

Summary of Comments and Responses for 220-RICR-30-00-13

Received from the Rhode Island Department of Transportation:

- 1) The intent of this new regulation is that the General Conditions will serve as the Contract between the State and Vendor thereby eliminating the need for separate contracts between vendors and agencies. As you know FHWA requires RIDOT to include Federal Forms in the Contracts such as FHWA 1273 Form, DBE Special Provisions, Suspension, Debarment, Title Six, Prevailing Wage Rates, etc. As long as RIDOT can include these forms along with the General Conditions no problem.

RESPONSE: Any federal requirements may be included as an Addenda to the General Conditions (“GC Addenda”) per Section 13.24. No change necessary.

- 2) §13.3C.7. states that the Purchasing Agent reserves the right to waive technical defects. I think we need to make sure that this does not include the ability to waive a federal requirement. In the past Purchasing allowed vendors to submit federal forms required to be submitted with the bid after bid the bid opening as a technicality.

RESPONSE: A “technical defect” does not include a federal requirement and references a non-material issue. Additionally, any federal requirements may be included as an Addenda to the General Conditions per Section 13.24. No change necessary.

- 3) §13.4.B discusses Order of Precedence and lists RIGLs as number one. I think we should suggest that applicable Federal Law is number one on Federally Funded projects.

RESPONSE: Comment Accepted and Section 13.4(B) amended accordingly.

- 4) §13.25 Subcontracting states that vendors shall not subcontract with any third-party except as set forth in its bid or proposal without written prior consent of the Purchasing Agent. As you know FHWA only requires that DBE sub-contracts be submitted with bid. Currently the Bluebook requires other sub-contracts to be submitted to RIDOT for approval prior to sub being allowed to work. If these sub-contracts have to go to Purchasing for approval this could cause project delays and result in delay claims.

RESPONSE: Comment Accepted and Section 13.25 amended accordingly.

Received from Division of Purchases, Department of Administration:

- 5) Terms in Section 13.2(A)(2)(a) & (b) need to be clarified to reflect implementation of new E-Procurement System.

RESPONSE: Comment accepted and 13.2(A)(2)(a) & (b) amended accordingly.

- 6) The standard RFP template has a period of 180 days to hold a vendor’s proposal irrevocable. Should the regulations be consistent?

RESPONSE: The regulation allows the period for proposals to be irrevocable to be changed by specifying in the solicitation, but the standard for all procurements should be 60 days. Comment not accepted.

- 7) Advise on “form” stated in Section 13.3(C)(4).

RESPONSE: Submission of a bid or proposal must be authorized. Currently this is done through a written signature. The regulation allows either a signature or an electronic certification for submission of a proposal. Submission of a bid or a proposal is a binding offer to the State and an authorized agent must sign or certify submission. No change necessary and comment not accepted.

Received from Office of Internal Audits, Department of Administration:

- 8) General Conditions should contain Audit clause as a vendor obligation?

RESPONSE: Comment accepted. Vendor obligations in section 13.22 updated to include a reference to R.I. Gen. laws 37-2-34 (Right to inspect facilities – Right to Audit).

Received from the Community College of Rhode Island:

- 9) Summary of Proposed Rule, third sentence “...the updated General Conditions will serve as the primary contractual instrument with State vendors.” Challenge will be communicating this to the vendors. Will there be language in the State RFP (template) that will clearly convey this?

RESPONSE: This question is beyond the scope of the regulations. No change necessary.

- 10) 13.1 Should address: Sole source procurements, software and licensing agreements, consultant contracts, A&E, student services programs CCRI is contracted to provide (i.e. Drivers Ed), FERPA requirements, HIPAA requirements. CCRI’s experience indicates that software/licensing vendors (as well as other vendors) may not be amenable to foregoing their own agreements in favor of solely utilizing the State issued contract.

RESPONSE: Section 13.1 was clarified to address this comment. The General Conditions apply to all procurements.

- 11) 13.2 A. 1. Does this mean vendor specific agreements would be incorporated here?

