatization activity is for services without regular or easily defined outputs, the using agency shall divide the total cost by the number of labor hours expended.
- 4602.7 After the solicitation has been issued, and a prospective contractor selected, the using agency shall calculate both the total and the per-unit cost of privatizing the goods or services.
- 4602.8 The using agency shall calculate the total cost of privatizing the goods or services by totaling the following:
 - (a) The costs of eliminating District government employee positions, including but not limited to:
 - (1) Severance pay;
 - (2) Buyback of accrued vacation and sick day costs;
 - (3) Early retirement benefits; and
 - (4) Unemployment benefit costs.
 - (b) Contract monitoring costs, including but not limited to:
 - (1) Direct using agency costs including employee, equipment, and supplies and materials costs.
 - (2) Indirect costs incurred by the Office of Contracting and Procurement, including the costs of the contracting officer and the cost of terminating existing contracts and leases no longer needed as a result of the privatization contract.
 - (c) The cost of the prospective privatization contract to provide the good or service; and
 - (d) All other costs associated with issuing and managing a privatization contract, including the cost of existing major capital equipment if the District government allows the contractor to use the District government's existing major capital equipment.
- 4602.9 The using agency shall determine the per-unit cost of privatizing the good or service using the following means:

- (1) If the candidate privatization activity is for goods, the using agency shall divide the total contracting cost by the number of units of the goods the prospective contractor intends to provide during the contract period.
- (2) If the candidate privatization activity is for services with regular or easily defined outputs, the using agency shall divide the total contracting cost by the number of such outputs the prospective contractor intends to provide during the contract period.
- (3) If the candidate privatization activity is for services without regular or easily defined outputs, the using agency shall divide the total prospective contracting cost by the number of labor hours the prospective contractor intends to provide during the contract period.

4602.10 If the using agency determines that the total cost to the government of providing the good or service supports a level of performance that meets acceptable standards of quantity provided or performed, the using agency shall perform a cost comparison between the total cost to the government of providing the good or service as calculated in §4602.5, and the cost of privatizing the good or service as calculated in §4602.8.

4602.11 If the using agency determines that the total cost to the government of providing the good or service supports a level of performance below acceptable standards of quantity provided or performed, the using agency shall perform a cost comparison between the unit cost to the government of providing the good or service as calculated in §4602.6, and the cost of privatizing the goods and service as calculated in §4602.9.

4602.12 For both §§ 4602.10 and 4602.11, if the total cost to the District of Columbia of providing the good or service plus five (5) percent is more than or equal to the total cost of privatizing the good or service, then the Mayor or independent agency head shall submit a determination and findings to the Council of the District of Columbia that there is financial justification to privatize the activity.

4603 PERFORMANCE ANALYSIS

4603.1 The using agency shall determine performance measures for each major activity under consideration for privatization, using the following methodology:

- (a) Establish quantitative and qualitative performance standards for each activity;
- (b) Develop quantifiable results or outcomes for each performance standard;

- (c) Develop measures for each result or outcome; and
 - (d) Develop a methodology for determining the degree to which each measure is achieved.
- 4603.2 The using agency shall describe performance measures in clear, concise, commonly used, easily understood, measurable terms.
- 4603.3 Whenever possible, the using agency shall use industry standard performance measures.
- 4603.4 In those cases in which industry standard performance measures do not exist, the using agency shall use reasonable standards in developing the performance measures.
- 4603.5 The using agency shall calculate the performance measures for the last completed fiscal year for the using agency's existing goods or services under consideration for privatization.
- 4603.6 If the using agency's actual performance over the last completed fiscal year is significantly less favorable than those established in §4603.1, the using agency shall calculate the agency's performance measures using the previous three-year average measures.
- 4603.7 If the using agency uses the previous three-year average measures, the using agency shall provide a written justification for doing so to the contracting officer as part of the performance analysis. The written justification shall include an enumeration and explanation of why the previous years are significantly less favorable than the standards established in §4603.1.
- 4603.8 The contracting officer shall include in the solicitation performance measures that are at least as favorable as the performance measures in §4603.1, except in cases where the using agency's measures are contrary to health and safety, or other statutory or regulatory requirements.
- 4603.9 The using agency shall develop a performance analysis, which shall include the following information regarding both the using agency and the contractor performance measures:
 - (a) Quantitative and qualitative performance standards for each activity;
 - (b) Quantifiable results or outcomes for each performance standard;
 - (c) Measures for each result or outcome;
 - (d) A description of the expected impact of the proposed privatization on the quality of the goods and services provided to or on behalf of the District of Columbia. This description shall include:
 - (1) Expected changes in performance as expressed by the measures developed for §4603.1.

