

**BOARD OF COMMISSIONERS
FOR THE
TOWN OF UPPER MARLBORO**

ORDINANCE: 2011-02
SESSION: Regular Town Meeting
DATE: May 17, 2011

AN ORDINANCE related to the use of competitive bidding, purchasing and contracting for all Town procurements. The purpose of this ordinance is to repeal any previously enacted ordinances on this subject matter and enact a new comprehensive ordinance in order to provide a more practical and efficient process for obtaining goods and services through public expenditures, and disposing of surplus property as more particularly set forth herein.

WHEREAS, pursuant to Md. Ann. Code, Article 23A, § 2, the Town of Upper Marlboro (hereinafter, "the Town") has the general authority to pass such ordinances not contrary to the Constitution of Maryland, public general law, and

WHEREAS, the Charter of the Town of Upper Marlboro (the "Charter") in Section 82-56 (Purchasing and Contracts) mandates that the Board of Commissioners adopt an ordinance consistent with said Section, and

WHEREAS, Ordinance 97-1, is no longer consistent with Charter Section 82-56 amended on August 17th, 2010 by Charter Resolution 01-2010, and

WHEREAS, the Board of Commissioners of the Town of Upper Marlboro (the "Board") desires to repeal Ordinance 97-1, in its entirety, that was approved on January 14, 1997, and

WHEREAS, the Board finds it in the best interest of the Town of Upper Marlboro to enact a new and comprehensive procurement ordinance as provided herein.

NOW THEREFORE, the Board of Commissioners of the Town of Upper Marlboro, State of Maryland, does ordain as follows:

SECTION 1. Purpose.

The purpose of this ordinance is to:

- (a) Provide for fair and equitable treatment of all persons involved in public purchasing by the Town;
- (b) Ensure the maximum purchasing value of public funds in procurement; and

(c) Provide safeguards for maintaining a procurement and disposition system of quality and integrity.

SECTION 2. Definitions.

The following words, terms and phrases, when used in this Ordinance shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

"Bid" means an offer, in writing, to furnish goods or services in conformity with the **specifications**, delivery terms and conditions or other requirements included in the **invitation for bids** or an offer to purchase property declared to be surplus property by the Board of Commissioners.

"Competitive sealed bid" or Sealed Bidding means a method of procurement in which a supply, service, or **construction** item is defined in a list of **specifications**; the **specifications** are included in an **invitation for bids**; the **bids** are received by a specified time in sealed envelopes; an award is made to the lowest **responsible bidder** meeting all **specifications**, and cost is objectively measurable as defined in the **specifications**.

"Competitive sealed proposal" or Request for Proposals means a method of procurement in which a supply, service, or **construction** item is defined in a list of **specifications**; **proposals** are received by a specified time in sealed envelopes; and an award is made to the proposer most closely meeting **specifications** as determined by an evaluation that uses a predetermined and published set of evaluation criteria. Cost is one (1) criterion among others, all of which may be assigned specific weights.

"Construction" means the erection; alteration or repair of any Town structure or building; or other public improvements of any kind. **"Construction"** does not include the routine operation, repair or maintenance of existing facilities.

"Contract" means any type of Town agreement, regardless of how it may be titled, for the procurement or disposition of goods, services or **construction**.

"Contractor" means any person having a **contract** with the Town.

"Invitation for bids" means all documents, whether attached or incorporated by reference, used for soliciting **competitive sealed bids**.

"Professional services" means those services provided by persons whose services are customarily negotiated because of the individuality of those services, because of the extensive level of training, education and skill involved, and because they do not lend themselves to a fixed price **bid**.

"Proposal" means an offer to supply goods or perform services, or both or to purchase goods and services from the Town in response to a **request for proposals**.

"Public notice" as used herein means timely publication on the Town's website, in a newspaper

of general circulation or in another appropriate publication as determined by the Board.

“Request for proposals” means all documents, whether attached or incorporated by reference, used for soliciting **proposals**.

“Responsible bidder or offeror” means a person who has the capability and reliability in all respects to perform fully the **contract** requirements. Any person who is in default on the payment of taxes, licenses or other monies due the Town shall not be deemed responsible.

“Responsive bidder” means a person who has submitted a **bid**, which conforms in all material respects to the **invitation for bids**.

“Specification” means any description of the design 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 supply, service or **construction** item for delivery.

“Town” means the inhabitants of the Town of Upper Marlboro, Maryland that are collectively considered a body corporate and a municipal corporation empowered to enact certain ordinances through its legislative body pursuant to Article XI E of the Constitution of Maryland, the Charter and Article 23A of the Annotated Code of Maryland.

