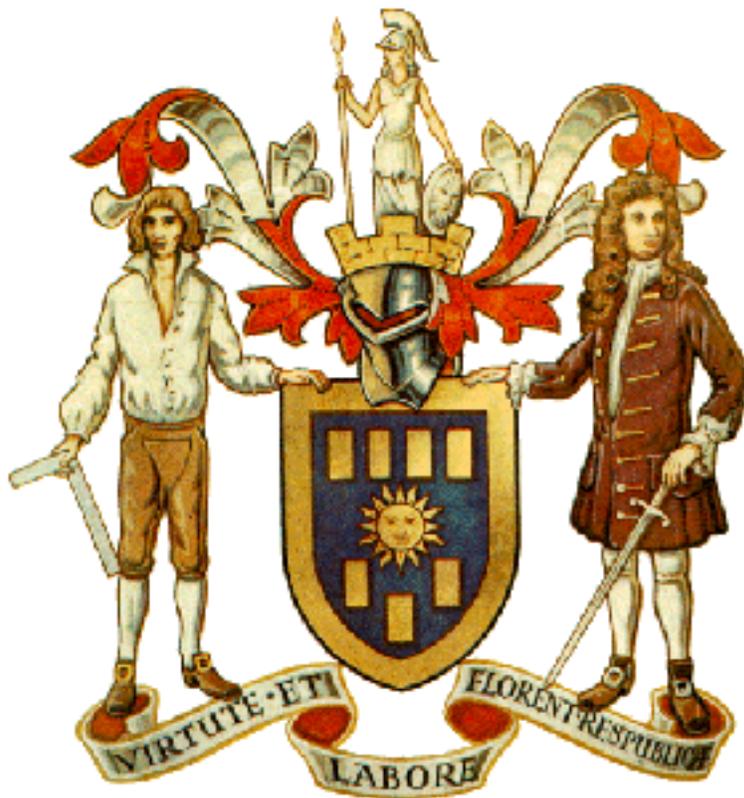

CITY OF WILLIAMSBURG PURCHASE PROCEDURES MANUAL



Revised April 1998

TO: Mayor and City Council

DATE: March 25, 1998

SUBJECT: Revised Purchase Procedures Manual

In April, 1997, City Council adopted revisions to the City of Williamsburg Purchase Procedures Manual (originally adopted by City Council in February, 1994). Changes to the Virginia Public Procurement Act effective July 1, 1997 necessitate several additional revisions to the Manual.

One change to the revised manual relates to section 11-35E of the VPPA dealing with the purchase of professional services. The 1997 Act raises the threshold for mandatory application of the provisions of the VPPA regarding the method for procurement of professional services from \$20,000 to \$30,000 (in the aggregate or for the sum of all phases of a contract or project).

Similarly, another change to the revised manual relates to section 11-41.1 of the VPPA and deals with competitive bidding on state-aid projects. The 1997 Act increases the threshold for mandatory application of the provisions of the VPPA regarding the use of competitive sealed bidding or competitive negotiation prior to awarding contracts for the construction of any building or for an addition to or improvement of an existing building where state funds are used. The revision changes the dollar amount from \$15,000 to \$30,000 and adds the language "...in the aggregate or for the sum of all phases of a contract or project..."

A copy of the pages with significant changes are attached. Upon adoption, copies of the revised pages of the Purchase Procedures Manual will be distributed to all City departments.

Staff Contact: Stuart Smith, Purchasing Agent

Recommendation: That the City Council approve the revised Purchase Procedures Manual.

Jackson C. Tuttle, II
City Manager

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ARTICLE 1: GENERAL PROVISIONS

101. Purchasing System Goals

The goals of this Purchasing Manual are to provide for the fair and equitable treatment of all persons involved in public purchasing by this City, to emphasize quality, value, and integrity in the procurement of goods and services, to maximize the purchasing value of public funds in procurement, to allow for delegation of purchasing authority wherever possible and prudent, to exercise positive fiscal control over public expenditures, and to promote administrative efficiency.

102. Purpose of this Manual

In order to achieve the above stated goals, there is hereby created a purchasing system to operate under the direction and supervision of the City Manager.

103. Application of this Manual

The provisions of this Manual apply to contracts for the procurement of goods, services, insurance and construction entered into by the City involving every expenditure for public purchasing from **nongovernmental sources**. When the procurement involves the expenditure of Federal assistance or contract funds, to the extent authorized by City Council, the procurement shall be conducted in accordance with any applicable mandatory Federal law or regulation which is not reflected in this Manual. Nothing in this Manual shall prevent the City from complying with the terms and conditions of any grant, gift or bequest which are otherwise consistent with law.

104. Cooperative Procurement Agreements

The City may participate in, sponsor, conduct, or administer a cooperative procurement agreement with one or more other public bodies for the purpose of combining requirements to increase efficiency or reduce administrative expenses. Any public body which enters into a cooperative procurement agreement with the City shall comply with the policies and procedures of this Manual.

105. Ethics

Article 4 of the "Virginia Public Procurement Act", as amended, dealing with ethics in public contracting is hereinafter incorporated by reference into this Manual and appears as "Appendix C, Article 4, Ethics in Public Contracting".

All persons with responsibility for making procurement transactions pursuant to this Manual shall first refer to Article 4 of Appendix "C". The following summation of ethical guidelines is intended only as a

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quick reference and is not complete. Nothing in the following list may be construed to replace, alter or invalidate the requirements found in Appendix "C".

All persons with responsibility for making procurement transactions pursuant to this Manual:

- (1) Shall scrupulously avoid even the appearance of impropriety;
- (2) Shall not accept any gift, favor, or service from anyone with whom they have official business;
- (3) Shall not obligate themselves to any vendor;
- (4) Shall not participate in any procurement transaction from which they may personally benefit;
- (5) Shall report potential conflicts of interest to the Purchasing Agent for referral to the City Attorney.

106. General Policies

Persons with responsibility for procurement transactions shall:

- (1) Strive to maintain strong and enduring relationships with vendors of proven ability to meet the needs of the City. To accomplish this purchasing activities shall, within the limitations and guidelines of this manual, be handled so that vendors will value the City's business and make every effort to fulfill its requirements on the basis of quality, service, and price;
- (2) Strive to foster constructive competition by constantly seeking new bidders, obtaining multiple bids on most items purchased, and developing more than one active source of supply for various products and services;
- (3) Identify small or minority businesses and encourage them to compete for City business;
- (4) Develop specifications in a manner so as to encourage competitive bidding whenever possible. In cases where a specification recommended by the person having responsibility for the procurement transaction may discourage competitive bidding, that person shall justify the need for the restrictive specification and shall obtain approval of the Purchasing Agent before including such specification in the bid request.

107. Public Access to Procurement Information

All inquires and requests for information regarding procurements shall be directed to the Purchasing Agent.

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Except as provided herein, all proceedings, records, contracts, and other public records relating to procurement transactions shall be open to the inspection of any interested person, firm or corporation, in accordance with the Virginia Freedom of Information Act. Cost estimates relating to a proposed transaction prepared by or for the City shall not be open to public inspection. Any bidder or offeror, upon request, shall be afforded the opportunity to inspect bid and proposal records within a reasonable time in the event that the City decides not to accept any of the bids and to reopen the contract. Otherwise, bid and proposal records shall be open to public inspection only after award of the contract. Any inspection of procurement transaction records under this section shall be subject to reasonable restrictions to ensure the security and integrity of the records. Trade secrets or proprietary information submitted by a bidder, offeror, or contractor in connection with a procurement transaction shall not be subject to public disclosure under the Virginia Freedom of Information Act; however, the bidder, offeror, or contractor must invoke protection prior to or upon submission of the data or other materials, and must identify the data or other materials to be protected and state the reasons why protection is necessary.

State Law Reference: Sec. 11-52, Code of Virginia (1950), as amended.

In the case of prequalification for construction contractors , see §11-46, Code of Virginia (1950), as amended.

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ARTICLE 2: AUTHORITY TO MAKE PURCHASES

201. City Manager; Appropriated Funds

The City Manager shall act as the chief contracting officer for the City of Williamsburg, and in such capacity shall appoint the Purchasing Agent and shall provide leadership in all purchasing and contracting activities of the City.

NO PURCHASES SHALL BE PAID FOR EXCEPT FROM FUNDS APPROPRIATED BY CITY COUNCIL.

202. Purchasing Agent

There is hereby created the position of Purchasing Agent, who shall be the City's principal public purchasing official. The Purchasing Agent shall be appointed by the City Manager and shall be subject to his direction and control. The Purchasing Agent shall be responsible for the procurement of goods and services, insurance and construction in accordance with this Manual, except where this Manual vests authority for making certain of these purchases in other persons. The Purchasing Agent shall also be responsible for the management and disposal of supplies, except where this Manual vests such authority for certain supplies in other persons.

A. In accordance with this Manual, subject to the supervision of the City Manager, and where this Manual does not vest responsibility for such purchase in any other person, the Purchasing Agent shall:

(1) Purchase or supervise the purchasing of goods, services, insurance and construction needed by the City; provided, however, that no contract for such construction shall be advertised for bid, nor shall such contract be let until all plans, specifications and documents have been reviewed and approved by the City Manager;

(2) Exercise direct supervision over the City's central stores and general supervision over all other inventories of goods belonging to the City;

(3) Sell, trade or otherwise dispose of surplus goods belonging to the City;

B. The Purchasing Agent shall have the power and duty to:

(1) Purchase or contract for all goods, services, insurance and construction required by using departments, except:

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(a) where this Manual vests the power and duty to make such a purchase in a department head or other City official; and,

(b) that none of the following contracts shall be let unless expressly approved and authorized by City Council:

- (i) Any contract or expenditure for goods or services of \$100,000 or more, except for recurring expenditures such as salaries, utilities, and school and library payments;
- (ii) Any contract employing a City Manager or City Attorney;
- (iii) Any contract in excess of \$30,000 for professional services as defined in Article 3, Section 303 B of this Manual;
- (iv) Any contract for the sale or lease of five years or more of real property or any rights or interests therein;
- (v) Any contract for the acquisition or lease of five years or more of real property or any rights or interests therein; provided that contracts for acquisition of real property or interests therein of \$25,000 or less need not be approved by City Council
- (vi) Any other specific contract for which City Council reserves unto itself final approval.

(2) Ensure preparation and enforcement of standard specifications for all those procurements made through him and for which specifications are required;

(3) Ensure the inspection of all deliveries of goods, services or construction purchased through him to determine their conformance with the order or contract, and where there is any failure to comply with the terms of the order whether because the wrong goods were delivered, by reason of damage, or for any other reason, inform the vendor in a timely manner of any and all deficiencies in the delivery and seek to have such remedied;

(4) Act to procure for the City the highest quality in goods, services, insurance and construction at the least expense to the City;

(5) Endeavor to obtain full and open competition as possible on all purchases and sales;

(6) Keep informed of current developments in the field of purchasing, prices, market conditions, and new products;

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(7) Secure for the City the benefits of research done in the fields of purchasing by other governmental jurisdictions, national societies, national trade associations, and private business and organizations;

(8) Prepare and adopt standard purchase nomenclature for the using departments and for goods;

(9) Prepare, adopt and maintain a vendor's file containing catalogs, descriptions of commodities, prices, and discounts;

(10) Maintain a current file of sources of goods, services, insurance and construction to be known as a "bidders' list" to which vendors can request to be included;

(11) Declare vendors who have been debarred pursuant to Article 8 of this Manual, ineligible to receive business from the City for a stated period of time;

(12) Promote communication and goodwill in City-vendor relations and inter-departmental relations relative to purchasing;

(13) Wherever this Manual assigns to the Purchasing Agent the responsibility of gathering information regarding any aspect of the procurement of goods and services, he shall make available to any and all persons which this Manual assigns purchasing authority such of this information as is relevant to their responsibilities and which he is not precluded from disclosing by some other provision of this Manual or other state or federal law with which he must comply;

(14) Recognize and refer potential conflicts of interest arising out of any procurement transaction to the City Attorney for resolution;

(15) Determine the deviations from standard procedures required when Federal funds are involved and make recommendations to City Council regarding approval of same;

(16) Make recommendations for improvement of the purchasing system;

(17) Perform such other functions and duties in keeping with good purchasing practices and such other duties as the City Manager assigns.

(18) Determine who is required to file the annual certification required under Section 206 and provide the necessary certification forms.

With the approval of the City Manager, the Purchasing Agent may delegate any of his own authority to purchase certain goods, services or construction items to other City officials, if such delegation is deemed necessary for the effective procurement of those items.

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203. Heads of Departments

A. The head of each department shall be responsible for the procurement of the following goods and services for his or her respective department:

- (1) Those office supplies, and other miscellaneous items which are not provided through the central store of supplies;
- (2) Those goods, services, insurance and construction which have application specifically to a particular department. [For example: a particular piece of firefighting equipment would have application only to the Fire Department and its procurement would, therefore, best be made by the head of the Fire Department, whereas a photocopying machine or other office equipment would have application to any department and its procurement would best be made by the Purchasing Agent.]

The Purchasing Agent shall have authority to determine what goods and services constitute procurements which have specific application to a particular department.

B. Any procurement made pursuant to this section shall be made in full compliance with this Manual.

C. Subsections (2), (3), (4), (5), (6), (12), (14), and (16) of Section 202 of this Manual are made applicable to all persons who have responsibility for procurement transactions.

D. Each department head shall, at all stages of a procurement transaction for which they have responsibility, ensure compliance all applicable standard operating procedures set forth in Appendix B of this Manual.

E. With the approval of the Purchasing Agent, the head of any department may delegate any of his own authority to purchase certain goods or services to a specific employee in his or her department, if such delegation is deemed necessary for the effective procurement of those items.

204. Finance Department

The Finance Department shall have the authority and duty to:

A. Make timely payment of vendor invoices, taking advantage of discounts offered when to the City's advantage;

B. Provide the City Manager and department heads with relevant fiscal and transaction status information, including account numbers, annual budget with backup details on approved capital outlay expenditures, and monthly status of account reports.

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205. Unauthorized Purchases

No person on behalf of the City shall purchase or contract for any goods, services, insurance or construction except as authorized by and in full compliance with this Manual and any purchase order or contract made contrary to the provisions hereof is not approved and the City shall not be bound thereby.

Failure to comply with the requirements of this Manual shall be cause for disciplinary action in accordance with the City's Personnel Manual.

206. Annual Certification

As provided by §11-79.1 of the Code of Virginia (1950) as amended, every employee of the City who approves procurement transactions totaling \$30,000 or more during the fiscal year shall by August 31 of each year submit to the Purchasing Agent a certification that they complied with the provisions of Article 4 of Title 11 of the Code of Virginia (1950) as amended [Ethics in Public Contracting] as to each transaction under their supervision.

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ARTICLE 3: PROCUREMENT METHODS AND SOURCE SELECTION

Except for certain procurements which meet the small purchase exceptions or other exceptions set out in Articles 5 and 6 of this Manual, procurement of goods and services shall comply with the following procedures:

301. Use of Competitive Sealed Bidding

All public contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, or construction shall be awarded after competitive sealed bidding, unless otherwise provided in this Manual. The Purchasing Agent may from time to time authorize deviations from procedures set out herein as to purchases under his control, but only so long as such deviations are in full compliance with applicable law. The Purchasing Agent's authorization shall be in writing, in advance and shall state the reason for the deviation and shall specify the law which applies.

302. Competitive Sealed Bidding Defined

Competitive sealed bidding is a method of contractor selection which includes the following elements:

A. Issuance of a written Invitation to Bid containing or incorporating by reference the specifications and contractual terms and conditions applicable to the procurement. Unless the City Council or the City Manager as its agent has provided for prequalification of bidders, the Invitation to Bid shall include a statement of any requisite qualifications of potential contractors. When it is impractical to prepare initially a purchase description to support an award based on prices, an Invitation to Bid may be issued requesting the submission of unpriced offers to be followed by an Invitation to Bid limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.

B. Public notice of the Invitation to Bid at least ten days prior to the date set for receipt of bids by posting in a designated public area, or publication in a newspaper of general circulation, or both. In addition, bids may be solicited directly from potential contractors. In the case of state aid projects as described in Section 307, any additional solicitations shall include businesses selected from a list made available by the Virginia Department of Minority Business Enterprise.

State Law Reference: Section 11-37., subdivisions 1 and 2 under the definition of "competitive sealed bidding."