RESPONSE: This is a question and no change necessary. The General Conditions and incorporated items are intended to be the contract between the State and the vendor and not any other instrument.

- 12) 13.3 C. 2. This indicates that the State may reject a Vendor’s bid or proposal at its’ sole discretion. Will agency input be considered as well?

RESPONSE: This is a question and no change necessary. Agencies will continue to be involved in the procurement and evaluation processes.

- 13) 13.3 C.3. What limits of liability, if any, will be allowed from a vendor (i.e., software/licensing agreements with max purchase price as liability limit).

RESPONSE: This is a question and not a comment and no change necessary. In a proposal or bid, a vendor may propose a qualified or conditional offer (e.g. limitation of liability) which will be treated in accordance with the provisions of 220-RICR-30-00-13.3(C)(3).

- 14) 13.3 C.7. Will agency input be considered?

RESPONSE: This is a question and no change necessary. Agencies will continue to be involved in the procurement and evaluation processes.

- 15) 13.3 E.2. Product Evaluation – The State Purchasing Agent reserves the right to determine whether substitute items are approved equals. Will agencies be consulted in this decision-making process?

RESPONSE: This is a question and no change necessary. Agencies will continue to be involved in the procurement and evaluation processes.

- 16) 13.4 Entire Agreement – Same as 13.1: Sole source procurements, software and licensing agreements, consultant contracts, A&E, student services programs CCRI is contracted to provide (i.e. Drivers Ed), FERPA requirements, HIPAA requirements.

RESPONSE: Section 13.1 was clarified. The General Conditions apply to all procurements.

- 17) 13.4 C. Will specific specifications, FERPA language be included?

RESPONSE: This is a question and no change necessary. Any additional requirements, federal or otherwise, may be included as an addendum to the General Conditions of Purchase. If the agency has federal requirements which apply, they need to provide them to the Division of Purchases to be included as part of the procurement.

- 18) 13.20 Termination, Default, Cancellation and Stop Work – will this be actively enforced?

RESPONSE: This is a question and no change necessary. In the event that a vendor does not meet its contractual requirements, as provided in the General Conditions and incorporated items, the State may exercise its contractual rights.

- 19) 13.22 Vendor Obligations 10. Drug-Free Workplace Requirement – how will this be enforced for out-of-state or foreign entities?

RESPONSE: This is a question and no change necessary. The vendor is required to meet this obligation regardless of location and if it does not, the State may enforce its contractual rights.

20) 13.26 Advertising – add – “or agency”. The college as well as the council own their own trademarks.

RESPONSE: Section 13.26 amended to include agency approval for advertising.

21) 13.34 C. 1. Are Cybersecurity requirements addressed by the General Insurance Requirements?

RESPONSE: This is a question and no change necessary. Cybersecurity requirements may be included in one of the addendums to the General Conditions (i.e. A- Insurance Requirements and/or B--Information Technology Requirements.

22) 13.34 C. 3. Are Prevailing Wage requirements addressed by the Public Works Project Requirements?

RESPONSE: This is a question and no change necessary. Prevailing Wage requirements are addressed by statute, but may also be included in GC Addenda C – Public Works Project Requirements (AIA)

23) 13.2 Definitions – Purchase Order and Change Order do not appear in the list of defined terms.

RESPONSE: These terms are defined in other State Procurement Regulations. Section 13.2(B) provides that “All other terms contained in the State Purchases Act and State Procurement Regulations and used herein shall have the same meanings.” Comment not accepted.

24) Currently the addendums listed under 13.34 are not available for review. Once these become available, there could be further comments from CCRI.

RESPONSE: This is a question and no change necessary. These items will be made available.

Received from the Rhode Island Nuclear Science Center:

25) Our agency should be under the RIGL that goes along with the rest of higher education, which makes grant purchasing independent of State Purchasing.

RESPONSE: This is a policy comment related to the State’s general laws. No change to the regulations necessary.