Part I Procurements over \$10,000

SECTION 3 (A) Competitive Sealed Bidding or Sealed Bid.

Unless the Board, by unanimous vote of the full Board, finds another method of procurement to be more advantageous, all purchases and **contracts** by the **Town**, shall be awarded through a **competitive sealed bid** process when the amount of the purchase or **contract** is anticipated to be \$10,000 or more. **Competitive sealed bidding** shall be the preferred method for **Town** procurement which is expected to exceed ten thousand dollars (\$10,000.00).

(a) **Invitation for bids.** An **invitation for bids** shall be in writing and shall include **specifications**, and all **contractual** terms and conditions deemed necessary and applicable to the procurement. **Public notice** of the invitation shall be given at least fifteen (15) days prior to the opening of the **bids**.

(b) Cancellation. The Board of Commissioners may cancel any **invitation for bids**.

(c) **Bid opening.** **Bids** shall be opened and recorded publicly as outlined in the **invitation for bids**, in the presence of one (1) or more witnesses at the time and place designated in the **invitation for bids**.

(d) **Bid acceptance and evaluation.** **Bids** shall be unconditionally accepted without alteration or correction except as authorized in this Ordinance, and shall be evaluated based on the requirements and

criteria set forth in the **invitation for bids**.

(e) **Bid** correction or withdrawal. Mistakes discovered after **bid** opening resulting in downward correction of a **bid**, which would displace the apparent low bidder, shall only be permitted if the error made and the intended **bid** price can be determined by the **Town** solely from the **bid** documents. Upward correction of a **bid**, established from the **bid** documents, shall be permitted only if the **Town** finds that the mistake was inadvertent and bona fide and that it would be unconscionable to require the **bidder** to enter into a **contract** at the **bid** price. All decisions to permit the correction or withdrawal of **bids** based upon **bid** mistakes, shall be supported by a written determination made by the President.

(f) Award. The **contract** shall be awarded with reasonable promptness by written notice from the President to the lowest responsible **bidder**.

SECTION 3 (B) Competitive Sealed Proposals or Request for Proposals.

(a) When appropriate to use. In lieu of bid specifications, a request for proposal may be issued. A request for proposal may be issued when a desired outcome is sought, but the method for achieving that outcome is not defined in a detailed specification, or circumstances allows for presenting different options for achieving the desired outcome beyond proposed specifications. Services or goods purchased by request for proposal shall be awarded based on a variety of factors, including project approach, experience, price, and such other criteria as shall be defined and specifically set forth in the request for proposal. Requests for proposal shall be posted in the same manner as bid specifications, and responses shall be sealed in the same manner as bids. **Proposals** shall be solicited through a **request for proposals** by **public notice**. Such **public notice** shall be given at least fifteen (15) days prior to the opening of the **proposals**.

(b) Confidentiality of **proposals**. The identity of any offeror or the contents of any **proposal** shall not be disclosed to competing offerors during the evaluation process.

(c) **Bid** regulations applicable to **proposals**. Subsections (b), (c), (d) and (e) of Section 3 (A) relating to **competitive sealed bids** shall also be applicable to **competitive sealed proposals**.

(d) Discussion with responsible offerors and revisions to **proposals**. As provided in the **request for proposals**; discussions may be conducted with responsible offerors who submit **proposals** determined to be reasonably susceptible to being selected for award for the purpose of clarification to assure full understanding of, and conformance to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of **proposal** and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions there shall be no discussion of the identity of competing offerors.

(e) Award. Award shall be made to the responsible offeror whose **proposal** is determined in writing to be the most advantageous to the **Town** taking into consideration price and the evaluation factors set forth in the **request for proposals**. The **contract** file shall contain the basis on which the award is made, and shall be retained pursuant to the approved records retention schedule.

(f) The use of a **request for proposals** or other methods of procurement under this section must be authorized by a unanimous vote of the full Board upon a determination that such method is more advantageous for the **Town** than **competitive sealed bidding**.

SECTION 3 (C) All procurements within Part I must be approved by the Board before coming effective.

Part II Procurements at or below \$10,000

SECTION 4. Procurements between \$10,000 and \$2,000.

(a) Except as may be provided under Section 6, procurements under this Section require, insofar as it is practical, a minimum of three quotes or **proposals** that may include offers based on advertising materials available to the public. If such quote or **proposal** is oral, a written record of the offer shall be made with the date and details to be maintained with the procurement record.

(b) All procurements between \$10,000 and \$ 2,000 shall be approved by the Board.

SECTION 5. Procurements under two thousand dollars (\$2,000).