303. Use of Competitive Negotiation for Professional Services

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A. Professional services, the cost of which are expected to exceed \$30,000 in the aggregate or for the sum of all phases of a contract or project, shall be procured by competitive negotiation. However, legal services, provided that the pertinent provisions of Chapter 11 (§2.1-117 et seq.) of Title 2.1 of the Code of Virginia (1950) as amended, remain applicable; or expert witnesses and other services associated with litigation or regulatory proceedings may be procured without competition. **State Law Reference: Section 11-35-E and Section 11-45-B.**

B. "Professional services" means work performed by an independent contractor within the scope of the practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law, dentistry, medicine, optometry, pharmacy or professional engineering. **State Law Reference: Section 11-37.**

C. Competitive negotiation for professional services shall proceed as follows: The City Manager shall select an evaluation committee of at least three members, one of which shall come from the requesting department. The committee shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence, to provide the required services. Repetitive informal interviews shall be permissible. The offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. The Request for Proposal shall not, however, request that offerors furnish estimates of man-hours or cost for services. At the discussion stage, the committee may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of price for services. Proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of discussion with the offerors, on the basis of evaluation factors published in the Request for Proposal and all information developed in the selection process to that point, the City Manager shall select in the order of preference two or more offerors whose professional qualifications and proposed services are deemed most meritorious. Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the City can be negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable price. Should City Council or the City Manager as its agent, determine by resolution that only one offeror is fully qualified, or that one offeror is clearly more highly qualified and suitable than the others under consideration, a contract may be negotiated and awarded to that offeror.

State Law reference: Section 11-37.

304. Use of Competitive Negotiation for Other Than Professional Services

A. If City Council by resolution determines, or the City Manager as Council's agent determines in writing, that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, goods, non professional services, or insurance may be procured by competitive negotiation. In such instance, insurance may be procured through a licensed agent or

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broker selected by competitive negotiation. Council's resolution or the City Manager's determination shall document the basis for such determination.

B. Competitive negotiation may also be used in the following types of construction contracts, subject to the determinations set forth in Section A above having first been made:

(1) the alteration, repair, renovation or demolition of buildings when the contract is not expected to cost more than five hundred thousand dollars (\$500,000);

(2) the construction of highways and any draining, dredging, excavation, grading or similar work, including utility work, upon real property.

EXCEPT as provided in B 1 and 2 above, all construction contracts which do not meet as exception set out in Article 5 of this manual shall be procured by competitive bid.

State Law Reference: Sections 11-35 E & 11-41 C 2(ii) and (iii).

305. Competitive Negotiation Defined

A. Competitive negotiation is a method of contractor selection which includes the following elements:

(1) Issuance of a written Request for Proposal indicating in general terms that which is sought to be procured, specifying the factors which will be used in evaluating the proposal and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities or qualifications which will be required of the contractor.

(2) Public notice of the Request for Proposal at least ten days prior to the date set for receipt of proposals by posting in a public area normally used for posting of public notices or by publication in a newspaper or newspapers of general circulation in the area in which the contract is to be performed, or both, so as to provide reasonable notice to the maximum number of offerors that can be reasonably anticipated to submit proposals in response to the particular request. In addition, proposals may be solicited directly from potential contractors.

(3) The City Manager shall select an evaluation committee of at least three members, one of which shall come from the requesting department. The committee shall select two or more offerors deemed to be fully qualified and best suited among those submitting proposals, on the basis of the factors involved in the Request for Proposal, including price if so stated in the Request for Proposal. Negotiations shall be conducted with each of the selected offerors. Price shall be considered, but need not be the sole determining factor. After negotiations have been conducted with each selected offeror, the purchasing agent or other party handling the procurement shall select the offeror which in his or her opinion, has made the best proposal, and shall award the contract to that offeror. Should the City Manager determine in writing and at his sole discretion that only one offeror is fully qualified, or that

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one offeror is clearly more highly qualified than the others under consideration, a contract may be negotiated and awarded to that offeror.

State Law Reference: Section 11-37., subdivisions 1 and 2 under the definition of "competitive negotiation", Code of Virginia (1950), as amended.

306. Pre-Bid or Pre-Proposal Conferences

For complex equipment, supplies, or repair, the City may conduct pre-bid or pre-proposal conferences with prospective bidders after the preparation of draft specifications. Such conferences detect unclear provisions and widen competition by removing unnecessarily restrictive language. The person responsible for the procurement transaction may call such conferences, and request the presence of the City Attorney.

307. Competitive Bidding on State-Aid Projects

No contract for the construction of any building or for an addition to or improvement of an existing building by the City for which state funds of not more than \$30,000 in the aggregate or for the sum of all phases of a contract or project, either by appropriation, grant-in-aid, or loan are used or are to be used for all or part of the cost of construction shall be let except after competitive sealed bidding or after competitive negotiation as provided in this Manual. The procedure for the advertising for bids or for proposals and for letting of the contract shall conform to the provisions of this Manual. A person or firm who has been engaged as an architect or engineer for the same project under a separate contract shall not be eligible to bid on or submit a proposal for any such contract or to have the contract awarded to him.

State Law Reference: Section 11-41.1, Code of Virginia (1950), as amended.

308. Prequalification of Bidders and Offerors

The Purchasing Agent may prequalify bidders prior to the solicitation of bids or proposals by requiring prospective bidders to submit any information deemed appropriate, including, but not limited to, samples, financial reports, and references. Any prospective bidder who has not been suspended or debarred under this Manual must have the opportunity to prequalify. The Purchasing Agent may refuse to prequalify any prospective contractor, provided that written reasons for refusing to pre-qualify are made a part of the record in each case. All decisions regarding prequalification are final. Prequalification of a bidder shall not constitute a conclusive determination of the bidder's responsibility. The City may reject any bidder as non-responsible on the basis of subsequently discovered information. Failure of a bidder to prequalify for a given procurement does not bar the bidder from seeking prequalification for future procurements or bidding on procurements which do not require prequalification. In the case of prequalification of a prospective contractor for construction, the prequalification procedure will be executed in accordance with §11-46(B) of the Code of Virginia, (1950), as amended, which is incorporated by reference into the Manual and appears as "Appendix C".

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309. Publication of the Invitation to Bid

When publication of an Invitation to Bid is required pursuant to Section 302. of this Manual, the newspaper notice will include a general description of the articles to be purchased or sold, shall state where bid blanks and specifications may be secured, and designate the time and place for opening bids.

310. Solicitation of Bidders and Offerors

The person responsible for any procurement transaction shall also solicit sealed bids or proposals from all responsible prospective suppliers who have requested their names to be added to a "bidders list" which the Purchasing Agent shall maintain, by sending such notice as will acquaint them with the proposed purchase or sale. In any case, invitations sent to the vendors on the bidders list shall be limited to commodities that are similar in character and ordinarily handled by the trade group to which the invitations are sent.

311. Brand Names in the Invitation to Bid or Request for Proposal

Unless otherwise provided in the Invitation to Bid or Request for Proposal, the name of a certain brand, make, or manufacturer does not restrict bidders to the specific brand, make, or manufacturer named. Instead, it conveys the general style, type, character, and quality of the article desired, and any article which the City, in its sole discretion, determines to be the equal of that specified, considering quality, workmanship, economy of operation, and suitability for the purpose intended, shall be accepted.

State Law Reference: Section 11-49, Code of Virginia (1950), as amended.

312. Bid Bonds on Construction Contracts

Pursuant to Section 11-57, Code of Virginia (1950), as amended, except in cases of emergency, all bids or proposals for construction contracts in excess of \$100,000 shall be accompanied by a bid bond from a surety company selected by the bidder which is legally authorized to do business in Virginia, as a guarantee that if the contract is awarded to such bidder, the bidder will enter into the contract for the work mentioned in the bid. The amount of the bid bond or alternate security shall not exceed five percent of the amount bid.

313. Bid Bonds for Other Contracts

At the discretion of the City Manager or person handling the particular procurement, bidders for contracts for which a bid bond is not required under Section 11-58, Code of Virginia (1950), as amended, may nevertheless be required to submit with their bid a bid bond or a certified check in an amount to be determined by the City Manager and specified in the Invitation to Bid, which shall be

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forfeited to the City as liquidated damages upon the bidder's failure to execute a contract awarded to him or upon bidder's failure to furnish any required performance or payment bonds in connection with a contract awarded to him.

314. Cancellation of an Invitation for Bid or Request for Proposal

An Invitation to Bid, a Request for Proposal, any other solicitation, or any and all bids or proposals, may be canceled or rejected. The reasons for cancellation shall be made part of the contract file.

State Law Reference: Sec. 11-42, Code of Virginia (1950), as amended.

315. Submission and Opening of Bids

Bids shall be submitted sealed to the person responsible for the procurement transaction and shall be identified as bids on the envelope.

Bids shall be opened in public at the time and place stated in the public notices.

No bid arriving after the hour designated for the opening shall be considered.

316. Withdrawal of Bids Due to Error

A. A bidder for a public construction contract, other than a contract for construction or maintenance of public highways, may withdraw his bid from consideration if the price bid was substantially lower than the other bids due solely to a mistake therein, provided the bid was submitted in good faith, and the mistake was a clerical mistake as opposed to a judgment mistake, and was actually due to an unintentional omission of a quantity of work, labor or material made directly in the compilation of a bid, which unintentional arithmetic error or unintentional omission can be clearly shown by objective evidence drawn from inspection of original work papers, documents and materials used in the preparation of the bid sought to be withdrawn. The procedure for bid withdrawal must be stated in the advertisement for bids. The procedure for withdrawal of bids on public construction contracts shall be selected by the person responsible for the procurement transaction from the two following alternatives and included in the bid advertisement:

(1) The bidder shall give notice in writing of his claim of right to withdraw his bid within two business days after the conclusion of the bid opening procedure and shall submit original work papers with such notice; or

(2) The bidder shall submit to the person in charge of the procurement his original work papers, documents and materials used in the preparation of the bid within one day after the date fixed for submission of bids. The work papers shall be delivered by the bidder in person or by registered mail at or prior to the time fixed for the opening of bids. In either instance, such work papers, documents and materials may be considered as trade secrets or proprietary information subject to the conditions

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of subsection D of §11-52 of the Code of Virginia (1950) as amended. The bids shall be opened one day following the time fixed by the City for the submission of bids. Thereafter, the bidder shall have two hours after the opening of bids within which to claim in writing any mistake as defined herein and withdraw his bid. The contract shall not be awarded by the City until the two-hour period has elapsed. Such mistake shall be proved only from the original work papers, documents and materials delivered as required herein.

B. No bid may be withdrawn under this section when the result would be the awarding of the contract or another bid of the same bidder or of another bidder in which the ownership of the withdrawing bidder is more than five percent.

C. If a bid is withdrawn under the authority of this section, the lowest remaining bid shall be deemed to be the low bid.

D. No bidder who is permitted to withdraw a bid shall, for compensation, supply any material or labor to or perform any subcontract or other work agreement for the person or firm to whom the contract is awarded or otherwise benefit, directly or indirectly, from the performance of the project for which the withdrawn bid was submitted.

E. If the City denies the withdrawal of a bid under the provisions of this section, it shall notify the bidder in writing stating the reasons for its decision and award the contract to such bidder at the bid price, provided such bidder is a responsible and responsive bidder.

State Law Reference: Section 11-54., Code of Virginia (1950), as amended.

317. Bid Evaluation

A. In addition to price, the City may also consider the following factors in determining the lowest responsive and responsible bidder:

(1) The ability, capacity, and skill of the bidder to perform the contract or provide the service required;

(2) Whether the bidder can perform the contract or provide the service promptly or within the time specified, without delay or interference;

(3) The character, integrity, reputation, judgment, experience and efficiency of the bidder;

(4) The quality of performance of previous contracts or services;

(5) The sufficiency of the financial resources and ability of the bidder to perform the contract or provide the service;

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(6) The quality, availability, and adaptability of the goods or services to the particular use required;

(7) The ability of the bidder to provide future maintenance and service for the use of the subject of the contract.

318. Bid Award

Bids shall be awarded to the lowest responsive and responsible bidder. In making the award, City Council or the person responsible for the procurement transaction upon advice of the City Attorney, as the case may be, may waive informalities in bids. When the terms and conditions of multiple bids are so provided in the Invitation to Bid, awards may be made to more than one bidder.

Unless canceled or rejected, a responsible bid from the lowest responsive and responsible bidder shall be accepted as submitted except that if the bid from the lowest responsible bidder exceeds available funds, the City may negotiate with the apparent low bidder to obtain a contract price within available funds.

When the award is not given to the lowest bidder, a full and complete statement of the reasons for placing the order elsewhere shall be prepared by the person responsible for the procurement transaction and after approval by the City Manager shall be filed with the other papers relating to the transaction.

State Law Reference: Sec. 11-53, Code of Virginia (1950), as amended.

319. Tie Bids

In the case of a tie bid, preference shall be given to goods, services and construction produced in Virginia or provided by Virginia persons, firms, or corporations (with bidders situated within the City given first preference) if such a choice is available; otherwise the tie shall be decided by lot. Where all bidders are Virginia persons, firms, or corporations (or, alternatively, if all bidders are non-Virginia persons, firms, or corporations), the tie shall also be decided by lot.

Whenever any bidder is a resident of any other state and such state under its laws allows a resident contractor of that state a preference, a like preference may be allowed to the lowest responsible bidder who is a resident of Virginia.

State Law Reference: Sec. 11-47, Code of Virginia (1950) as amended.

320. Multi-Step Sealed Bidding

When it is considered impractical to initially prepare a purchase description based on price, an invitation for bids may be issued requesting the submission of unpriced offers to bidders whose offers have been determined to be technically acceptable under the criteria set forth in the first solicitation.

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ARTICLE 4: CONTRACT FORMATION

401. Contract Pricing Arrangement

Subject to the limitations of this Manual, any type of contract which is appropriate to the procurement and which will promote the best interests of the City may be used; provided that the use of a cost-plus-a-percentage-of-cost contract or a cost-plus-a-percentage-of-construction-cost contract, however, is prohibited. A cost reimbursement contract may be used only when a determination is made in writing that such contract is likely to be less costly to the City than any other type or that it is impracticable to obtain the supply, service or construction item required except under such a contract.

402. Employment Discrimination by Contractor Prohibited

Every City contract of over \$10,000 shall include the following provisions:

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

1. The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex or national origin, except where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.
2. The contractor, in all solicitations or advertisements for employees placed by or on behalf of the contractor, will state that such contractor is an equal opportunity employer.
3. Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for the purpose of meeting the requirements of this section.

The contractor shall include the provisions of the foregoing paragraphs 1, 2 and 3 in every subcontract or purchase order of over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.

State Law Reference: Section 11-51, Code of Virginia (1950), as amended.

403. Contract Provisions Barring Damages for Unreasonable Delays

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A. Any provision contained in any public construction contract entered into on or after July 1, 1991, that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages for unreasonable delay in performing such contract, either on his behalf or on behalf of his subcontractor if and to the extent such delay is caused by acts or omissions of the City, its agents or employees and due to causes within their control is against public policy and is void and unenforceable.

B. Subsection A shall not be construed to render void any provision of a public construction contract that:

- (1) Allows the City to recover that portion of delay costs caused by the acts or omissions of the contractor, or its subcontractors, agents or employees;
- (2) Requires notice of any delay by the party claiming the delay;
- (3) Provides for liquidated damages for delay; or
- (4) Provides for arbitration or any other procedure designed to settle contract disputes.

C. A contractor making a claim against the City for costs or damages due to the alleged delaying of the contractor in the performance of its work under any public construction contract shall be liable to the City and shall pay its for a percentage of all costs incurred by the City in investigating, analyzing, negotiating, litigating and arbitrating the claim, which percentage shall be equal to the percentage of the contractor's total delay claim which is determined through litigation or arbitration to be false or to have no basis in law or in fact.

State Law Reference: Section 11-56.2., Code of Virginia (1950), as amended.

404. Multi-Term Contracts

Unless otherwise provided by law, a contract for goods or services, or insurance may be entered into for any period of time deemed to be in the best interests of the City, provided the term of the contract and conditions for renewal or extension are included in the solicitation, and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor. When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be canceled.

405. Contract Modification

A public contract may include provisions for modification of the contract during performance, but no fixed-price contract may be increased by more than twenty-five (25) percent of the amount of the contract or ten thousand dollars (\$10,000), whichever is greater, without the advance written approval

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of the City Manager. In no event may the amount of any contract, without adequate consideration, be increased for any purpose, including, but not limited to, relief of an offeror from the consequences of an error in its bid or offer.