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Received from the University of Rhode Island:

	Section	Para	Subpar	Item	Topic	Comment	Response
26)	13.13	A	6		Payment	Payments under A/E supervision must be authorized by the architect. What level of supervision is being defined to require that authorization (vs. owner's rep or PM) and how does this affect us?	This is a question and no change necessary.
27)	13.22	A	10		Vendor Obligations	Only section b makes references to the abuse of prescription drugs but they all should.	Comment Accepted – Change to proposed regulations in this section.
28)	13.29				Survival	The intent is unclear. Please explain.	This is a question and no change necessary. Obligations of vendors may survive beyond the contract term.
29)	13.3	C	9	a	Procurement Process	Preference for products raised or manufactured in RI in the event all other things are 'materially' equal. We need to define materially. See RIGL 37-2-80. Use of the word materially is new (see section 13, I in the previous GCs).	Comment Accepted – Change to proposed regulations. Deleted "Materially."
30)	13.3	C	9	b	Procurement Process	The addition of the defined contribution towards MBE participation is now much more restrictive in the purchase of materials and supplies where the value of the material doesn't count towards the 10% requirement, now only fees and commissions count. This is not in the statute (37-14.1) or in the regulations (section 5.12). The previous GCs (section 25) counted materials towards 60% of the overall 10% requirement.	Comment not accepted. The regulation language has always been, and continues to be, the standards that the MBE office has utilized. These standards are consistent with both law and regulations. It is also consistent with MBE Utilization Plan forms and the MBE participation credit guidance document that has been used for years and that is also posted on the Office of Diversity, Equity and Opportunity (ODEO) website. Pursuant to RIGL 37-14.1-7, MBE

							<p>compliance regulations must be consistent with the federal DBE regulations, and the attached guidance language is taken directly from 49 CFR 26. It is also the exact credit language utilized by RIDOT for the DBE program, with which is purposefully drafted so that the regulations are consistent.</p> <p>As a recap, there are no changes in the MBE participation credit and no restrictive covenants have been added. Further questions on this subject should be directed to ODEO and more specifically, the Minority Business Enterprise Compliance Program.</p>
31)	13.3	C	3	b	Awards	<p>Qualified or conditional offers ...may be set aside in favor of the requirements set forth in the solicitation (with the consent of the vendor). We are requesting clarification on this section.</p>	<p>This is a question and no change necessary. This section of the proposed regulations provides options to the State in the event that vendor proposes a qualified or conditional offer. These same options are currently in the existing General Conditions.</p>
32)	13.32				Effective Date	<p>How will this effect active bids still unopened on 10/1 as well as bids opened and under evaluation but not awarded.</p>	<p>Comment Accepted – Change to proposed regulations in this section to clarify: “The General Conditions shall apply to all procurements issued after the effective date of these regulations.”</p>

33)	13.34				Addendums	URI is not comfortable proceeding with the revised General Conditions without first reviewing the addendums and how they apply.	Comment Accepted – Change to proposed regulations in this section adding E.
34)	13.1				Incorporation & Single/Sole Source	Line 5 includes reference to "the solicitation and related solicitation documents..." along with the regulations, statutes, bidder certification form and general conditions as making up the entire and exclusive contract. There does not appear to be a provision for referenced vendor documents in the case of a single/sole source.	Comment Accepted – Change to proposed regulations to add in section 13.4(A)(7): "The offer/proposal submitted by Vendor and accepted by the State."
35)	13.1				Incorporation	There is no reference to the Vendor's standard terms and conditions although they are mentioned in later sections.	Comment not accepted: Unless an exception is made by the State Purchasing Agent, the State's General Conditions control the contractual relationship with the Vendor, not Vendor's terms and conditions. As part of their offer, the Vendor may submit a qualified or conditional offer proposing different terms/conditions. The qualified or conditional offer shall be treated in accordance with Section 13.3(C)(3) and may be:

							<ul style="list-style-type: none"> a. Rejected as being non-responsive; or, b. Set aside in favor of the requirements set forth in the solicitation (with the consent of the Vendor); or, c. Accepted, if the State Purchasing Agent determines in writing that such acceptance is in the best interest of the State.
36)	13.12	B			Product Warranties	The statement "...in a commercially reasonable manner..." has been added. This is still a bit ambiguous. Can you clarify the expectation.	This is a question and no change necessary.
37)	13.12				Product Warranties	Most Vendors, particularly manufacturers and software companies, will provide some form of "express warranty" and disclaim all other warranties including the warranty or merchantability and fitness for a particular purpose which the warranties set forth here essentially mirror.	Comment not accepted. The State may consider alternate warranties in accordance with Section 13.3(C)(3)
38)	13.15	B			Damages for Claims	Can the Vendor dispute or challenge the assessment of damages or the reasonableness of the assessment?	Comment Accepted – Change to proposed regulations in this section to allow vendor to appeal an assessment of damages.

39)	13.17				Confidentiality	This entire section should be reviewed more closely. It appears to be in conflict create tension with the Access to Public Records Act that contains significant exemptions to protect the privacy of state employees and others who deal with the State. If the concern is the use of data created by different state service agencies perhaps that can be addressed in a more focused Special Addenda as opposed to being part of the main section of the General Conditions. I believe agencies have their own Data Use Agreements now which spell out confidentiality obligations as well as permissible use of data.	Not accepted. This section is consistent with APRA and determination of whether something is public under APRA is left to the State.
40)	13.2				Definitions	Some definitions conflict with definitions in the Regulations. Ex. Vendors which is referenced in section 4.1 of the regulations but does not read the same.	Not accepted. The definitions in proposed regulations apply only to Section 13. However, all "other terms contained in the State Purchases Act and State Procurement Regulations and used herein shall have the same meanings." We will review the definitions in the other sections as necessary.
41)	13.2	A	1		Definitions	"Contract": Does the reference to all contractual documents include a Vendor's standard terms and conditions or other form contract. If so, are they now required to be expressly incorporated into the purchase order?	Not accepted. See response to 35).

42)	13.20	C			Availability of Funds	This has been modified to expand the freedom the State has to cancel a contract and even identifies that the vendor may have to return goods they have in stock or on order on our behalf. This and the following convenience clause have the highest potential to increase costs. They are also in conflict with § 37-2-33 Multi-year contracts and § 37-2-43 Contract clauses and their administration. The first states that "reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the supplies or services delivered under the contract"	Not accepted. This is a policy decision to protect the interests of the State. A vendor may propose a qualified or conditional offer which will be considered under 13.3(C)(3).
43)	13.21				Indemnification	This becomes a problem when it is tied to a limitation of liability clause which in and of itself may be acceptable. We will reject a proposal or contract condition that seeks to limit a Vendor's proposal to include their indemnification obligation for third party claims within the limitation of liability clause.	Not accepted. A vendor proposal to limit liability may be considered and/or rejected under 13.3(C)(3) related to qualified or conditional offers.
44)	13.25	B			Assignment	It is not uncommon for a Vendor to ask that consent for an assignment to an affiliated entity not be required. What is the State's position with regard to such assignments?	This is a question and no change necessary. The State's position is stated in 13.25(B), which requires written consent from the State Purchasing Agent to assign a contract.
45)	13.26				Advertising	Can we assume that listing a project on a company brochure that includes photographs of the project without endorsement of the company is permitted?	This is a question and no change necessary. However, this section was amended to include approval of any advertising by the State Purchasing Agent and the agency.
46)	13.3	C	4		Procurement Process	Please advise what the 'form of certification' is that is referenced in this section.	This is a question and no change necessary. Currently a signature from an authorized agent is required. However, as the state moves towards electronic submission, an electronic certification may take the place of a signature.