(a) The President is authorized to make individual purchases and execute contracts up to \$2,000 in cost without prior Board approval so long as the duration of the purchases or contract is one year or less as long as such contracts or purchases were previously authorized by a budget ordinance or approved within any detailed budget documents supporting said budget ordinance.

(b) For individual purchases or contracts over \$500, the President shall if feasible obtain three (3) or more offers, or quotations, such quotations may be oral or based on published prices.

(c) Purchases or contracts with a value of \$1,000 or more shall be reported to the Board.

(d) The President may, in writing, authorize the Town Clerk or Department Heads with the authority to make purchases under \$500 with the same restrictions as set forth in Section 5 (a) above.

Part III Special Procurement of Any Amount

SECTION 6. Special classes of procurements.

(a) Sole source procurement. A **contract** may be awarded without competition when the Board

of Commissioners determines and records in the minutes of a public meeting, after conducting a good faith review of available sources, that there is only one (1) source for the required supply, service or **construction** item. The President or his designee shall conduct negotiations as appropriate, as to price, delivery, and terms and keep a written record of all sole source procurements.

(b) Emergency procurement. Notwithstanding any other provision of this Ordinance, the Board of Commissioners may make or authorize others to make emergency procurement of supplies, services or **construction** items when there exists a threat to public health, welfare or safety, and delay would seriously injure the **Town** financially or otherwise. A written statement of the nature of the emergency shall be made by the President who shall promptly notify the Board of Commissioners of the circumstances requiring the emergency procurement. Such emergency procurement shall be made with a level of competition as deemed practical under the circumstances, but need not satisfy the requirements of Part I of this Ordinance.

(c) Cooperative and wholesale procurement.

(i) Cooperative purchasing. Notwithstanding any other provision of this Ordinance, the Board of Commissioners may **contract** with any supplier who offers goods or services on the same terms as provided other state or local governments or agencies thereof if the Board of Commissioners finds that the cost of the items to be purchased is equal to or less than that which could be obtained by competitive procurement.

(ii) Interjurisdictional purchasing. The Board of Commissioners may also **contract** directly with state or local governments or agencies thereof for goods or services when such goods, work or services were obtained through competitive procurement procedures or service to be performed is now being performed by the state or local jurisdiction.

(iii) Joint purchasing. The Board of Commissioners may join with other units of government in cooperative purchasing plans when the best interests of the **Town** would be served thereby.

(d) **Professional services.** Selection of professional service **contractors** for the **Town** may be procured by methods set forth in Section 3 or 4 of this Ordinance or by **public notice** and negotiation. Notwithstanding the foregoing, the Board of Commissioners may select individuals or firms to provide continuing **professional services** by whatever procedure the Board deems appropriate and in the best interests of the **Town**.

(e) Selection process by negotiation for a services or **construction contract**. The Board of Commissioners or other appropriate **Town** personnel may conduct discussions with applicable persons regarding any primarily services or **construction-oriented contract** not exceeding ten thousand dollars (\$10,000.00) and the President or his designee shall select from among them, three (3) persons or entities deemed most qualified to provide the required services or **construction**. Upon approval of the Board of Commissioners, the negotiations shall then be conducted by the President or his designee based on criteria or guidelines established and made public by the Board of Commissioners. Should the President or his designee be unable to negotiate a **contract** at a fair and reasonable price with any of the three (3) selected persons or entities, additional persons or entities may be selected in order of their competence and qualifications, and negotiations shall be continued in accordance with this subsection until an agreement is reached. If an agreement cannot be reached at a fair price to the **Town**, negotiations may be terminated and the selection process may start over.

Part IV Disposal of Town Personal Property

SECTION 7. Methods of sale.

(A) Goods which have been found by the Board of Commissioners to have become surplus, obsolete or unusable, and whose current estimated value is ten thousand dollars (\$10,000) or less may be disposed of by competitive offers, price quotations or by public auction, trade or exchange for goods, or by price quotations or offers as provided for in goods over ten thousand dollars (\$10,000) set forth herein.

(B) All goods, which have been found by the Board to have become surplus, obsolete or unusable and whose current estimated value exceeds ten thousand dollars (\$10,000) shall be sold by one (1) of the following methods:

- (1) **Competitive sealed bid,**
- (2) **Competitive sealed proposal,**
- (3) Competitive auction sale, or
- (4) Trade-in or exchange for goods which are currently needed.

SECTION 8. Ethics in contracting.

(a) Competitive procurement required. No **contract** in which any officer or employee of the **Town** is financially interested or through which the officer or employee stands to profit financially shall be awarded without competitive procurement. Any **contract** in violation of the provisions of this subsection shall be voidable by the **Town**. For the purpose of this subsection, a person who owns more

than either stock valued at ten thousand dollars (\$10,000.00) or five (5) percent of the stock of any publicly-held corporation listed on a national stock exchange or an equivalent financial interest in any other business entity shall be deemed to be financially interested.