State Law Reference: Sec. 11-55, Code of Virginia (1950), as amended.

406. Retainage on Construction Contracts

In any public contract for construction which provides for progress payments in installments based upon an estimated percentage of completion, the contractor shall be paid at least ninety-five percent of the earned sum when payment is due, with not more than five percent being retained to assure faithful performance of the contract. All amounts withheld may be included in the final payment.

Any subcontractor for a public project which provides for similar progress payments shall be subject to the same limitations.

State Law Reference: Section 11-56, Code of Virginia (1950), as amended.

407. Escrow Account Procedures

As provided in Section 11-56.1, Code of Virginia (1950), as amended, in the case of a public contract of \$200,000 or more for the construction of highways, roads, streets, bridges, parking lots, demolition, clearing, grading, excavating, paving, pile driving, miscellaneous drainage structures and the installation of water, gas, sewer lines and pumping stations, provisions shall be included in the City's bid proposal for the contractor to use an escrow account procedure for utilization of the City's retainage funds by so indicating in the space provided in the proposal documents. An escrow agreement form substantially the same as that used by the Commonwealth of Virginia Department of Transportation shall be included with the proposal documents. If the successful bidder has properly indicated its desire to use the escrow account procedure, then upon award of the contract to such bidder, it shall be fifteen (15) days from the date of such award to submit the signed escrow agreement to the City using the form provided. Should the successful bidder fail to timely submit such escrow agreement properly executed, then it shall forfeit its rights to the use of the escrow account procedure. When elected, the escrow account procedure shall conform to the requirements of Section 11-56.1 b, Code of Virginia (1950), as amended, and all regulations promulgated by the City Manager relative to the escrow procedure shall be substantially the same as those used by the Commonwealth of Virginia Department of Transportation. The escrow procedure here provided shall not apply to public contracts for the construction of railroads, public transit systems, runways, dams, foundations, installation or maintenance of power systems, runways, dams, foundations, installation or maintenance of power systems for the generation and primary and secondary distribution of electric current ahead of the customer's meter, the installation or maintenance of telephone, telegraph or signal systems for public utilities and the construction or maintenance of solid waste or recycling facilities and treatment plants.

Any public contract for construction which provides for the payment of the interest on retained funds may require a provision whereby the contractor, exclusive of reasonable circumstances beyond the

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contractor's control stated in the contract, shall pay a specified penalty for each day exceeding the completion date as stated in the contract.

Any subcontract for a project which is subject to the escrow account procedures here required will be subject to the provisions of this section.

408. Performance and Payment Bonds

A. Upon the award of any public construction contract exceeding \$100,000 to any prime contractor, such contractor shall furnish to the City the following bonds:

(1) A performance bond in the sum of the contract amount conditioned upon the faithful performance of the contract in strict conformity with the plans, specifications and conditions of the contract.

(2) A payment bond in the sum of the contract amount. Such bond shall be for the protection of claimants who have and fulfill contract to supply labor or materials to the prime contractor to whom the contract was awarded, or to any subcontractors, in the prosecution of the work provided for in such contract, and shall be conditioned upon the prompt payment for all such material furnished or labor supplied or performed in the prosecution of the work. "Labor or materials" shall include public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site.

B. Each of such bonds shall be executed by one or more surety companies selected by the contractor which are legally authorized to do business in Virginia. In lieu of such bond, the contractor may furnish an alternate form of security as provided in Section 411 of this Manual.

C. Bonds shall be made payable to the City of Williamsburg.

D. Each of the bonds shall be filed with the department head in charge of the procurement.

E. Nothing in this section shall preclude the person with responsibility for the procurement transaction from requiring payment of performance bonds for construction contracts below \$100,000.

F. Nothing in this section shall preclude such contractor from requiring each subcontractor to furnish a payment bond with surety thereon in the sum of the full amount of the contract with such subcontractor conditioned upon the payment to all persons who have and fulfill contracts which are directly with the subcontractor for performing labor and furnishing materials in the prosecution of the work provided for the subcontract.

State Law Reference: Section 11-58, Code of Virginia (1950), as amended.

409. Action on Performance Bonds

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A. No action against the surety on a performance bond shall be brought unless within one year after:

- (1) Completion of the contract, including the expiration of all warranties and guarantees, or
- (2) Discovery of the defect or breach of warranty, if the action be for such.

State Law Reference: Section 11-59, Code of Virginia (1950), as amended.

410. Action on Payment Bonds

A. Any claimant who has performed labor or furnished materials in accordance with the contract for which a payment bond has been given, and who has not been paid in full therefor before the expiration of ninety days after the day on which such claimant performed the last of such labor or furnished the list of such materials for which he claims payment, may bring an action on such payment bond to recover any amount due him for such labor or material, and may prosecute such action to final judgement and have execution on the judgement. The obligee named in the bond need not be named a party to such action. Any claimant who has a direct contractual relationship with any subcontractor from whom the contractor has not required a subcontractor payment bond, but who has no contractual relationship, expressed or implied, with such contractor, may bring an action on the contractor's payment bond only if he has given written notice to such contractor within 180 days from the day on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment, stating with substantial accuracy the amount claimed and the name of the person for whom the work was performed or to whom the material was furnished.

B. Any claimant who has a direct contractual relationship with a subcontractor from whom the contractor has required a subcontractor payment bond but who has no contractual relationship, expressed or implied, with such contractor, may bring an action on the subcontractor's payment bond. Notice to the contractor shall be served by registered or certified mail, postage prepaid, in an envelope addressed to such contractor at any place where his office is regularly maintained for the transaction of business. Claims for sums withheld as retainage with respect to labor, performance or materials furnished, shall not be subject to the time limitations stated in this subsection.

C. Any action on a payment bond must be brought within one year after the day on which the person bringing such action last performed labor or last furnished or supplied materials.

State Law Reference: Section 11-60, Code of Virginia (1950), as amended.

411. Alternative Forms of Security

A. In lieu of a bid, payment, or performance bond, a bidder may furnish a certified check or cash escrow in the face amount required for the bond.

B. If approved by the City Attorney, a bidder may furnish a personal bond, property bond, or bank or savings institution's letter of credit on certain designated funds in the face amount required for

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the bid bond. Approval shall be granted only upon a determination that the alternative form of security proffered affords protection to the City equivalent to the corporate surety's bond.

State Law Reference: 11-61, Code of Virginia (1950), as amended.

412. Contract Extension

The term of any existing contract may be extended to allow completion of any work under taken pursuant thereto but not completed during the original term of the contract.

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ARTICLE 5: SMALL PURCHASES AND MISCELLANEOUS PROCUREMENTS

501. Small Purchases

A. Unless the Purchasing Agent or the person responsible for the procurement transaction shall determine that competitive sealed bidding or competitive negotiation should be required in the best interest of the City, the following procurements shall not be subject to the requirements of the competitive sealed bidding or competitive negotiation requirement of this Manual:

(1) All purchases of goods, printing, non-professional services and capital improvements not expected to exceed thirty thousand dollars (\$30,000) and any other single or term contract not expected to exceed thirty thousand dollars (\$30,000) **State Law Reference: 11-41F, Code of Virginia (1950), as amended;**

(a) Purchases of \$500 or less may be made from a sole source without securing a written purchase order or approved sole source determination, however, obtaining several quotations is encouraged;

(b) Purchases of \$501 to \$1,000 shall require two verbal or written quotations but no written purchase order;

(c) Purchases of \$1,001 to \$5,000 shall require three verbal or written quotations and a written purchase order;

(d) Purchases of \$5,001 to \$30,000 shall require three written quotations and a written purchase order;

(2) Single or term contracts for professional services not expected to exceed thirty thousand dollars (\$30,000);

B. Such awards shall be based, except when the person responsible for the procurement transaction shall determine in writing that it is impracticable to do so, on three (3) or more competitive quotations. Written quotations from Vendors shall be obtained where practicable, although verbal quotations will be permitted so long as the person responsible for the procurement transaction causes the name of the business submitting a quotation, and the date and amount of each quotation to be recorded and maintained as a public record of the transaction. At the end of each fiscal year all such records maintained by persons other than the Purchasing Agent or photocopies of those records shall be turned over to the Purchasing Agent or department head, as appropriate. Whenever the person responsible for a procurement transaction determines that seeking competitive quotations for a particular procurement is not practicable, a written determination to that effect shall be made and

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submitted to the Purchasing Agent or department head, as applicable, for approval. No such non-competitive procurement may be made without the Purchasing Agent's or department head's written approval **IN ADVANCE**. Award shall be made by the person responsible for the procurement transaction, with such approval as may be required, to the business offering the lowest acceptable quotation.

C. In making determinations as to practicability, the person responsible for the procurement transaction shall consider the cost of the purchasing process relative to the cost of items being purchased and shall not be limited necessarily to considerations of cost factors alone.

D. No contract requirement or amount shall be artificially divided either so as to constitute a small purchase under this section.

502. Sole Source Procurement

A. A contract normally requiring formal competitive sealed bidding or competitive negotiation may be awarded without competition when the person responsible for the procurement transaction determines in writing, after conducting a good faith review of available sources, that there is only one source for the required good, service, insurance or construction item and such determination is approved by the City Manager or Purchasing Agent. The person responsible for the procurement transaction shall conduct negotiations as appropriate, as to price, delivery and terms. The person responsible for the procurement transaction shall also issue a written notice stating that only one source was determined to be practicably available, and identifying that which is to be procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted in a designated public area or published in a newspaper of general circulation on the date the City awards or announces its decision to award the contract, whichever comes first. A record of sole source procurements shall be maintained that lists each contractor's name, the amount and type of each contract, and a listing of the item(s) procured under each contract.

State Law Reference: Sec. 11-41 D, Code of Virginia (1950), as amended.

B. Contracts may be awarded without competition for (i) legal services, provided that the pertinent provisions of Chapter 11 (§2.1-117 et seq.) of Title 2.1 of the Code of Virginia (1950) as amended remain applicable; or (ii) expert witnesses and other services associated with litigation or regulatory proceedings.

State Law Reference: Sec. 11-45 B, Code of Virginia (1950), as amended.

503. Emergency Purchases

In case of emergency, a contract may be awarded without competitive sealed bidding or competitive negotiations; however, such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The person responsible for the

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procurement transaction shall also issue a written notice stating that the contract is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted in a designated public area or published in a newspaper of general circulation on the day the City awards or announces its decision to award the contract, whichever occurs first, or as soon thereafter as is practicable. **State Law Reference: Sec. 11-41 E, Code of Virginia (1950) as amended.**

504. Public Auction Procurements

Upon a determination made in advance by the City Manager in writing that the purchase of goods, products or commodities from a public auction sale is in the best interest of the public, such items may be purchased at auction.

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ARTICLE 6: NON-COMPETITIVE METHODS OF SOURCE SELECTION

601. Exceptions to Requirements for Competitive Procurement

The City may enter into the following contracts without competition:

A. Contracts for the purchase of goods or services (a) which are performed or produced by persons, or in schools or work shops, under the supervision of the Virginia Department for the Visually Handicapped; or (b) which are performed or produced by non-profit sheltered workshops or other non-profit organizations which are for transitional or supported employment services serving the handicapped.

B. Legal services subject, however, to the pertinent provisions of Chapter 11, § 2.1-117 et seq of the Code of Virginia (1950), as amended.

C. Contracts for the employment of expert witnesses and other services associated with litigation or regulatory proceedings.

D. Purchase from the state penitentiary, state contracts, or from the state purchasing department warehouse.

E. Purchases for special police work when the Chief of Police certifies to the Purchasing Agent that items are needed for undercover operations.

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ARTICLE 7: DISPOSAL OF SURPLUS PERSONAL PROPERTY

701. Procedure

A. The Purchasing Agent shall have the responsibility for the management and disposal of surplus property. He shall have the authority to transfer to or between City departments, to sell by public auction or sealed bid, to sell or donate to another government entity or bona fide non-profit organization, to exchange, destroy or otherwise dispose of supplies, materials and equipment determined by him, with the approval of the City Manager, to be surplus, obsolete, worn out, unused or unsuitable for public use.

B. Disposal of surplus property shall be made in the manner deemed by the Purchasing Agent to be most appropriate for the class of commodity. The Purchasing Agent may delegate to the head of a department authority to dispose of certain surplus property which is being relinquished by that department. In carrying out such disposal the department head should follow any and all applicable procedures contained in Appendix B of this Manual together with such procedures as are designated by the Purchasing Agent.

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ARTICLE 8: REMEDIES

801. Remedies

Article 3 of the "Virginia Public Procurement Act", as amended, dealing with remedies in public contracting is hereinafter incorporated into this Manual as Appendix C.

802. Authority to Debar

After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the City Manager, after consulting with the City Attorney, is authorized to debar a person for cause from consideration for award of contracts. The debarment shall not be for a period of more than three (3) years.

803. Causes for Debarment

Causes for debarment include:

A. Conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract or in the performance of such contract;

B. Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously and directly affects responsibility as a City contractor;

C. Conviction under state or federal antitrust statutes arising out of the submission of bids or proposals;

D. Violation of contract provisions, as set forth below, of a character which is regarded by the City Manager to be so serious as to justify debarment action:

(1) Deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or

(2) A recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment;

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E. any other cause the City Manager determines to be so serious and compelling as to affect responsibility as a City contractor including debarment by another governmental entity for any cause in this Manual, and for violation of the ethical standards set forth in this Manual.

804. Decision to Debar

The City Manager shall issue a written decision to debar. The decision shall state the reasons for the action taken and inform the debarred person involved of his rights concerning judicial or administrative review. The City shall immediately mail or otherwise furnish a copy of the decision to the debarred or suspended vendor.

805. Notice of Decision

A copy of the decision required by section 804. (Decision to Debar) shall be mailed or otherwise furnished immediately to the debarred or suspended person.

CITY OF WILLIAMSBURG PURCHASE PROCEDURES MANUAL
ARTICLE 9: ADMINISTRATIVE APPEALS PROCEDURE

901. Application of Administrative Appeals Procedure

An administrative appeals procedure is hereinafter described which shall be used for hearing protests of decision to award or an award, appeals from refusals to allow withdrawal of bids, appeals from debarments, appeals from determinations on non-responsibility, and appeals from decisions on disputes arising during the performance of a contract.

902. Appeal Submission and Applicable Time Limits

A. To initiate the administrative appeals procedure, the aggrieved party shall submit in writing a protest or appeal to the Purchasing Agent. The protest or appeal shall include the basis for the protest or appeal and the relief sought. Protests and appeals must be submitted within the following time limits:

(1) A protest of a decision to award or an award shall be submitted within ten (10) days after the award or the announcement of the decision to award, whichever occurs first;

(2) An appeal from a refusal to allow withdrawal of a bid shall be submitted within ten (10) days after receipt of the decision;

(3) An appeal from a debarment shall be submitted within thirty (30) days after receipt of the decision;

(4) an appeal from a determination of non-responsibility shall be submitted within ten (10) days after receipt of the decision;

(5) an appeal from a decision resulting from a contract dispute shall be submitted within sixty (60) days after final payment.

903. Response by the Purchasing Agent

Upon receipt of a protest or an appeal, the Purchasing Agent shall respond in writing to the protest or appeal within ten (10) days, or give verbal notice to the protesting or appealing party within ten (10) days that a hearing is required to present the facts concerning the protest or appeal. The Purchasing Agent shall establish a location, date, and time for the hearing. The hearing shall allow for the presentation of relevant facts and shall allow representatives of the City and the aggrieved party to explain their position on the matter. At the conclusion of the hearing, the Purchasing Agent may choose to respond to the aggrieved party's protest or appeal verbally. A verbal response shall be

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summarized in writing and filed with the other documents concerning the protest or appeal. If a verbal response is not given to the aggrieved party at the conclusion of the hearing, the Purchasing Agent shall issue a written response within ten (10) days after the conclusion of the hearing.

904. Request for Panel Hearing; Applicable Time Limits

Should the aggrieved party not be satisfied with the response given by the Purchasing Agent, the aggrieved party may request a panel hearing. A request for a panel hearing shall be submitted in writing to the City Manager within ten (10) days after receipt of a written response or within ten (10) days of the issuance of a verbal response.