47)	13.3	C	3		Procurement Process	<p>This will require URI to seek approval of the State Purchasing Agent to accept a Vendor's terms and conditions or form contract document which we get all the time and will slow the process down. Most, if not all Vendors we deal with insist that we sign their contract document. This could overwhelm the office of the State Purchasing Agent. We should consider and attempt to define the elements or factors to be considered in determining what the "best interest of the State" and delegate this authority to the VP of Finance and Administration for URI purchases.</p>	<p>Not accepted. The purpose of these comprehensive General Conditions of Purchase, along with incorporated items reference therein, is to be the governing contract with State vendors. Qualified or conditional offers may be considered in accordance with 13.3(C)(3). The intent is to eliminate the need to negotiate separate agreements between agencies and vendors and standardize as many of the State's conditions as possible. Additionally, providing the State's General Conditions up-front limits any after-the fact-negotiation that would potentially change the solution procured by the State. In the event of an extremely unusual situation where the vendor refuses to accept the State General Conditions wholesale and the State has no other option, the State Purchasing Agent can make an exception in the best interests of the State.</p>
48)	13.3	D			Public Records	<p>Will this require URI to use reasonable efforts to honor the Vendor's assertion or will the Division be responsible to do this. Historically, URI has made the determination as to whether or not the Vendor's request is consistent with the exemption for "commercial or financial information" of a confidential nature under the RI Access to Public Records Act. We give the Vendor notice a request for public records but do not joint the Vendor in any action seeking an injunction or protective order.</p>	<p>Comment accepted and section amended.</p>

49)	13.3	C	9	b	Minority Business Enterprise	<p>Per the associated statute, the section reads that: “A minimum of ten percent [10%] of the dollar value of the work performed against contracts shall be performed by certified Minority Business Enterprises where it has been determined that subcontract and/or supply opportunities exist, and where certified Minority Business Enterprises are available. A vendor may count 60% of its expenditures for materials and supplies required under a contract and obtained from an MBE certified as a regular dealer or supplier, and 100% of such expenditures when obtained from an MBE certified as a manufacturer, towards the MBE participation requirement under RIGL 37-14.1-6.” The University is very supportive of the objectives reflected in the referenced statute and has reinforced the State’s commitment to seek full compliance from vendors “where subcontract and supply opportunities exist” responding to University public works projects. The University has observed instances where the original determinations have not fully materialized and the apparent low bid vendors’ exploration of alternative methods of fulfilling the ratios have fallen short despite these efforts. It would be helpful in such instances that a certain time-frame be set (i.e. the 60-day period for hold pricing as bid) by which a definitive decision be reached to either re-bid the project, or acceptance that the MBE subcontractor/supply opportunity does not exist is confirmed and the award of the purchase order proceeds. This would provide a predictable period within which the needed public works project can ultimately proceed.</p>	<p>Comment not accepted. The regulation language has always been, and continues to be, the standards that the MBE office has utilized. These standards are consistent with both law and regulations. It is also consistent with MBE Utilization Plan forms and the MBE participation credit guidance document that has been used for years and that is also posted on the Office of Diversity, Equity and Opportunity (ODEO) website. Pursuant to RIGL 37-14.1-7, MBE compliance regulations must be consistent with the federal DBE regulations, and the attached guidance language is taken directly from 49 CFR 26. It is also the exact credit language utilized by RIDOT for the DBE program, with which is purposefully drafted so that the regulations are consistent.</p> <p>As a recap, there are no changes in the MBE participation credit and no restrictive covenants have been added. Further questions on this subject should be directed to ODEO and more specifically, the Minority Business Enterprise Compliance Program.</p>
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50)	13.32	A			Effective Date of GCs	The effective date is October 1, 2018 which does not leave much room to address these and other comments. In addition, how are those matters now in the pipeline going to be handled. Can we assume that the existing general conditions will apply to all matters solicited prior to October 1 even if the PO has not been awarded?	Comment Accepted. Effective Date section amended.
51)	13.34				Addendums	In 2015, knowledgeable University personnel worked cooperatively with Purchasing and Legal Counsels for the RI Department of Administration in the examination of, and amendment to, the American Institute of Architects (AIA) proprietary contract documentation for professional services and construction contracts associated with Public Works projects. Involving those engaged in the development and delivery of public works projects at both the State and University level was productive and mutually beneficial as both sides have gained considerable experience in what contractual elements best protect the interests of both the University and the State. The University is aware that the AIA has released new versions of their contract templates that will require a revisiting of our previous painstaking examination and amendment process. The University recommends that we do so, with particular attention to the preservation of those elements that we came to terms with in the 2015 effort that we believe have served our mutual interests well since that undertaking. The product of this second effort would logically be incorporated into the "Addendum 13.34 C 3" of the State proposed, revised "General Conditions of Purchase." The University is prepared to respond to a proposed schedule and team member identification to start this process in the immediate future.	Comment Not Accepted. Updated AIA agreements are an addendum to the General Conditions.