(b) Penalty for violation. Any person responsible for the making of a **contract** in willful violation of the provisions of this section shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than one hundred dollars (\$100.00) or imprisonment for not more than thirty (30) days or both.

SECTION 9. Appeals and remedies.

(a) Submission of **bid** protest. Any **bidder**, offeror, or **contractor** who is aggrieved in connection with the solicitation or award of a **contract** must first seek resolution of such complaint by submitting a protest to the Board of Commissioners in writing. A protest with respect to an **invitation for bids** or **request for proposals** shall be submitted prior to the opening of **bids** or the **proposals**, unless the protestor did not know and did not have reason to know of the facts giving rise to the protest until after such date, in which case the protest must be submitted within ten (10) calendar days after the facts became known, but in no event after the execution of a binding **contract** with the successful bidder.

(b) Suspension of procurement. In the event of a timely protest under subsection (a) of this section, procurement shall not proceed further until the dispute is resolved or until the Board of Commissioners makes a determination on the record that the award of a **contract** without delay is necessary to protect substantial interests of the **Town**.

(c) Submission and resolution of **contract** claim or protest. Claims by a **contractor** against the **Town** relating to a **contract** or **bid**, shall be submitted in writing to the Board of Commissioners for a decision. Claims include, without limitation, controversies arising under a **contract**, and those based upon breach of **contract**, mistake, misrepresentation, or other cause for **contract** modification or revision.

(d) Board of Commissioner's decision. The decision of the Board of Commissioners shall be promptly issued in writing and mailed or otherwise furnished to the **contractor**. This decision shall state the reasons for the decision and inform the **contractor** of the **contractor's** right of appeal under subsection (e) of this section.

(e) Appeal to court. The decision by the Board of Commissioners shall be final except that a contract dispute, **bid** protest, or controversy involving the sale of surplus property exceeding seven thousand five hundred dollars (\$7,500.00), may be appealed to the Circuit Court for Prince George's County in accordance with Title 7, Chapter 200, "Judicial Review of Administrative Agency

Decisions” of the Maryland Rules, provided that notwithstanding the provisions of Title 7, Chapter 200, the decision of the Circuit Court for the county shall be final and no further appeal may be filed with the State Court of Appeals or any other state appellate court, either by way of mandamus, injunction, certiorari, declaratory judgment, or otherwise.

SECTION 10. Evidence of contract or purchase.

(a) Every contract or purchase over fifty dollars (\$50) shall have written evidence in support in accordance with standard commercial practice. A written contract signed by both parties shall be required for a procurement involving the expenditure of more than five thousand dollars (\$5,000).

SECTION 11. Contract modification, change or adjustment.

Every contract modification, change order, or price adjustment under a contract with the Town which exceeds two thousand dollars (\$2,000.00) shall be subject to prior approval by the Board after receiving a report from the President.

SECTION 12. Right to reject bids, proposals, proposals and offers, bid security

Whenever one (1) or more bids, proposals or offers are submitted under the provisions of this Ordinance, the awarding authority, whether it be the Board of Commissioners, the President or a designee, shall have the right to reject any and all such bids, proposals, or offers. All written contracts may be protected by such bonds, penalties, and conditions as the Town may require.

SECTION 13. Savings clause. The entirety of Ordinance 97-1 which is repealed by this Ordinance shall remain in full force and effect until the effective date of this ordinance.

SECTION 14. Severability. Severability is intended throughout and within the provisions of this Ordinance. If any section, subsection, sentence, clause, phrase or portion of this Ordinance is held to be invalid or unconstitutional by a court of competent jurisdiction, then that decision shall not affect the validity of the remaining portions of this Ordinance.

SECTION 15. BE IT FURTHER ENACTED AND ORDERED that this Ordinance shall be posted in the **Town** office, and this Ordinance, or a fair summary thereof, shall be published at least once, in a newspaper of general circulation in the **Town**.

SECTION 16. BE IT FURTHER ENACTED AND ORDERED that this Ordinance shall take effect twenty (20) calendar days after its final approval by the Board of Commissioners of the **Town** of Upper Marlboro, Maryland.

Adopted this 5th day of July, 2011.

TOWN OF UPPER MARLBORO,
BOARD OF COMMISSIONERS



Stephen Sonnett

Stephen Sonnett, President

Joseph Hourclé

Joseph Hourclé, Commissioner

Attest:

[Signature]
Clerk

James Storey
James Storey, Commissioner