905. Appointment of Panel

Upon receipt of a request for a panel hearing, the Purchasing Agent shall advise the City Manager that a panel hearing has been requested. The City Manager shall appoint a panel of three (3) or more disinterested persons. Panel members may be disinterested City employees or non-employees. The City Manager shall attempt to select a panel which collectively has knowledge of current state and local government procurement laws and regulations, familiarity with the type of product and/or service provided by the aggrieved party and knowledge of the product or service application in a similar environment.

906. Appointment of Chairman and Taking of Evidence

The panel members shall select a chairman who shall establish a location, date, and time for the panel hearing to be conducted. The panel hearing shall allow for the presentation of relevant facts and pertinent information by the aggrieved party and the person responsible for the procurement transaction. The participation of other City department and City agency employees who have contributed to an evaluation or decision making process or any persons involved in a contract dispute may be required. Should the aggrieved party elect to be represented by legal counsel, the Purchasing Agent, of his own accord or at the request of the person responsible for the procurement transaction, may request assistance from the City Attorney.

907. Hearing Procedures

The panel hearing is an administrative process and is not meant to be conducted as a full court proceeding. The panel, by majority vote, may decide procedural questions and rule upon objections raised during the course of the hearing. At the option of the aggrieved party or person responsible for the procurement transaction, opening statements may be made at the beginning of the hearing setting forth the issues and the panel may ask for such statements in order to clarify the issues involved. However, the panel shall take into account all reliable and substantial relevant facts and pertinent information produced at the hearing. The aggrieved party and the person responsible for the

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procurement transaction shall produce such additional relevant facts and pertinent information as the panel may deem necessary in understanding and determining a protest or an appeal.

908. Panel Finding Time Limit; Decision Final

Within ten (10) days after the conclusion of the panel hearing, the panel shall issue a written decision containing the findings of fact. The findings of fact shall be final and conclusive and shall not be set aside unless the same are fraudulent or arbitrary or capricious, or so grossly erroneous as to imply bad faith.

909. Panel Deliberations and Permitted Relief

A. The panel, in rendering its decision, shall decide the protest or appeal on the merits. The panel has the responsibility of insuring the proper application of statutes, regulations, policies, and procedures. The panel does not have the authority to formulate or to change policy. Accordingly, the panel shall make its decision within the following parameters:

B. A proposed award or an award shall be reversed only if the aggrieved party establishes that the proposed award or the award is not an honest exercise of discretion, but rather is arbitrary or capricious or not in accordance with the Constitution of Virginia, statutes, regulations, or the terms and conditions of the request for quotation, Invitation to Bid or the Request for Proposal. If prior to an award it is determined that the decision to award is arbitrary or capricious, then the sole relief shall be a finding to that effect. The City Manager shall cancel the proposed award or revise it to comply with the law. If, after the award, it is determined that an award of a contract was arbitrary or capricious, then the sole relief shall be as hereinafter provided. Where the award has been made but performance has not begun, the performance of the contract may be enjoined by the City Manager. Where the award has been made and performance has begun, the City Manager may declare the contract void upon a finding that this action is in the best interest of the City. Where a contract is declared void, the performing contractor shall be compensated for the cost of performance up to the time of such declaration. In no event shall the performing contractor be entitled to lost profits. When a panel determines that there is probable cause to believe that a decision to award was based on fraud or corruption, the City Manager may enjoin the award of the contract to a particular bidder.

C. A decision denying a bidder withdrawal of a bid shall be reversed only if the aggrieved party establishes that the decision to deny withdrawal of the bid was clearly erroneous.

D. A decision debaring a bidder or offeror, actual or prospective, from participation shall be reversed only if the aggrieved party establishes that the decision was arbitrary or capricious.

E. A decision determining that a bidder or offeror is not a responsible bidder or offeror for a particular contract shall be reversed only if the aggrieved party establishes that the decision was arbitrary or capricious. If it is determined that the decision determining non-responsibility was

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arbitrary or capricious, and the award of the contract in question has not been made, the sole relief shall be a finding that the bidder is a responsible bidder for the contract in question. If, after an award, it is determined that a determination of non-responsibility was arbitrary or capricious, the City Manager, upon determining the action to be in the best interest of the City, may enjoin the performance of a contract where performance has not begun. Where the award has been made and performance has begun, the City Manager may declare the contract void. Where a contract is declared void, the performing contractor shall be compensated for the cost of performance up to the time of such declaration. In no event shall the performing contractor be entitled to lost profits.

F. A decision resulting from a contract dispute shall be reversed only if the aggrieved party establishes that the decision is arbitrary or capricious or not in accordance with the Constitution of Virginia, statutes, regulations or the terms and conditions of the request for quotation, Invitation to Bid or the Request for Proposal or any resulting contract document.

910. Judicial Review

Any party to the Administrative Appeals Procedure, including the City, shall be entitled to institute judicial review if such action is brought within thirty (30) days of receipt of the panel's written decision.

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APPENDIX A: GLOSSARY OF SELECTED PURCHASING TERMS

Bid An offer submitted in response to an Invitation For Bid; can become a contract upon acceptance by the City.

Blanket Purchase Order A contract under which a vendor agrees to provide goods or services to a purchaser on a demand basis. b

Brand Name or Equal Specification A specification limited to one or more items by manufacturers' names or catalog numbers to describe the standard of equality, performance, and other salient characteristics needed to meet City requirements and which provides for the submission of equivalent products.

Business Any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture or any other private legal entity.

Change Order (Unilateral) A written order unilaterally issued by the City Manager directing contractor to make changes which the "changes" clauses of the contract authorizes the City to order without the consent of the contractor. b

Confidential Information Any information which is available to an employee only because of employee's status as an employee of the City and is not a matter of public knowledge or available to the public on request. b

Confirming Purchase Order A purchase order restating the same terms originally placed verbally.

Construction Building, altering, repairing, improving or demolishing any structure, building, highway and any draining, dredging, excavation, grading, or similar work upon real property. D

Contract All types of City agreements, regardless of what they may be called, for the procurement of goods, services, insurance or construction.

Contract Modification Any written alteration in specifications, delivery point, date of delivery, period of performance, price, quantity or other provision of any contract accomplished by mutual action of the parties of the contract.

Contractor Any entity that has a direct contract with the City or any agency of the City.

Cost Analysis The evaluation of cost data for the purpose of arriving at costs actually incurred estimates of costs to be incurred, prices to be paid, and costs to be reimbursed. D

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Cost Data Factual information concerning the cost of labor, material, overhead and other cost elements which are expected to be incurred or which have been actually incurred by the contractor in performing the contract.

Cost-Reimbursement Contract A contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of this Manual, and a fee or profit, if any.

Delivery The formal handing over of property; the transfer of possession, as by carrier to purchaser.

Emergency Defined as situations which would adversely affect the life, health or well being of citizens or employees. Work stoppages, unforeseen conditions, rapid response actions, etc., qualify as emergencies if the conditions arise from unforeseen circumstances. Conditions which arise from a lack of planning on the part of users do not qualify as emergencies under most circumstances.

Employee An individual drawing a salary or wages from the City whether elected or not; any non-compensated individual performing personal services for the City or any department, agency, commission, council, board, or any other entity established by the executive or legislative branch of this city; and any non-compensated individual serving as an elected official of the City.

Female-Owned or Female-Controlled Business A business enterprise at least 50 percent of which is owned by females or in the case of a publicly owned business at least 51 percent of the stock of which is owned by females.

Goods All material, equipment, supplies, printing, and automated data processing hardware and software.

Informality A minor defect or variation of a bid or proposal from the exact requirements of the Invitation to Bid, or the Request for Proposal, which does not affect the price, quality, quantity, or delivery schedules of the goods, services or construction being procured.

Insurance A contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils.

Invitation for Bid All documents, whether attached or incorporated by reference, utilized for soliciting sealed bids. No confidential or proprietary data shall be solicited in any invitation for bid.

Minority-Owned Business A business enterprise that is owned or controlled by one or more socially or economically disadvantaged persons. Such disadvantage may arise from cultural, racial, chronic economic circumstances or background or other similar cause. Such

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persons include, but are not limited to, Blacks, Puerto Ricans, Spanish-speaking Americans, American Indians, Eskimos, and Aleuts.

Nominal Value So small, slight or the like, in comparison to what might properly be expected, scarcely to be entitled to the name but in no case to be more than two hundred dollars. **a**

Non-Professional Services Any services not specifically identified as professional services in definition of professional services. **b**

Professional Services Work performed by an independent contractor within the scope of the practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law, medicine, optometry, pharmacy, or professional engineering.

Person Any business, individual, union, committee, club, other organization, or group of individuals.

Public Body Any legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board or political subdivision created by law to exercise some sovereign power or to perform some government duty, and empowered by law to undertake the activities described in this Manual.

Purchase Order a purchaser's written document to a supplier formally stating all terms and conditions of a proposed transaction.

Qualified Products List An approved list of goods, services or construction items described by model or catalog number, which prior to competitive solicitation, the City has determined will meet the applicable specification requirements.

Request for Proposal All documents, whether attached or incorporated by reference, utilized soliciting proposals. **f**

Request for Quotation A form of informal solicitation, including obtaining oral or written quotes from vendors, without formal advertising and receipt of sealed bids.

Responsive Bidder or Offeror A person who has submitted a bid or proposal which conforms in all material respects to the Invitation to Bid or Request for Proposal. **i**

Services Any work performed by an independent contractor wherein the service rendered does consist primarily of acquisition of equipment or materials, or the rental of equipment, materials and supplies. **n**

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Sheltered Workshop A work-oriented rehabilitative facility with a controlled working environment and individual goals which utilizes work experience and related services for assisting the handicapped person to progress toward normal living and a productive vocational status.

Small Business A United States corporation, partnership, sole proprietorship, or other legal entity formed for the purpose of making a profit, which is independently owned and operated, and has either fewer than 100 employees or less than \$1,000,000 in annual gross receipts.

Specification Any description of the physical or functional characteristics or of the nature of a good, 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.

Subcontractor Any entity that has a contract to supply labor or materials to the contractor to whom the contract was awarded or to any subcontractor in the performance of the work provided for in such contract.

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APPENDIX B: STANDARD OPERATING PROCEDURES

101. Petty Cash Purchase Procedures

The Finance Department maintains a centralized petty cash fund to reimburse employees who have been authorized to purchase items which are needed immediately. Purchases of this type are generally random in nature and are from a vendor with whom the City does not have an established account. Petty cash reimbursements up to \$100 will be made at the Finance Department customer windows to City employees presenting cash receipts within five (5) working days of the date of the purchase. All receipts shall be signed and dated by the employee who made the purchase and shall bear appropriate eight digit budgetary line item codes for each item purchased. A petty cash receipt signed by the employee and an authorized City official may also be required.

102. Credit Card Purchase Procedures

Purchases may be made by authorized City employees using City gasoline or other credit cards. All credit card receipts shall be signed and dated by the employee making the purchase and shall bear appropriate eight digit budgetary line item codes for each item purchased. Credit card receipts shall be retained by the employee in whose name the card is issued. City credit card holders shall: (1) verify the accuracy of charges appearing on their monthly credit card statements, (2) attach receipts for all items appearing on the monthly statement, (3) provide a summary of charges by eight digit budgetary line item, and (4) forward the documentation to the Finance Department within five working days after receipt of such statement.

103. Check Request Procedures

Occasionally (for items such as membership dues or magazine subscriptions) organizations or vendors require payment before providing the good or service to the City. In these cases, the person vested with responsibility for making the procurement transaction shall submit a Check Request to the Finance Department along with completed order forms for the items or services in question. The Finance Department will process the Check Request and mail the order as soon as possible. Except in unusual circumstances, checks are issued semimonthly.

104. Threshold for Issuing Purchase Orders

All purchases over \$1,000 require the completion of a purchase order by the individual authorizing the purchase.

105. Purchase Order Logs

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All individuals authorized to issue purchase orders shall maintain Purchase Order Logs. The Purchase Order Log records the purchase order number, the vendor, the date of procurement, and the total cost of the procurement. For auditing purposes, the log shall be kept current at all times. Each purchase order shall be recorded in the log at the time it is issued.

106. Basic Purchase Procedure

Subject to the particular thresholds and requirements outlined elsewhere in this Manual, whenever department heads authorize purchases over \$1,000 (*e.g.*, purchases requiring purchase orders), they shall:

- (1) develop specifications and sources with the assistance of their employees and, when necessary, the Purchasing Agent;
- (2) contact potential sources, recording written or telephone quotations as required on standard forms provided by the City;
- (3) select a source from those providing quotes;
- (4) complete a purchase order, and mail (or fax) a copy of the completed purchase order to the vendor, specifying the delivery location and method and informing the vendor to send all statements and invoices to the Finance Department;
- (5) inspect of the condition of goods upon delivery, verifying and retaining the packing slip, checking for the correct product and quantity, noting any deficiencies, and refusing delivery of damaged goods;
- (6) verify unit sizes and quantities, unit prices, price extensions, and authorized shipping costs upon receipt of the invoice;
- (7) prepare and send a packet containing the purchase order, the packing slip (noting any deficiencies), and the invoice for the goods received to the Finance Department within five (5) working days of completion of the preceding seven steps.

107. Blanket Purchase Orders

Blanket purchase orders are to be used when:

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- (1) purchasing repetitive, specified services or items, or categories of items from the same vendor over a set period of time;
- (2) ordering maintenance supplies;
- (3) items are for immediate use.

Blanket purchase orders generally should not be used when:

- (1) use of the procedure will adversely affect use of other purchasing techniques that might produce greater discounts;
- (2) items are for replenishing stock;
- (3) no benefit will derive over and above a regular purchase order;
- (4) quality of a vendor or services is questionable;
- (5) prices are unknown at ordering time, or subject to change later without notice.

In order to increase efficiency and flexibility in the use of blanket purchase orders, any City employee formally authorized by his or her department head may place or pick up orders. The employee shall sign his or her name on the order/receipt slip, which shall be coded and immediately forwarded to the City Finance Department for payment. A list of all blanket purchase orders will be issued to users each fiscal year and any other time a change occurs.

108. Confirming Purchase Orders

Confirming purchase orders restate an order placed verbally and may be used for emergencies and to speed the purchase of incidental items under conditions which would hamper ongoing work if procured through the normal purchase order process. In all cases, purchase order numbers are secured and given to the vendor prior to placement of an order. The number is to appear on packing slips and invoices for payment. Confirming purchase orders are not to be issued for items available through blanket purchase orders. The following questions will be asked prior to issuance of a confirming purchase order number:

- (1) Is this an emergency? Equipment repair?
- (2) Has the order been placed? Has the job been completed?

The Purchasing Agent and department heads will use their best judgement in determining the validity of requests. Whenever dollar amounts exceed \$3,000, the Purchasing Agent or department head shall

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request all information necessary to create a purchase order. Such orders shall be marked "CONFIRMATION ONLY - DO NOT DUPLICATE".

109. Preparation of the Invitation for Bid or Request for Proposal

The Purchasing Agent shall coordinate the preparation of necessary documents for Invitations for Bids and Requests for Proposals, including the bid request, special conditions, specifications, bid or proposal advertisement, special bid sheets, and the list of bidders or offerors.

Requests for Proposals shall indicate in general terms the goods or services the City seeks to procure, specifying the factors which the City will use in evaluating the proposal and containing any other applicable contractual terms and conditions, including any unique capabilities or qualifications which will be required of the offeror.

The Purchasing Agent shall consider the desirability of broad competition among vendors as a key factor in the preparation of both bid specifications and Requests for Proposals.

110. Bid and Proposal Files

The Purchasing Agent and department heads, as appropriate, shall maintain complete control files on all formal bids and proposals for the City. The file on each bid or proposal shall contain a copy of: the bid or proposal invitation, general conditions, special conditions, specifications, advertisements, all bids or proposals received, bid tabulation, and evidence of award.

111. Disposal Procedure

A full description and relevant details of surplus and obsolete property shall be submitted to the Purchasing Agent, who shall investigate all proposals to dispose of surplus property. In collaboration with the department head, he will either negotiate reassignment to another department, obtain the City Manager's approval to destroy, or prepare a recommendation to advertise by sealed bid or sell by auction. All sales shall be made in compliance with Commonwealth of Virginia statutes, and all bidding shall be open to the general public. No City employee or member of an City employee's immediate family shall participate in a sealed bid sale by the City, but City employees may participate in public auctions. The Purchasing Agent shall collect all proceeds, turning them over to the Finance Department as soon as possible. Sale, donation, or exchange to another government entity or bona fide non-profit organization is exempt from the above procedure provided prior approval is obtained from the City Manager.