52)	13.4	A			Incorporation	Can we assume that the reference “together with associated documents referenced therein” refers to or includes the Vendor’s standard terms and conditions or form contract?	This is a question and no change necessary. See response to 47.
53)	13.4	B			Order of Precedence	The initial paragraph make reference to the Vendor’s proposed standard terms of sale but there is no mention of them in the order of preference. To the extent these terms are not inconsistent with the solicitation and are consistent with the Vendor’s proposal accepted by the State they should be included in the order of precedence.	Not accepted. The order of precedence includes the offer, proposal or bid submitted by the vendor. Qualified or conditional offers would fall under that category.
54)	13.4	C	1	b	Contract Contingencies	Other sections refer to the PO and associated documents which seems to make this language inconsistent or contradictory.	Not Accepted. Language is consistent.
55)	13.4	C	1	c	Alterations	This is the same comment made for 13.3C. If URI is required to go back to the State Purchasing Agent for any variation or alteration it would appear to slow down the process significantly.	Not accepted; see response to 47.
56)	13.1				Incorporation & AIA Documents	Please confirm if the AIA documents and other contract forms used for Public Works projects included by reference as part of the 'related solicitation documents'.	This is a question and no change necessary. Section is amended in response to other comments. AIA documents are an addendum to the General Conditions. B— Public Works Project Requirements

57)	13.20	D			Convenience	This has been modified to expand the freedom the State has to cancel a contract and even identifies that the vendor may have to return goods they have in stock or on order on our behalf. This and the following convenience clause have the highest potential to increase costs. They are also in conflict with § 37-2-33 Multi-year contracts and § 37-2-43 Contract clauses and their administration. The first states that "reimbursed for the reasonable value of any nonrecurring costs incurred but not amortized in the price of the supplies or services delivered under the contract"	Comment not accepted. See response to 42.
58)	11				Collusion	The section regarding collusion has been eliminated. Is this because it is included in the Bidder Certification Form? Please clarify.	Comment Accepted; added F under section 13.3 (language under current regulation).
59)	12				Prohibition against Contingent Fees and Gratuities	This section regarding the prohibition against contingent fees and gratuities has been eliminated. Is this because it is included in the Bidder Certification Form?	Comment Accepted; Added G under 13.3 (Current language under regulation).
60)	13	d			Awards	Although it is understood that there is a movement towards electronic bidding, Section 13.3 should still include the statement that bids submitted in pencil should be rejected for those procurements that may still require physical submission.	Comment Accepted; language added into Section 13.3 (C)(4).
61)	13	j			Awards	The impact of discounted payment terms shall not be considered ... has been eliminated. Is this now being considered?	Not accepted. The State may consider discounted payment terms.
62)	3				Subcontracts	The statement that the vendor is required to provide a list of subcontractors upon request has been eliminated. (Reference section 13.25 of new/proposed). This should remain.	Comment Accepted; Language reinserted into 13.25.

Received from the Rhode Island Commission on the Deaf and Hard of Hearing:

63) In section 13.22(A)(9) change “Handicapped Access” to “Access by Persons with Disabilities,” and fix a typo in 13.24.

RESPONSE: Comment Accepted and language amended.

64) Would the General Conditions impact MPA 358?

RESPONSE: This is a question and no amendment necessary. The General Conditions will govern the contractual relationship with all vendors of the State who receive an MPA and/or Purchase Order.