- (2) Expected changes in subjective quality elements not captured by the performance measures.

4604 ECONOMIC IMPACT ANALYSIS

- 4604.1 The using agency shall perform a market review and survey of the amount of economic activity generated, and the resulting tax base, of businesses providing the good or service under consideration for privatization in the District of Columbia.
- 4604.2 The using agency shall collect the following data for the most recently completed fiscal year to determine the amount of economic activity generated by, and the tax base of, businesses providing the good or service related to the proposed privatization:
 - (1) The number of employees working in the District of Columbia;
 - (2) The number of jobs created in the District of Columbia on an annual basis;
 - (3) The number of new startup firms in the District of Columbia;
 - (4) The number of firms that relocate to the District of Columbia;
 - (5) The number of firms that leave the District of Columbia;
 - (6) The amount of sales, income, property, employment, permits, fees and any other tax revenue paid to the District government; and
 - (7) Any other available data on the state of the District of Columbia's overall economy, and that of businesses providing the good or service under consideration for privatization by the District government.
- 4604.3 The using agency may use the following sources to collect the data detailed in §4604.1:
 - (a) The U.S. Department of Commerce;
 - (b) The U.S. Department of Labor,
 - (c) The U.S. Bureau of Labor Statistics;
 - (d) The U.S. Census Bureau;
 - (e) The D.C. Department of Employment Services;

- (f) The D.C. Office of Tax and Revenue;
 - (g) The D.C. Chamber of Commerce; and
 - (h) The D.C. Better Business Bureau.
- 4604.4 The using agency may also collect additional information from interviews with and surveys of local area suppliers and businesses.
- 4604.5 The using agency shall assess the impact of the privatization on the District of Columbia's economy and tax base by calculating the following:
- (a) The number of employees the prospective contractor will use to provide the privatized good or service; and
 - (b) The amount of supplies, materials and new capital investments the prospective contractor will use to provide the privatized good or service.
- 4604.6 The using agency shall determine whether the planned privatization will have a positive or negative impact on employment opportunities, business creation, business development, and business retention in the District of Columbia.
- 4604.7 The using agency shall determine the impact on employment opportunities by using the following process:
- (a) Calculate the total salaries and fringe benefits of District government employees who reside in the District of Columbia whose positions will be eliminated as a result of the privatization; and
 - (b) Compare the salaries and benefits of new jobs, if any, the prospective contractor plans to create in order to provide the required services, to that of the eliminated District government employees.
- 4604.8 The using agency shall prepare an economic impact analysis, to include the following information:
- (a) An introduction that summarizes the District of Columbia's overall economic climate, and describes the state of economic activity for businesses that provide the good and service under consideration for privatization;
 - (b) A summary of economic impact in a format that provides boxes for the user to check which indicates net positive impact, net negative impact, unknown impact, no economic impact, or not applicable for each of the following items:
 - (1) Employment Opportunities;

- (2) Business Creation;
 - (3) Business Development;
 - (4) Business Retention;
 - (5) Tax Revenues;
 - (6) Overall Impact; and
- (c) A summary of the using agency's thought process and reasoning used to reach the conclusions.

4605 SUBMISSION OF BIDS OR PROPOSALS BY DISTRICT EMPLOYEES

- 4605.1 District government employees performing functions under consideration for privatization may submit bids or proposals for a privatization contract under the following conditions:
- (a) The using agency identifies the function as a candidate for privatization and informs prospective affected employees of the proposed privatization;
 - (b) The prospective affected employees form a legal business entity that is an individual or sole proprietorship, partnership, corporation, joint venture, joint stock company, or any other legal organization through which business is conducted in the District of Columbia;
 - (c) The prospective affected employees prepare and submit a bid or proposal in response to the privatization solicitation as representatives of the business; and
 - (d) The prospective affected employees do not engage in activities related to the solicitation, including attending pre-bid or pre-proposal conferences in their official capacity as District government employees, including those activities enumerated in §4605.2.
- 4605.2 In their official capacity as District government employees, prospective affected employees shall not participate in the procurement process relating to the issuance or award of any privatization contract, including:
- (a) Preparing the statement of work;
 - (b) Participating in pre-bid or pre-proposal conferences; or
 - (c) Participating in any proposal evaluation process in their official capacity.