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APPENDIX C: THE VIRGINIA PUBLIC PROCUREMENT ACT
UNOFFICIAL COPY - FOR JUDICIAL OR OTHER LEGAL USES, CONSULT THE CODE OF VIRGINIA

July 1, 1998

ARTICLE 1.
General Provisions

Section 11-35. Title; purpose; applicability. - A. This chapter may be cited as the Virginia Public Procurement Act.

B. The purpose of this chapter is to enunciate the public policies pertaining to governmental procurement from nongovernmental sources, to include governmental procurement which may or may not result in monetary consideration for either party. This chapter shall apply whether the consideration is monetary or nonmonetary and regardless whether the public body, the contractor, or some third party is providing the consideration.

C. The provisions of this chapter, however, shall not apply, except as stipulated in the provisions of Sections 11-41.1, 11-49, 11-51, 11-54, 11-56 through 11-61 and 11-72 through 11-80, to any town with a population of less than 3,500 as determined by the last official United States census.

D. Except to the extent adopted by such governing body, the provisions of this chapter also shall not apply, except as stipulated in subsection E, to any county, city or town whose governing body adopts by ordinance or resolution alternative policies and procedures which are based on competitive principles and which are generally applicable to procurement of goods and services by such governing body and the agencies thereof. This exemption shall be applicable only so long as such policies and procedures, or other policies and procedures meeting the requirements of this section, remain in effect in such county, city or town. Such policies and procedures may provide for incentive contracting which offers a contractor whose bid is accepted the opportunity to share in any cost savings realized by the locality when project costs are reduced by such contractor, without affecting project quality, during construction of the project. The fee, if any, charged by the project engineer or architect for determining such cost savings shall be paid as a separate cost and shall not be calculated as part of any cost savings.

Except to the extent adopted by such school board, the provisions of this chapter shall not apply, except as stipulated in subsection E, to any school division whose school board adopts by policy or regulation alternative policies and procedures which are based on competitive principles and which are generally applicable to procurement of goods and services by such school board. This exemption shall be applicable only so long as such policies and procedures, or other policies and procedures meeting

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the requirements of this section, remain in effect in such school division. This provision shall not exempt any school division from any centralized purchasing ordinance duly adopted by a local governing body.

E. Notwithstanding the exemptions set forth in subsection D, the provisions of Sections 11-41 C, 11-41.1, 11-46 B, 11-49, 11-51, 11-54, 11-56 through 11-61 and 11-72 through 11-80 shall apply to all counties, cities and school divisions, and to all towns having a population greater than 3,500 in the Commonwealth. The method for procurement of professional services set forth in subdivision 3.a. of Section 11-37 in the definition of competitive negotiation shall also apply to all counties, cities and school divisions, and to all towns having a population greater than 3,500, where the cost of the professional service is expected to exceed \$30,000 in the aggregate or for the sum of all phases of a contract or project. A school board that purchases educational technology through its educational technology corporation established pursuant to Section 22.1-212.2:2 shall be exempt from the provisions of this chapter, except, relative to such purchases, the school board shall comply with the provisions of Section 11-51, and Sections 11-72 through 11-80.

F. The provisions of this chapter shall not apply to those contracts entered into prior to January 1, 1983, which shall continue to be governed by the laws in effect at the time those contracts were executed.

G. To the end that public bodies in the Commonwealth obtain high quality goods and services at reasonable cost, that all procurement procedures be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety, that all qualified vendors have access to public business and that no offeror be arbitrarily or capriciously excluded, it is the intent of the General Assembly that competition be sought to the maximum feasible degree, that individual public bodies enjoy broad flexibility in fashioning details of such competition, that the rules governing contract awards be made clear in advance of the competition, that specifications reflect the procurement needs of the purchasing body rather than being drawn to favor a particular vendor, and that the purchaser and vendor freely exchange information concerning what is sought to be procured and what is offered.

H. Notwithstanding the foregoing provisions of this section, the selection of services by the Virginia Retirement System related to the management, purchase or sale of authorized investments, including but not limited to actuarial services, shall be governed by the standard set forth in Section 51.1-124.30 and shall not be subject to the provisions of this chapter.

I. The provisions of this chapter shall apply to procurement of any construction or planning and design services for construction by a Virginia not-for-profit corporation or organization not otherwise specifically exempted when the planning, design or construction is funded by state

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appropriations greater than \$10,000 unless the Virginia not-for-profit corporation or organization is obligated to conform to procurement procedures which are established by federal statutes or regulations, whether or not those federal procedures are in conformance with the provisions of this chapter.

J. The provisions of this chapter shall not apply to items purchased by public institutions of higher education for resale at retail bookstores and similar retail outlets operated by such institution. However, such purchase procedures shall provide for competition where practicable.

K. The provisions of this chapter shall not apply to the Virginia Port Authority in the exercise of any of its powers in accordance with Chapter 10 (Section 62.1-128 et seq.) Of title 62.1, provided the Authority implements, by policy or regulation adopted by the board of commissioners and approved by the Department of General Services, procedures to ensure fairness and competitiveness in the procurement of goods and services and in the administration of its capital outlay program. This exemption shall be applicable only so long as such policies and procedures meeting the requirements remain in effect.

L. Notwithstanding the foregoing provisions of this section, the selection of services by the Board of the Virginia Higher Education Tuition Trust Fund related to the operation and administration of the Fund, including but not limited to, contracts or agreements for the management, purchase, or sale of authorized investments or actuarial, record-keeping, or consulting services, shall be governed by the standard set forth in Section 23-38.80 and shall not be subject to the provision of this chapter.

M. Notwithstanding the provisions of this section, the selection of services by the University of Virginia related to the management and investment of its endowment funds shall be governed by the uniform management of Institutional Funds Act (§ 55.268.1 et seq.) as required by § 23-6.1 and shall not be subject to the provisions of this chapter.

Section 11-36. Implementation. - This chapter may be implemented by ordinances, resolutions or regulations consistent with this act and with the provisions of other applicable law promulgated by any public body empowered by law to undertake the activities described in this chapter. Any such public body may act by and through its duly designated or authorized officers or employees.

Section 11-37. Definitions. - The words defined in this section shall have the meanings set forth below throughout this chapter.

"Competitive sealed bidding" is a method of contractor selection which includes the following elements:

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1. Issuance of a written Invitation to Bid containing or incorporating by reference the specifications and contractual terms and conditions applicable to the procurement. Unless the public body has provided for prequalification of bidders, the Invitation to Bid shall include a statement of any requisite qualifications of potential contractors. When it is impractical to prepare initially a purchase description to support an award based on prices, an Invitation to Bid may be issued requesting the submission of unpriced offers to be followed by an Invitation to Bid limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.

2. Public notice of the Invitation to Bid at least ten days prior to the date set for receipt of bids by posting in a designated public area, or publication in a newspaper of general circulation, or both. In addition, bids may be solicited directly from potential contractors. Any additional solicitations shall include businesses selected from a list made available by the Department of Minority Business Enterprise.

3. Public opening and announcement of all bids received.

4. Evaluation of bids based upon the requirements set forth in the invitation, which may include special qualifications of potential contractors, life-cycle costing, value analysis, and any other criteria such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose, which are helpful in determining acceptability.

5. Award to the lowest responsive and responsible bidder. When the terms and conditions of multiple bids are so provided in the Invitation to Bid, awards may be made to more than one bidder.

6. Competitive sealed bidding shall not be required for procurement of professional services.

"Competitive negotiation" is a method of contractor selection which includes the following elements:

1. Issuance of a written Request for Proposal indicating in general terms that which is sought to be procured, specifying the factors which will be used in evaluating the proposal and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities or qualifications which will be required of the contractor.

2. Public notice of the Request for Proposal at least ten days prior to the date set for receipt of proposals by posting in a public area normally used for posting of public notices and by publication in a newspaper or newspapers of general circulation in the area in which the contract is to be performed so as to provide reasonable notice to the maximum number of offerors that can be

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reasonably anticipated to submit proposals in response to the particular request. In addition, proposals may be solicited directly from potential contractors.

3. a. Procurement of professional services. - The public body shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence, to provide the required services. Repetitive informal interviews shall be permissible. The offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. The Request for Proposal shall not, however, request that offerors furnish estimates of man-hours or cost for services. At the discussion stage, the public body may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of price for services. Proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of discussion, outlined in this subdivision, on the basis of evaluation factors published in the Request for Proposal and all information developed in the selection process to this point, the public body shall select in the order of preference two or more offerors whose professional qualifications and proposed services are deemed most meritorious. Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the public body can be negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable price. Should the public body determine in writing and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified and suitable than the others under consideration, a contract may be negotiated and awarded to that offeror.

Multiphase professional services contracts satisfactory and advantageous to the Department of Transportation for environmental, location, design and inspection work regarding highways and bridges may be negotiated and awarded based on a fair and reasonable price for the first phase only, when completion of the earlier phases is necessary to provide information critical to the negotiation of a fair and reasonable price for succeeding phases.

b. Procurement of other than professional services. - Selection shall be made of two or more offerors deemed to be fully qualified and best suited among those submitting proposals, on the basis of the factors involved in the Request for Proposal, including price if so stated in the Request for Proposal. Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but need not be the sole determining factor. After negotiations have been conducted with each offeror so selected, the public body shall select the offeror which, in its opinion, has made the best proposal, and shall award the contract to that offeror. Should the public body determine in

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writing and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified than the others under consideration, a contract may be negotiated and awarded to that offeror.

"Construction" means building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavation, grading or similar work upon real property.

"Construction management contract" means a contract in which a party is retained by the owner to coordinate and administer contracts for construction services for the benefit of the owner, and may also include, if provided in the contract, the furnishing of construction services to the owner.

"Design-build contract" means a contract between a public body and another party in which the party contracting with the public body agrees to both design and build the structure, roadway or other item specified in the contract.

"Goods" means all material, equipment, supplies, printing, and automated data processing hardware and software.

"Informality" means a minor defect or variation of a bid or proposal from the exact requirements of the Invitation to Bid, or the Request for Proposal, which does not affect the price, quality, quantity or delivery schedule for the goods, services or construction being procured.

"Multiphase professional services contract" means a contract for the providing of professional services where the total scope of work of the second or subsequent phase of the contract cannot be specified without the results of the first or prior phase of the contract.

"Nonprofessional services" means any services not specifically identified as professional services in the definition of professional services.

"Potential bidder or offeror" for the purposes of Sections 11-66 and 11-70 means a person who, at the time a public body negotiates and awards or proposes to award a contract, is engaged in the sale or lease of goods, or the sale of services, insurance or construction, of the type to be procured under such contract, and who at such time is eligible and qualified in all respects to perform that contract, and who would have been eligible and qualified to submit a bid or proposal had the contract been procured through competitive sealed bidding or competitive negotiation.

"Professional services" means work performed by an independent contractor within the scope of the practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law,

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dentistry, medicine, optometry, pharmacy or professional engineering. "Professional services" shall also include the services of an economist procured by the State Corporation Commission.

"Public body" means any legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in this chapter.

"Public contract" means an agreement between a public body and a nongovernmental source that is enforceable in a court of law.

"Responsible bidder" or "offeror" means a person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability which will assure good faith performance, and who has been prequalified, if required.

"Responsive bidder" means a person who has submitted a bid which conforms in all material respects to the Invitation to Bid.

"Services" means any work performed by an independent contractor wherein the service rendered does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials and supplies.

"Sheltered workshop" means a work-oriented rehabilitative facility with a controlled working environment and individual goals which utilizes work experience and related services for assisting the handicapped person to progress toward normal living and a productive vocational status.

Section 11-38: Reserved.

Section 11-39. Compliance with conditions on federal grants or contracts. - Where a procurement transaction involves the expenditure of federal assistance or contract funds, the receipt of which is conditioned upon compliance with mandatory requirements in federal laws or regulations not in conformance with the provisions of this chapter, a public body may comply with such federal requirements, notwithstanding the provisions of this chapter, only upon the written determination of the Governor, in the case of state agencies, or the governing body, in the case of political subdivisions, that acceptance of the grant or contract funds under the applicable conditions is in the public interest. Such determination shall state the specific provision of this chapter in conflict with the conditions of the grant or contract.

Section 11-40. Cooperative procurement - A. Any public body may participate in, sponsor,

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conduct, or administer a cooperative procurement agreement with one or more other public bodies, or agencies of the United States, for the purpose of combining requirements to increase efficiency or reduce administrative expenses. Any public body which enters into a cooperative procurement agreement with a county, city, or town whose governing body has adopted alternative policies and procedures pursuant to Section 11-35 C or Section 11-35 D of this chapter shall comply with the alternative policies and procedures adopted by the governing body of such county, city, or town.

B. Subject to the provisions of Sections 2.1-440, 2.1-442 and 2.1-447, any authority, department, agency, or institution of the Commonwealth may participate in, sponsor, conduct, or administer a cooperative procurement arrangement with private health or educational institutions or with public agencies or institutions of the several states, territories of the United States, or the District of Columbia, for the purpose of combining requirements to effect cost savings or reduce administrative expense in any acquisition of goods and services, other than professional services. In such instances, deviation from the procurement procedures set forth in the Virginia Public Procurement Act (Section 11-35 et seq.) and the administrative policies and procedures established to implement the Act will be permitted, if approved by the Director of the Division of Purchases and Supply; however, such acquisitions shall be procured competitively. Nothing herein shall prohibit the payment by direct or indirect means of any administrative fee that will allow for participation in any such arrangement.

C. A public body which is also a utility operator may purchase services through or participate in contracts awarded by one or more utility operators which are not public bodies for utility marking services as required by the Underground Utility Damage Prevention Act (Section 56-265.14 et seq.). A purchase of services under this subsection may deviate from the procurement procedures set forth in this chapter upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, and the contract is awarded based on competitive principles.

Section 11-40.1. Repealed.

Section 11-40.2. Exemptions for certain legislative activities. - The provisions of this chapter and the contract review provisions of Section 2.1-563.17 shall not apply to the purchase of goods and services by agencies of the legislative branch which may be specifically exempted therefrom by the Chairman of the Committee on Rules of either the House of Delegates or the Senate. The exemption shall be in writing and kept on file with the agency's disbursement records.

Section 11-40.3. Exemptions for certain election materials and services. - Contracts for certain essential election materials and services are exempted from the requirements of Articles 1, 2, and 3 of this chapter pursuant to Section 24.1-113.1.

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ARTICLE 2.

Contract Formation and Administration

Section 11-41. Methods of procurement. - A. All public contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, or construction, shall be awarded after competitive sealed bidding, or competitive negotiation as provided in this section, unless otherwise authorized by law.

B. Professional services shall be procured by competitive negotiation.

C. 1. Upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, goods, services, or insurance may be procured by competitive negotiation. The writing shall document the basis for this determination.

Upon a written determination made in advance by (i) the Governor or his designee in the case of a procurement by the Commonwealth or by a department, agency or institution thereof or (ii) the local governing body in the case of a procurement by a political subdivision of the Commonwealth, that competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured through a licensed agent or broker selected in the manner provided for the procurement of things other than professional services in subdivision 3 b of the definition of "competitive negotiation" in Section 11-37. The basis for this determination shall be documented in writing.

2. Construction may be procured only by competitive sealed bidding, except that competitive negotiation may be used in the following instances upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, which writing shall document the basis for this determination:

(i) By the Commonwealth, its departments, agencies and institutions on a fixed price design-build basis or construction management basis under Section 11-41.2;

(ii) By any public body for the alteration, repair, renovation or demolition of buildings when the contract is not expected to cost more than \$500,000;

(iii) By any public body for the construction of highways and any draining, dredging, excavation, grading or similar work upon real property; or

(iv) As otherwise provided in Section 11-41.2:1.

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D. Upon a determination in writing that there is only one source practicably available for that which is to be procured, a contract may be negotiated and awarded to that source without competitive sealed bidding or competitive negotiation. The writing shall document the basis for this determination. The public body shall issue a written notice stating that only one source was determined to be practicably available, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted in a designated public area or published in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first.

E. In case of emergency, a contract may be awarded without competitive sealed bidding or competitive negotiation; however, such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The public body shall issue a written notice stating that the contract is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted in a designated public area or published in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first, or as soon thereafter as is practicable.

F. A public body may establish purchase procedures, if adopted in writing, not requiring competitive sealed bids or competitive negotiation for single or term contracts if the aggregate or the sum of all phases is not expected to exceed \$30,000; however, such small purchase procedures shall provide for competition wherever practicable.

G. Any local school board may authorize any of its public schools or its school division to enter into contracts providing that caps and gowns, photographs, class rings, yearbooks and graduation announcements will be available for purchase or rental by students, parents, faculty or other persons using nonpublic money through the use of competitive negotiation as provided in this chapter, competitive sealed bidding not necessarily being required for such contracts. The Superintendent of Public Instruction may provide assistance to public school systems regarding this chapter and other related laws.

H. Upon a determination made in advance by the local governing body and set forth in writing that the purchase of goods, products or commodities from a public auction sale is in the best interests of the public, such items may be purchased at the auction. The writing shall document the basis for this determination.

Section 11-41.01. Petition for recycled goods and products; periodic review of procurement

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standards. - A. Any person who believes that particular goods or products with recycled content are functionally equivalent to the same goods or products produced from virgin materials may petition the Department of General Services or an agency of the Commonwealth to include the recycled goods or products in its procurement process. The petitioner shall submit, prior to or during the procurement process, documentation which establishes that the goods or products (i) contain recycled content and (ii) can meet the performance standards set forth in the applicable specifications. If the Department of General Services or the agency of the Commonwealth which receives the petition request determines that the documentation demonstrates that the goods or products with recycled content will meet the performance standards set forth in the applicable specifications, it shall incorporate such goods or products into its procurement process.

B. The Department of General Services and all agencies of the Commonwealth shall review and revise their procurement procedures and specifications on a continuing basis to encourage the use of goods and products with recycled content and shall, in developing new procedures and specifications, encourage the use of goods and products with recycled content.

Section 11-41.02. Petition for procurement of less toxic goods and products; periodic review of procurement standards. - As used in this section:

"*Goods and products*" means goods and products that are used or consumed by an agency of the Commonwealth in the performance of its statutory functions. The term shall include, but not be limited to: (i) cleaning materials, (ii) paints and coatings, (iii) solvents, (iv) adhesives, (v) inks, and (vi) pesticides and herbicides. The term shall not include: (i) fuels, (ii) food and beverages, (iii) furniture and fixtures, (iv) tobacco products, and (v) packaging and containers.

"*Less toxic goods and products*" means goods and products which (i) are functionally equivalent to and (ii) contain, emit, produce, or generate, less toxic or hazardous substances, or other toxic or hazardous substances which pose less of a hazard to public health and safety, or both, than goods and products procured by the Department of General Services or other agency of the Commonwealth.

"*Toxic or hazardous substance*" means (i) a chemical identified on the Toxic Chemical List established pursuant to Section 313 of the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. Section 11001 et seq. (P.L. 99-499) or (ii) a chemical listed pursuant to Sections 101 (14) or 102 of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9601 et seq. (P.L. 92-500).

B. Any person who manufactures, sells, or supplies goods or products may petition the Department of General Services or other appropriate agency of the Commonwealth for the inclusion of the less toxic goods and products in its procurement process. The petitioner shall submit, prior to

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or during the procurement process, documentation which establishes that the goods or products meet the performance standards set forth in the applicable specifications. If the Department of General Services or other agency of the Commonwealth which receives the petition determines that the documentation establishes that the less toxic goods or products meet the performance standards set forth in the applicable specifications, it shall incorporate such goods or products into its procurement process.

C. The Department of General Services and other agencies of the Commonwealth shall review and revise their procurement procedures and specifications on a continuing basis to encourage the use of less toxic goods and products; however, nothing in this section shall require the Department or such other agencies to purchase, test or evaluate any particular goods or products. Nor shall this section require the Department to purchase goods or products other than those that would be purchased under regular procurement procedures.

Section 11-41.1. Competitive bidding on state-aid projects. - No contract for the construction of any building or for an addition to or improvement of an existing building by any local government or subdivision of local government for which state funds of not more than \$30,000 in the aggregate or for the sum of all phases of a contract or project either by appropriation, grant-in-aid or loan, are used or are to be used for all or part of the cost of construction shall be let except after competitive sealed bidding or after competitive negotiation as provided under subdivision 2 of subsection C of Section 11-41. The procedure for the advertising for bids or for proposals and for letting of the contract shall conform, mutatis mutandis, to this chapter.

Section 11-41.2. Design-build or construction management contracts for Commonwealth authorized. - A. Notwithstanding any other provisions of law, the Commonwealth may enter into contracts on a fixed price design-build basis or construction management basis in accordance with the provisions of this section and Section 2.1-51.31. Procedures to implement this section and any changes to such procedures shall be adopted by the Secretary of Administration after a public hearing and approval by the House of Appropriations and Senate Finance Committees.

B. Procurement of construction by the design-build method shall be a two-step competitive negotiation process. In the first step, offerors shall be requested to submit their qualifications. Based upon the information submitted and any other relevant information which the Commonwealth may obtain, no more than five offerors deemed most suitable for the project shall be selected by the Commonwealth and requested to submit proposals.

C. Design-build contracts may be used by the Commonwealth only for those types of construction projects designated in the procedures adopted by the Secretary of Administration to implement this section.

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Section 11-41.2:01: Expired.

Section 11-41.2:02. Fixed-price or not-to-exceed-price design-build and construction management contracts for juvenile correctional facilities authorized. - Notwithstanding the provisions of § 11-41.2, but subject to the procedures adopted by the Secretary of Administration to implement the provisions to that section, the Commonwealth may enter into contracts for juvenile correctional facilities on a fixed-price or not-to-exceed-price design-build basis or construction management basis, including related leases, lease/purchase contracts, agreements relating to the sale of securities to finance such facilities, and similar financing agreements.

Section 11-41.2:1: Repealed.

Section 11-41.2:2. Design-build or construction management contracts for public bodies other than the Commonwealth; eligibility requirements; award of contract; records to be kept. - A. While the competitive sealed bid process remains the preferred method of construction procurement for public bodies in the Commonwealth, any public body other than the Commonwealth may enter into a contract for construction on a fixed price or not-to-exceed price design-build or construction management basis provided the public body complies with the requirements of this section and has obtained the approval of the Design-Build/Construction Management Review Board (the Review Board) pursuant to Section 11-41.2:5.

Prior to making a determination as to the use of design-build or construction management for a specific construction project, the public body shall have in its employ or under contract a licensed architect or engineer with professional competence appropriate to the project who shall advise the public body regarding the use of design-build or construction management for that project and who shall assist the public body with the preparation of the Request for Proposal.

Prior to issuing a Request for Proposal for any design-build or construction management contract for a specific construction project, the public body shall:

1. Have adopted, by ordinance or resolution, written procedures governing the selection, evaluation and award of design-build and construction management contracts. Such procedures shall be consistent with those described in this chapter for the procurement of nonprofessional services through competitive negotiation. Such procedures shall also require Requests for Proposals to include and define the criteria of such construction project in areas such as site plans; floor plans; exterior elevations; basic building envelope materials; fire protection information plans; structural, mechanical (HVAC), and electrical systems; and special telecommunications; and may define such other requirements as the public body determines appropriate for that particular construction project. Except as may otherwise be approved by the Review Board, such procedures for:

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(a) Design-build construction projects shall include a two-step competitive negotiation process consistent with the applicable provisions of the Design-Build Selection Procedures of paragraph D of Chapter IX (Special Construction Procedures) of the Capital Outlay Manual of the Commonwealth developed by the Department of General Services through the Division of Engineering and Buildings. The provisions of the Capital Outlay Manual shall apply, mutatis mutandis, to such procedures for design-build construction projects.

(b) Construction management projects shall include (i) selection procedures consistent with the applicable provisions of the Selection Procedures of paragraphs D and E of Chapter IX (Special Construction Procedures) of the Capital Outlay Manual of the Commonwealth and (ii) required construction management contract terms consistent with applicable provisions of the Required Construction Management Contract terms of paragraph F of Chapter IX (Special Construction Procedures) of the Capital Outlay Manual. The provisions of the Capital Outlay Manual shall apply, mutatis mutandis, to such procedures for construction management projects.

2. Have documented in writing that for a specific construction project (i) a design-build or construction management contract is more advantageous than a competitive sealed bid construction contract; (ii) there is a benefit to the public body by using a design-build or construction management contract; and (iii) competitive sealed bidding is not practical or fiscally advantageous.

B. Once approved by the Review Board in accordance with Section 11-41.2:5, the public body may award a design-build or construction management contract. Unless otherwise specified in the Request for Proposal, such contract shall be awarded to the fully qualified offeror who submits an acceptable proposal at the lowest cost in response to the Request for Proposal. The provisions of this subsection shall supersede any related provision in the Capital Outlay Manual.

C. The public body shall provide information as requested by the Review Board to allow post-project evaluation by the Review Board.

Section 11-41.2:3. Design-Build/Construction Management Review Board created; membership; terms; staffing; seal. - A. There is hereby created the Design-Build/Construction Management Review Board, hereinafter referred to as the Review Board, which shall be composed of nine members to be appointed by the Governor as follows: The Director of the Division of Engineering and Buildings of the Department of General Services, or his designee; two Class A general contractors selected from a list recommended by the Associated General Contractors ; one architect and one engineer selected from a list recommended by the Consulting Engineers Council of Virginia, the Virginia Society of the American Institute of Architects, and the Virginia Society of Professional Engineers; and four representatives of public bodies other than the Commonwealth selected from a list recommended by the Virginia Municipal League and the Virginia Association of

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Counties. Each such list shall include the names of at least four persons who are experienced and actively engaged in competitive sealed bidding or competitive negotiation and in design-build or construction management procedures. The Director of the Division of Engineering and Buildings or his designee shall be a nonvoting member of the Review Board, except in the event of a tie vote of the Review Board.

B. The initial terms of the Review Board shall be as follows: three members shall be appointed for two-year terms, three members shall be appointed for three-year terms and three members shall be appointed for four-year terms. Thereafter, all appointments shall be for terms of four years, except that appointments to fill vacancies shall be for the unexpired terms. No person shall be eligible to serve for more than two successive full terms, except the Director of the Division of engineering and Buildings, who shall serve until a successor qualifies.

C. The Review Board shall elect its chairman and vice-chairman from among its members. Members shall receive no compensation for their services as members of the Review Board, but shall receive reasonable expenses.

D. The Review Board shall meet monthly to conduct its business as required by Section 11-41.2:4. However, monthly meetings may be canceled by the chairman if there is no business before the Review Board. Five members shall constitute a quorum.

E. Such staff support as is necessary for the conduct of the Review Board's business shall be furnished by the Division of Engineering and Buildings of the Department of General services pursuant to Section 2.1-483.1:2.

F. The Review Board shall adopt a seal by which it shall authenticate its proceedings.

Section 11-41.2:4. Duties of the Design-Build/Construction Management Review Board; transitional provisions relating to regulations. -A. The Review Board shall have the following duties:

1. Review submissions by public bodies other than the Commonwealth of draft or adopted ordinances or resolutions to determine if the process for the selection, evaluation and award of a design-build or construction management contract is in compliance with the provisions of subdivision A 1 Section 11-41.2:2;

2. Determine if the public body has complied with the provisions of Section 11-41.2:2 relating to the retention of a licensed architect or engineer;

3. Review the findings and the basis of such findings submitted by the public body to determine

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if the public body has complied with the requirements of Section 11-41.2:2 and that the findings made by the public body pursuant to Section 11-41.2:2 are not unreasonable;

4. Develop guidelines relating to the documents and information to be reviewed by the Review Board;

5. Make post-project evaluations of construction projects procured by design-build or construction management contracts entered into by public bodies other than the Commonwealth, including cost and time savings, effectiveness of the selection, evaluation and award of such contracts, and the benefit to the public body; and

6. Report to the General Assembly and the Governor on or before December 1, 1999, concerning the Review Board's evaluation of and findings regarding all design-build and construction management construction undertaken by public bodies other than the Commonwealth since July 1, 1996, and any recommendations relating to future use of design-build or construction management contracts by such public bodies.

B. On or before July 1, 1997, the Review Board shall adopt regulations, as it deems appropriate, based on the substantive requirements of Chapter IX of the Capital Outlay Manual of the Commonwealth, for a two-step competitive negotiation process which shall be applied to design-build and construction management projects undertaken by public bodies other than the Commonwealth. For construction management projects, such regulations shall also include applicable provisions of the Required Construction Management Contract Terms of the Capital Outlay Manual. Such regulations shall also allow the Review Board to approve deviations from provisions of the Capital Outlay Manual that it deems appropriate. Such regulations, upon final adoption, shall supersede the provisions of subdivisions A 1 a and A 1 b of Section 11-41.2:2. Regulations of the Review Board shall be adopted in accordance with the Administrative Process Act (Section 9-6.14:1 et. seq.), except that regulations adopted pursuant to this subsection during the Review Board's first year of operation shall not be subject to the Administrative Process Act. Thereafter, all regulations shall be adopted in accordance with the Administrative Process Act.

Section 11-41.2:5. - Review by the Review Board for design-build or construction management approval; effect of disapproval; review of Review Board decision. - The Review Board shall conduct such inquiry it deems appropriate and may require the submission of additional documents or information by the public body, in a form prescribed by the Review Board, to determine if the public body has complied with the provisions of Section 11-41.2:2.

Within sixty days of the receipt of the request for review, the Review Board shall render a decision, unless a different timetable is agreed to by the public body. If the Review Board determines that the

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public body has complied with the provisions of Section 11-41.2:2 and the findings made by the public body pursuant to subdivision A 2 of Section 11-41.2:2 are not unreasonable, the Review Board shall approve such use. If the Review Board determines that (i) the public body has not complied with the provisions of Section 11-41.2:2 or (ii) the findings are made by the public body pursuant to subdivision A 2 of Section 11-41.2:2 are unreasonable, it shall disapprove such use, and the public body shall not use a design-build or construction management contract to procure construction for the proposed project. If no decision is made by the Review Board within the sixty-day period or as otherwise agreed to by the public body, the proposed use of a design-build or construction management contract shall be deemed approved.

Any public body other than the Commonwealth which has been aggrieved by any action of the Review Board shall be entitled to a review of such action. Appeals from such actions shall be in accordance with the provisions of the Administrative Process Act (Section 9-6.14:1 et seq.).

Section 11-41.3. Repealed.

Section 11-41.4. (Effective until January 1, 2001) Year 2000 Remediation. - That, to obtain responses to Requests for Proposals or Invitations to Bid for goods or nonprofessional services to remediate computers, software programs, databases, networks, or information systems which are not compliant with the "Year 2000" date change and such goods or services are to be procured through competitive negotiation or competitive sealed bidding pursuant to the Virginia Public Procurement Act (§ 11-35 et seq.), public bodies shall strive to solicit responsible bidders or offerors who provide such remediation in Virginia and may solicit other responsible bidders or offerors to provide such remediation.

Section 11-42. Cancellation, rejection of bids; waiver of informalities. - A. An Invitation to Bid, a Request for Proposal, any other solicitation, or any and all bids or proposals, may be canceled or rejected. The reasons for cancellation or rejection shall be made part of the contract file. A public body shall not cancel or reject an Invitation to Bid, a Request for Proposal, any other solicitation, bid or proposal pursuant to this section solely to avoid awarding a contract to a particular responsive and responsible bidder or offeror.

B. A public body may waive informalities in bids.

Section 11-43. Contract pricing arrangements. - A. Except as prohibited herein, public contracts may be awarded on a fixed price or cost reimbursement basis, or on any other basis that is not prohibited.

B. Except in case of emergency affecting the public health, safety or welfare, no public contract shall be awarded on the basis of cost plus a percentage of cost. A policy or contract of insurance or prepaid

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coverage having a premium computed on the basis of claims paid or incurred, plus the insurance carrier's administrative costs and retention stated in whole or part as a percentage of such claims, shall not be prohibited by this section.

Section 11-44. Discrimination prohibited. - In the solicitation or awarding of contracts, no public body shall discriminate because of the race, religion, color, sex, or national origin of the bidder or offeror. Whenever solicitations are made, each public body shall include businesses selected from a list made available by the Department of Minority Business Enterprise.