- 4605.3 Any business, as defined in §4605.1, that submits a bid or proposal to the Office of Contracting and Procurement in response to a privatization solicitation shall be deemed ineligible for an award if any District government employees having a legal or financial or ownership interest in, or association with, or plan to have an association with, the business, participated in any aspect of the procurement process on behalf of the District government.
- 4605.4 Prospective affected employees having a financial or ownership interest in, or association with, a business that is notified of a prospective privatization contract award, shall resign from their positions prior to contract award.
- 4605.5 Prospective affected employees shall submit their bid or proposal in response to a privatization solicitation in accordance with the following:
- (a) The employees shall form or associate with a business as described in §4605.1;
 - (b) The business shall possess all appropriate business licenses and permits to allow it to operate within the District of Columbia, and to contract with the District government as applicable to the activity;
 - (c) The business shall receive a privatization solicitation from the contracting officer that is identical to the one that the contracting officer issues to all other bidders or offerors;
 - (d) The business shall comply with any procedures specified in the solicitation; and
 - (e) The business shall be subject to all applicable rules and regulations governing the conduct of District bidders, offerors, and contractors.
- 4605.6 The business shall submit to the Office of Contracting and Procurement required documentation demonstrating its viability as a business, including:
- (a) Federal Tax Identification Number (TIN);
 - (b) Dun and Bradstreet number;
 - (c) Tax registration or compliance record from the District Office of Tax and Revenue (OTR);
 - (d) Unemployment tax records and First Source Agreement from the District Department of Employment Services (DOES);
 - (e) Business licenses or permits from the District Department of Consumer and Regulatory Affairs (DCRA);

- (f) A complete list of prospective District government employees having a legal, financial or ownership interest in, or association with, or plan to become associated with, the business, including a complete description of the nature and extent of each employee's legal, financial, or ownership interest in, or association with the business; and
- (g) A notarized affidavit setting forth the employees' intent to resign from District employment prior to contract award from each District government employee having a legal, financial or ownership interest in, or association with, or plan to become associated with, the business, pursuant to D.C. Personnel Regulations, Chapter 18, Employee Conduct.

4699 DEFINITIONS

4699.1 When used in this chapter, the following terms and phrases shall have the meanings ascribed:

Candidate privatization activity – Services with regular or easily defined outputs. The using agency shall divide the total cost by the number of outputs provided.

Contracting Officer — the individual with authority to enter into, administer, and terminate contracts.

The District — the government of the District of Columbia.

The District of Columbia — the city of the District of Columbia.

Good or Service — a product, item, material, component, subsystem, or system that is sold or traded to the general public by a vendor in the course of normal business operations at an established catalog price or market price.

Performance Measure — a quantifiable and measurable characterization of the performance of a task or activity. The measures define what data should be collected and what calculations need to be performed when assessing performance.

Privatization — a process in which the District government enters in to a contract with a private sector firm, non-profit organization, or other external entity, to provide a good or service to or on behalf of the District that has been provided, prior to contracting out, by District government employees, departments, or agencies, including the modification of an existing contract to provide goods or services to or on behalf of the District that are currently provided by District government employees, departments, or agencies.

Public Safety Workers — Operational workers involved in police, fire, emergency medical and emergency management tasks.

Using Agency — The District of Columbia government agency, department or entity on whose behalf the contracting officer issues a privatization solicitation, or whose existing contract the contracting officer modifies to provide goods or services to or on behalf of the District that are currently provided by District government employees, departments, agencies or entities.

All persons desiring to comment on the subject matter of this proposed rulemaking should file comments, in writing, and send them to the Chief Procurement Officer, 441 4th Street, 700 South, Washington, D.C. 20001. Comments must be received no later than thirty (30) days from the date of publication of this notice in the *D.C. Register*. A copy of this proposed rulemaking may be obtained at the same address.