Section 11-44.1. Exclusion of insurance bids prohibited. - Notwithstanding any other provision of law, no insurer licensed to transact the business of insurance in this Commonwealth or approved to issue surplus lines insurance in this Commonwealth may be excluded from presenting an insurance bid proposal to a public body in response to a request for proposal or an invitation to bid. Nothing in this section shall preclude a public body from debarring a prospective contractor pursuant to Section 11-46.1.

Section 11-45. Exceptions to requirement for competitive procurement. - A. Any public body may enter into contracts without competition for the purchase of goods or services (i) which are performed or produced by persons, or in schools or workshops, under the supervision of the Virginia Department for the Visually Handicapped; or (ii) which are performed or produced by nonprofit sheltered workshops or other nonprofit organizations which offer transitional or supported employment services serving the handicapped.

B. Any public body may enter into contracts without competition for (i) legal services, provided that the pertinent provisions of Chapter 11 (Section 2.1-117 et seq.) of Title 2.1 remain applicable; or (ii) expert witnesses and other services associated with litigation or regulatory proceedings.

C. Any public body may extend the term of an existing contract for services to allow completion of any work undertaken but not completed during the original term of the contract.

D. An industrial development authority may enter into contracts without competition with respect to any item of cost of "authority facilities" or "facilities" as defined in Section 15.2-4902).

E. The Department of Alcoholic Beverage Control may procure alcoholic beverages without competitive sealed bidding or competitive negotiation.

F. Any public body administering public assistance programs as defined in Section 63.1-87, the fuel assistance program, community services boards as defined in Section 37.1-1, or any public body purchasing services under the Comprehensive Services Act for At-Risk Youth and Families (Section

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2.1-745 et seq.) may procure goods or personal services for direct use by the recipients of such programs without competitive sealed bidding or competitive negotiations if the procurement is made for an individual recipient. Contracts for the bulk procurement of goods or services for the use of recipients shall not be exempted from the requirements of Section 11-41.

G. Any public body may enter into contracts without competitive sealed bidding or competitive negotiation for insurance if purchased through an association of which it is a member if the association was formed and is maintained for the purpose of promoting the interest and welfare of and developing close relationships with similar public bodies, provided such association has procured the insurance by use of competitive principles and provided that the public body has made a determination in advance after reasonable notice to the public and set forth in writing that competitive sealed bidding and competitive negotiation are not fiscally advantageous to the public. The writing shall document the basis for this determination.

H. The Department of Health may enter into contracts with laboratories providing cytology and related services without competitive sealed bidding or competitive negotiation if competitive sealed bidding and competitive negotiations are not fiscally advantageous to the public to provide quality control as prescribed in writing by the Commissioner of Health.

I. The Director of the Department of Medical Assistance Services may enter into contracts without competitive sealed bidding or competitive negotiation for special services provided for eligible recipients pursuant to Section 32.1-325 E, provided that the Director has made a determination in advance after reasonable notice to the public and set forth in writing that competitive sealed bidding or competitive negotiation for such services is not fiscally advantageous to the public, or would constitute an imminent threat to the health or welfare of such recipients. The writing shall document the basis for this determination.

J. The Virginia Code Commission may enter into contracts without competitive sealed bidding or competitive negotiation when procuring the services of a publisher pursuant to Sections 9-77.7 and 9-77.8, to publish the Code of Virginia or the Virginia Administrative Code.

K. (Effective until July 1, 1999) The State Health Commissioner may enter into agreements or contracts without competitive sealed bidding or competitive negotiation for the compilation, storage, analysis, evaluation, and publication of certain data submitted by health care providers and for the development of a methodology to measure the efficiency and productivity of health care providers pursuant to Chapter 7.2 (Section 32.1-276.2 et seq.) of Title 32.1, if the Commissioner has made a determination in advance, after reasonable notice to the public and set forth in writing, that competitive sealed bidding or competitive negotiation for such services is not fiscally advantageous to

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the public. The writing shall document the basis for this determination. Such agreements and contracts shall be based on competitive principles.

L. A community development authority formed pursuant to Article 6 (Section 15.2-5152 et seq.) of Chapter 51 Title 15.2, with members selected pursuant to such article, may enter into contracts without competition with respect to the exercise of any of its powers permitted by Section 15.2-5158; however, this exception shall not apply in cases where any public funds other than special assessments and incremental real property taxes levied pursuant to Section 15.2-5158 are used as payment for such contract.

M. Virginia Correctional Enterprises may enter into contracts without competitive sealed bidding or competitive negotiation when procuring materials, supplies, or services for use in and support of its production facilities, provided such procurement is accomplished using procedures which ensure the efficient use of funds as practicable and, at a minimum, shall include obtaining telephone quotations. Such procedures shall require documentation of the basis for awarding contracts under this section.

N. The Virginia Baseball Stadium Authority may enter into agreements or contracts without competitive sealed bidding or competitive negotiation for the operation of any facilities developed under the provisions of Chapter 58 (Section 15.2-5800 et seq.) of Title 15.2, including contracts or agreements with respect to the sale of food, beverages and souvenirs at such facilities.

O. The Department of Health may procure child restraint devices, pursuant to Section 46.2-1097, without competitive sealed bidding or competitive negotiation.

P. With the consent of the Governor, the Jamestown-Yorktown Foundation may enter into agreements or contracts with private entities without competitive sealed bidding or competitive negotiation for the promotion of tourism through marketing provided a demonstrable cost savings, as reviewed by the Secretary of Education, can be realized by the Foundation and such agreements or contracts are based on competitive principles.

Q. The Virginia Racing commission may designate an entity to administer and promote the Virginia Breeders Fund created pursuant to § 59.1-372.

R. The Chesapeake Hospital Authority may enter into contracts without competitive sealed bidding or competitive negotiation in the exercise of any power conferred under Chapter 271, as amended, of the Acts of Assembly of 1966.

S. The Hospital Authority of Norfolk may enter into contracts without competitive sealed

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bidding or competitive negotiation in the exercise of any power conferred under Chapter 53 (§ 15.2-5300 et seq.) of Title 15.2. The Authority shall not discriminate against any person on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability in the procurement of goods and services.

Section 11-45.1. Acceptance of bids submitted to the Department of Transportation. - In a procurement by the Department of Transportation by competitive sealed bidding for highway construction and maintenance contracts, the Department may accept bids in response to an Invitation to Bid at the Department's central office or at district offices or other satellite locations designated in the Invitation to Bid, in accordance with specifications adopted by the Department. An Invitation to Bid may authorize agents of the Department to accept from bidders on a voluntary basis a supplemental submission referencing the total bid amount on a form prescribed by the Department. Information contained in any supplemental submission may be made available to the public by the Department after the time for receiving bids has expired and before the public opening and announcement of all sealed bids.

Section 11-46. Prequalification generally; prequalification for construction. - A. Prospective contractors may be prequalified for particular types of supplies, services, insurance or construction, and consideration of bids or proposals limited to prequalified contractors. Any prequalification procedure shall be established in writing and sufficiently in advance of its implementation to allow potential contractors a fair opportunity to complete the process.

B. Any prequalification of prospective contractors for construction by a public body subsequent to July 1, 1995, shall be pursuant to a prequalification process for construction projects adopted by the public body. Such process shall be consistent with the provisions of this subsection.

The application form used in such process shall set forth the criteria upon which the qualifications of prospective contractors will be evaluated. The application form shall request of prospective contractors only such information as is appropriate for an objective evaluation of all prospective contractors pursuant to such criteria. Such form shall allow the prospective contractor seeking prequalification to request, by checking the appropriate box, that all information voluntarily submitted by the contractor pursuant to this subsection shall be considered a trade secret or proprietary information subject to the provisions of subsection D of Section 11-52.

In all instances in which the public body requires prequalification of potential contractors for construction projects, advance notice shall be given of the deadline for the submission of prequalification applications. The deadline for submission shall be sufficiently in advance of the date set for the submission of bids for such construction so as to allow the procedures set forth in this subsection to be accomplished.

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At least thirty days prior to the date established for submission of bids or proposals under the procurement of the contract for which the prequalification applies, the public body shall advise in writing each contractor which submitted an application whether that contractor has been prequalified. In the event that a contractor is denied prequalification, the written notification to such contractor shall state the reasons for such denial of prequalification and the factual basis of such reasons.

A decision by a public body denying prequalification under the provisions of this subsection shall be final and conclusive unless the contractor appeals the decision as provided in Section 11-63.

A public body may deny prequalification to any contractor only if the public body finds one of the following:

1. The contractor does not have sufficient financial ability to perform the contract that would result from such procurement. If a bond is required to ensure performance of a contract, evidence that the contractor can acquire a surety bond from a corporation included on the United States Treasury list of acceptable surety corporations in the amount and type required by the public body shall be sufficient to establish the financial ability of such contractor to perform the contract resulting from such procurement;
2. The contractor does not have appropriate experience to perform the construction project in question;
3. The contractor or any officer, director or owner thereof has had judgments entered against him within the past ten years for the breach of contracts for governmental or nongovernmental construction, including, but not limited to, design-build or construction management;
4. The contractor has been in substantial noncompliance with the terms and conditions of prior construction contracts with a public body without good cause. If the public body has not contracted with a contractor in any prior construction contracts, the public body may deny prequalification if the contractor has been in substantial noncompliance with the terms and conditions of comparable construction contracts with another public body without good cause. A public body may not utilize this provision to deny prequalification unless the facts underlying such substantial noncompliance were documented in writing in the prior construction project file and such information relating thereto given to the contractor at that time, with the opportunity to respond;
5. The contractor or any officer, director, owner, project manager, procurement manager or chief financial official thereof has been convicted within the past ten years of a crime related to governmental or nongovernmental construction or contracting, including, but not limited to, a violation of (i) Article 4 (Section 11-72 et seq.), (ii) the Virginia Governmental Frauds Act (Section

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18.2-498.1 et seq.), (iii) Chapter 4.2 (Section 59.1-68.6 et seq.) of Title 59.1, or (iv) any substantially similar law of the United States or another state;

6. The contractor or any officer, director or owner thereof is currently debarred pursuant to an established debarment procedure from bidding or contracting by any public body, agency of another state or agency of the federal government; and

7. The contractor failed to provide to the public body in a timely manner any information requested by the public body relevant to subdivisions 1 through 6 of this subsection.

If a public body has a prequalification ordinance which provides for minority participation in municipal construction contracts, that public body may also deny prequalification based on minority participation criteria; provided, however, that nothing herein shall authorize the adoption or enforcement of minority participation criteria except to the extent that such criteria, and the adoption and enforcement thereof, are in accordance with the Constitution and laws of the United States and the Commonwealth.

The provisions of this subsection do not apply to prequalification for contracts let by the Commonwealth Transportation Board under Section 33.1-12.

Section 11-46.1. Debarment. - Prospective contractors may be debarred from contracting for particular types of supplies, services, insurance or construction, for specified periods of time. Any debarment procedure shall be established in writing for state agencies and institutions by the agency or agencies the Governor may designate, and for political subdivisions by their governing bodies. Any debarment procedure may provide for debarment on the basis of a contractor's unsatisfactory performance for a public body.

Section 11-46.2. Reserved.

Section 11-46.3. Workers' compensation requirements for construction contractors and subcontractors - A. No contractor shall perform any work on a construction project of a department, agency or institution of the Commonwealth unless he (i) has obtained, and continues to maintain for the duration of such work, such workers' compensation coverage as may be required pursuant to the provisions of Chapter 8 (Section 65.2-800 et seq.) of Title 65.2 and (ii) provides prior to the award of contract on a form furnished by the department, agency, or institution of the Commonwealth evidence of such coverage.

B. The Department of General Services shall provide the form to such departments, agencies,

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or institutions. Failure of a department, agency or institution to provide such form prior to the award of a contract shall waive the requirements of clause (ii) of subsection A.

C. No subcontractor shall perform any work on a construction project of a department, agency or institution of the Commonwealth unless he has obtained, and continues to maintain for the duration of such work, such workers' compensation coverage as may be required pursuant to the provisions of Chapter 8 (Section 65.2-800 et seq.) of Title 65.2.

D. The provisions of this section shall apply to localities on and after January 1, 1994, and the Department of General Services shall furnish the forms to localities.

Section 11-47. Preference for Virginia products with recycled content and for Virginia firms. - A. In the case of a tie bid, preference shall be given to goods, services and construction produced in Virginia or provided by Virginia persons, firms or corporations, if such a choice is available; otherwise the tie shall be decided by lot.

B. Whenever any bidder is a resident of any other state and such state under its laws allows a resident contractor of that state a preference, a like preference may be allowed to the lowest responsible bidder who is a resident of Virginia.

C. Notwithstanding the provisions of subsections A and B, in the case of a tie bid in instances where goods are being offered, and existing price preferences have already been taken into account, preference shall be given to the bidder whose goods contain the greatest amount of recycled content.

Section 11-47.01. Purchase programs for recycled goods; agency responsibilities.- A. State agencies which are members of the Virginia Recycling Markets Development Council and all other state agencies shall implement a purchase program for recycled goods. State agencies shall coordinate their efforts so as to achieve the goals and objectives established in subsection C of this section as well as those set forth in Sections 10.1-1425.6, 10.1-1425.7, 10.1-1425.8, 11-41.01, 11-47, and 11-47.2.

B. The Department of Environmental Quality, with advice from the Virginia Recycling Markets Development Council, shall advise the Department of General Services concerning the designation of recycled goods. In cooperation with the Department of General Services, the Department of Environmental Quality shall increase the awareness of state agencies as to the benefits of using such products.

C. The Department of General Services shall:

1. Ensure that the Commonwealth's procurement guidelines for state agencies promote the use

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of recycled goods.

2. Promote the Commonwealth's interest in the use of recycled products to vendors.
3. Make agencies aware of the availability of recycled goods, including those which use post-consumer and other recovered materials processed by Virginia-based companies.

D. All state agencies shall, to the greatest extent possible, adhere to the procurement program guidelines for recycled products to be established by the Department of General Services.

Section 11-47.1. Priority for Virginia coal used in state facilities. - In determining the award of any contract for coal to be purchased for use in state facilities with state funds, the Department of General Services shall procure using competitive sealed bidding and shall award to the lowest responsive and responsible bidder offering coal mined in Virginia so long as its bid price is not more than four percent greater than the bid price of the low responsive and responsible bidder offering coal mined elsewhere.

Section 11-47.2. Preference for recycled paper and paper products used by state agencies. - A. In determining the award of any contract for paper and paper products to be purchased for use by agencies of the Commonwealth, the Department of General Services shall procure using competitive sealed bidding and shall award to the lowest responsible bidder offering recycled paper and paper products of a quality suitable for the purpose intended, so long as the bid price is not more than ten percent greater than the bid price of the low responsive and responsible bidder offering a product that does not qualify under subsection B of this section.

B. For purposes of this section, recycled paper and paper products means any paper or paper products meeting the EPA Recommended Content Standards as defined in 40 C.F.R. Part 250.

Section 11-47.3. (Effective until July 1, 1997) Preference for community reinvestment activities in contracts for investment of funds. - Notwithstanding any other provision of law, any county or city which is authorized to and has established affordable housing programs pursuant to (i) Section 15.1-491.8 or Section 15.1-491.9 or (ii) a local ordinance adopted prior to December 31, 1988, may provide by resolution that in determining the award of any contract for time deposits or investment of its funds, the treasurer or director of finance of such county or city may consider, in addition to the typical criteria, the investment activities of qualifying institutions which enhance the supply of, or accessibility to, affordable housing within the jurisdiction. No more than fifty percent of the funds of the county or city, calculated on the basis of the average daily balance of the general fund during the previous fiscal year, may be deposited or invested by considering such investment activities as a factor in the award of a contract. A qualifying institution shall meet the provisions of the Virginia

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Security for Public Deposits Act (Section 2.1-359 et seq.) and all local terms and conditions for security, liquidity and rate of return.

This section shall expire on July 1, 1997. However, all contracts awarded under the authority of this section shall be performed in accordance with their terms.

11-47.4. Preference for local products and firms; applicability. - A. The governing body of a county, city or town may, in the case of a tie bid, give preference to goods, services and construction produced in such locality or provided by persons, firms or corporations having principal places of business in such locality, if such a choice is available; otherwise the tie shall be decided by lot, unless Section 11-47 shall apply.

B. The provisions of this section shall apply only to bids submitted pursuant to a written Invitation to Bid.

Section 11-48. Participation of small businesses and businesses owned by women and minorities. - All public bodies shall establish programs consistent with all provisions of this chapter to facilitate the participation of small businesses and businesses owned by women and minorities in procurement transactions. Such programs shall be in writing, and shall include cooperation with the Department of Minority Business Enterprise, the United States Small Business Administration, and other public or private agencies. State agencies shall submit annual progress reports on minority business procurement to the Department of Minority Business Enterprise.

Section 11-49. Use of brand names. - Unless otherwise provided in the Invitation to Bid, the name of a certain brand, make or manufacturer does not restrict bidders to the specific brand, make or manufacturer named; it conveys the general style, type, character, and quality of the article desired, and any article which the public body in its sole discretion determines to be the equal of that specified, considering quality, workmanship, economy of operation, and suitability for the purpose intended, shall be accepted.

Section 11-50. Comments concerning specifications. - Every public body awarding public contracts shall establish procedures whereby comments concerning specifications or other provisions in Invitations to Bid or Requests for Proposal can be received and considered prior to the time set for receipt of bids or proposals or award of the contract.

Section 11-51. Employment discrimination by contractor prohibited. - All public bodies shall include in every contract of over \$10,000 the provisions in 1 and 2 herein:

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

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a. The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex or national origin, except where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.

b. The contractor, in all solicitations or advertisements for employees placed by or on behalf of the contractor, will state that such contractor is an equal opportunity employer.

c. Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for the purpose of meeting the requirements of this section.

2. The contractor will include the provisions of the foregoing paragraphs a, b and c in every subcontract or purchase order of over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.

Section 11-52. Public inspection of certain records. - A. Except as provided herein, all proceedings, records, contracts and other public records relating to procurement transactions shall be open to the inspection of any citizen, or any interested person, firm or corporation, in accordance with the Virginia Freedom of Information Act (Section 2.1-340 et seq.).

B. Cost estimates relating to a proposed procurement transaction prepared by or for a public body shall not be open to public inspection.

C. Any competitive sealed bidding bidder, upon request, shall be afforded the opportunity to inspect bid records within a reasonable time after the opening of all bids but prior to award, except in the event that the public body decides not to accept any of the bids and to reopen the contract. Otherwise, bid records shall be open to public inspection only after award of the contract.

C1. Any competitive negotiation offeror, upon request, shall be afforded the opportunity to inspect proposal records within a reasonable time after the evaluation and negotiations of proposals are completed but prior to award, except in the event that the public body decides not to accept any of the proposals and to reopen the contract. Otherwise, proposal records shall be open to public inspection only after award of the contract.

C2. Any inspection of procurement transaction records under this section shall be subject to reasonable restrictions to ensure the security and integrity of the records.

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D. Trade secrets or proprietary information submitted by a bidder, offeror or contractor in connection with a procurement transaction or prequalification application submitted pursuant to subsection B of Section 11-46 shall not be subject to public disclosure under the Virginia Freedom of Information Act; however, the bidder, offeror or contractor must invoke the protections of this section prior to or upon submission of the data or other materials, and must identify the data or other materials to be protected and state the reasons why protection is necessary.

Section 11-53. Negotiation with lowest responsible bidder. Unless canceled or rejected, a responsive bid from the lowest responsible bidder shall be accepted as submitted, except that if the bid from the lowest responsible bidder exceeds available funds, the public body may negotiate with the apparent low bidder to obtain a contract price within available funds; however, such negotiation may be undertaken only under conditions and procedures described in writing and approved by the public body prior to issuance of the Invitation to Bid and summarized therein.

Section 11-54. Withdrawal of bid due to error. - A. A bidder for a public construction contract, other than a contract for construction or maintenance of public highways, may withdraw his bid from consideration if the price bid was substantially lower than the other bids due solely to a mistake therein, provided the bid was submitted in good faith, and the mistake was a clerical mistake as opposed to a judgment mistake, and was actually due to an unintentional arithmetic error or an unintentional omission of a quantity of work, labor or material made directly in the compilation of a bid, which unintentional arithmetic error or unintentional omission can be clearly shown by objective evidence drawn from inspection of original work papers, documents and materials used in the preparation of the bid sought to be withdrawn. One of the following procedures for withdrawal of a bid shall be selected by the public body and stated in the advertisement for bids: (i) the bidder shall give notice in writing of his claim of right to withdraw his bid within two business days after the conclusion of the bid opening procedure and shall submit original work papers with such notice; or (ii) the bidder shall submit to the public body or designated official his original work papers, documents and materials used in the preparation of the bid within one day after the date fixed for submission of bids. The work papers shall be delivered by the bidder in person or by registered mail at or prior to the time fixed for the opening of bids. In either instance, such work papers, documents and materials may be considered as trade secrets or proprietary information subject to the conditions of subsection D of Section 11-52. The bids shall be opened one day following the time fixed by the public body for the submission of bids. Thereafter, the bidder shall have two hours after the opening of bids within which to claim in writing any mistake as defined herein and withdraw his bid. The contract shall not be awarded by the public body until the two-hour period has elapsed. Such mistake shall be proved only from the original work papers, documents and materials delivered as required herein.

B. A public body may establish procedures for the withdrawal of bids for other than

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construction contracts.

C. No bid may be withdrawn under this section when the result would be the awarding of the contract on another bid of the same bidder or of another bidder in which the ownership of the withdrawing bidder is more than five percent.

D. If a bid is withdrawn under the authority of this section, the lowest remaining bid shall be deemed to be the low bid.

E. No bidder who is permitted to withdraw a bid shall, for compensation, supply any material or labor to or perform any subcontract or other work agreement for the person or firm to whom the contract is awarded or otherwise benefit, directly or indirectly, from the performance of the project for which the withdrawn bid was submitted.

F. If the public body denies the withdrawal of a bid under the provisions of this section, it shall notify the bidder in writing stating the reasons for its decision and award the contract to such bidder at the bid price, provided such bidder is a responsible and responsive bidder.

Section 11-55. Modification of the contract. - A. A public contract may include provisions for modification of the contract during performance, but no fixed-price contract may be increased by more than twenty-five percent of the amount of the contract or \$10,000, whichever is greater, without the advance written approval of the Governor or his designee, in the case of state agencies, or the governing body, in the case of political subdivisions. In no event may the amount of any contract, without adequate consideration, be increased for any purpose, including, but not limited to, relief of an offeror from the consequences of an error in its bid or offer.

B. Nothing in this section shall prevent any public body from placing greater restrictions on contract modifications.

Section 11-56. Retainage on construction contracts. - A. In any public contract for construction which provides for progress payments in installments based upon an estimated percentage of completion, the contractor shall be paid at least ninety-five percent of the earned sum when payment is due, with not more than five percent being retained to assure faithful performance of the contract. All amounts withheld may be included in the final payment.

B. Any subcontract for a public project which provides for similar progress payments shall be subject to the same limitations.

Section 11-56.1. Deposit of certain retained funds on certain contracts with local

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governments; penalty for failure to timely complete. - A. Any county, city, town or agency thereof or other political subdivision of the Commonwealth when contracting directly with contractors for public contracts of \$200,000 or more for construction of highways, roads, streets, bridges, parking lots, demolition, clearing, grading, excavating, paving, pile driving, miscellaneous drainage structures, and the installation of water, gas, sewer lines and pumping stations where portions of the contract price are to be retained, shall include in the Bid Proposal an option for the contractor to use an escrow account procedure for utilization of the political subdivision's retainage funds by so indicating in the space provided in the proposal documents. In the event the contractor elects to use the escrow account procedure, the "Escrow Agreement" form included in the Bid Proposal and Contract shall be executed and submitted to the political subdivision within fifteen calendar days after notification. If the "Escrow Agreement" form is not submitted within the fifteen-day period, the contractor shall forfeit his rights to the use of the escrow account procedure.

B. In order to have retained funds paid to an escrow agent, the contractor, the escrow agent, and the surety shall execute an "Escrow Agreement" form. The contractor's escrow agent shall be a trust company, bank or savings institution with its principal office located in the Commonwealth. The "Escrow Agreement" and all regulations promulgated by the political subdivision entering into the contract shall be substantially the same as that used by the Commonwealth of Virginia Department of Transportation.

C. This section shall not apply to public contracts for construction for railroads, public transit systems, runways, dams, foundations, installation or maintenance of power systems for the generation and primary and secondary distribution of electric current ahead of the customer's meter, the installation or maintenance of telephone, telegraph or signal systems for public utilities and the construction or maintenance of solid waste or recycling facilities and treatment plants.

D. Any such public contract for construction with a county, city, town or agency thereof or other political subdivision of the Commonwealth, which includes payment of interest on retained funds, may require a provision whereby the contractor, exclusive of reasonable circumstances beyond the control of the contractor stated in the contract, shall pay a specified penalty for each day exceeding the completion date stated in the contract.

E. Any subcontract for such public project which provides for similar progress payments shall be subject to the provisions of this section.

Section 11-56.2. Public construction contract provisions barring damages for unreasonable delays declared void. - A. Any provision contained in any public construction contract entered into on or after July 1, 1991, that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages for unreasonable delay in performing such contract, either on his behalf or

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on behalf of his subcontractor if and to the extent such delay is caused by acts or omissions of the public body, its agents or employees and due to causes within their control is against public policy and is void and unenforceable.

B. Subsection A shall not be construed to render void any provision of a public construction contract that:

1. Allows a public body to recover that portion of delay costs caused by the acts or omissions of the contractor, or its subcontractors, agents or employees;
2. Requires notice of any delay by the party claiming the delay;
3. Provides for liquidated damages for delay; or
4. Provides for arbitration or any other procedure designed to settle contract disputes.

C. A contractor making a claim against a public body for costs or damages due to the alleged delaying of the contractor in the performance of its work under any public construction contract shall be liable to the public body and shall pay it for a percentage of all costs incurred by the public body in investigating, analyzing, negotiating, litigating and arbitrating the claim, which percentage shall be equal to the percentage of the contractor's total delay claim which is determined through litigation or arbitration to be false or to have no basis in law or in fact.

Section 11-57. Bid bonds. - A. Except in cases of emergency, all bids or proposals for construction contracts in excess of \$100,000 shall be accompanied by a bid bond from a surety company selected by the bidder which is legally authorized to do business in Virginia, as a guarantee that if the contract is awarded to such bidder, that bidder will enter into the contract for the work mentioned in the bid. The amount of the bid bond shall not exceed five percent of the amount bid.

B. No forfeiture under a bid bond shall exceed the lesser of (i) the difference between the bid for which the bond was written and the next low bid, or (ii) the face amount of the bid bond.

C. Nothing in this section shall preclude a public body from requiring bid bonds to accompany bids or proposals for construction contracts anticipated to be less than \$100,000.

Section 11-58. Performance and payment bonds. - A. Upon the award of any public construction contract exceeding \$100,000 awarded to any prime contractor, such contractor shall furnish to the public body the following bonds:

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1. A performance bond in the sum of the contract amount conditioned upon the faithful performance of the contract in strict conformity with the plans, specifications and conditions of the contract.

2. A payment bond in the sum of the contract amount. Such bond shall be for the protection of claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded, or to any subcontractors, in the prosecution of the work provided for in such contract, and shall be conditioned upon the prompt payment for all such material furnished or labor supplied or performed in the prosecution of the work. "Labor or materials" shall include public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site.

B. Each of such bonds shall be executed by one or more surety companies selected by the contractor which are legally authorized to do business in Virginia.

C. If the public body is the Commonwealth of Virginia, or any agency or institution thereof, such bonds shall be payable to the Commonwealth of Virginia, naming also the agency or institution thereof. Bonds required for the contracts of other public bodies shall be payable to such public body.

D. Each of the bonds shall be filed with the public body which awarded the contract, or a designated office or official thereof.

E. Nothing in this section shall preclude a public body from requiring payment or performance bonds for construction contracts below \$100,000.

F. Nothing in this section shall preclude such contractor from requiring each subcontractor to furnish a payment bond with surety thereon in the sum of the full amount of the contract with such subcontractor conditioned upon the payment to all persons who have and fulfill contracts which are directly with the subcontractor for performing labor and furnishing materials in the prosecution of the work provided for in the subcontract.

Section 11-59. Action on performance bond. - No action against the surety on a performance bond shall be brought unless within five years after completion of the work on the project to the satisfaction of the Department of Transportation, in cases where the public body is the Department of Transportation, or within one year after (i) completion of the contract, including the expiration of all warranties and guarantees, or (ii) discovery of the defect or breach of warranty, if the action be for such, in all other cases.

Section 11-60. Actions on payment bonds. - A. Subject to the provisions of subsection B

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hereof, any claimant who has performed labor or furnished material in accordance with the contract documents in the prosecution of the work provided in any contract for which a payment bond has been given, and who has not been paid in full therefor before the expiration of ninety days after the day on which such claimant performed the last of such labor or furnished the last of such materials for which he claims payment, may bring an action on such payment bond to recover any amount due him for such labor or material, and may prosecute such action to final judgment and have execution on the judgment. The obligee named in the bond need not be named a party to such action.

B. Any claimant who has a direct contractual relationship with any subcontractor from whom the contractor has not required a subcontractor payment bond under Section 11-58 F but who has no contractual relationship, express or implied, with such contractor, may bring an action on the contractor's payment bond only if he has given written notice to such contractor within 180 days from the day on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment, stating with substantial accuracy the amount claimed and the name of the person for whom the work was performed or to whom the material was furnished. Any claimant who has a direct contractual relationship with a subcontractor from whom the contractor has required a subcontractor payment bond under Section 11-58 F but who has no contractual relationship, express or implied, with such contractor, may bring an action on the subcontractor's payment bond. Notice to the contractor shall be served by registered or certified mail, postage prepaid, in an envelope addressed to such contractor at any place where his office is regularly maintained for the transaction of business. Claims for sums withheld as retainages with respect to labor performed or materials furnished, shall not be subject to the time limitations stated in this subsection.

C. Any action on a payment bond must be brought within one year after the day on which the person bringing such action last performed labor or last furnished or supplied materials.

Section 11-61. Alternative forms of security. - A. In lieu of a bid, payment, or performance bond, a bidder may furnish a certified check or cash escrow in the face amount required for the bond.

B. If approved by the Attorney General in the case of state agencies, or the attorney for the political subdivision in the case of political subdivisions, a bidder may furnish a personal bond, property bond, or bank or savings institution's letter of credit on certain designated funds in the face amount required for the bid, payment or performance bond. Approval shall be granted only upon a determination that the alternative form of security proffered affords protection to the public body equivalent to a corporate surety's bond.

C. The provisions of subsections A and B shall not apply to the Department of Transportation.

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Section 11-62. Bonds on other than construction contracts. - A public body may require bid, payment, or performance bonds for contracts for goods or services if provided in the Invitation to Bid or Request for Proposal.

ARTICLE 2.1 Prompt Payment

Section 11-62.1. Definitions. - As used in this article, unless the context clearly shows otherwise, the term or phrase:

"Contractor" means the entity that has a direct contract with any "state agency" as defined herein, or any agency of local government as discussed in Section 11-62.10.

"Debtor" means any individual, business, or group having a delinquent debt or account with any state agency which obligation has not been satisfied or set aside by court order or discharged in bankruptcy.

"Payment date" means either (i) the date on which payment is due under the terms of a contract for provision of goods or services; or (ii), if such date has not been established by contract, thirty days after receipt of a proper invoice by the state agency or its agent or forty-five days after receipt by the local government or its agent responsible under the contract for approval of such invoices for the amount of payment due, or thirty days after receipt of the goods or services, whichever is later.

"State agency" means any authority, board, department, instrumentality, institution, agency or other unit of state government. The term shall not include any county, city or town or any local or regional governmental authority.

"Subcontractor" means any entity that has a contract to supply labor or materials to the contractor to whom the contract was awarded or to any subcontractor in the performance of the work provided for in such contract.

Section 11-62.2. Prompt payment of bills. - Every state agency that acquires goods or services, or conducts any other type of contractual business with nongovernmental, privately owned enterprises shall promptly pay for the completely delivered goods or services by the required payment date.

Payment is deemed to have been made when offset proceedings have been instituted, as authorized under the Virginia Debt Collection Act (Section 2.1-726 et seq.).

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Section 11-62.3. Separate payment dates. - Separate payment dates may be specified for contracts under which goods or services are provided in a series of partial deliveries or executions to the extent that such contract provides for separate payment for such partial delivery or execution.

Section 11-62.4. Defect or impropriety in the invoice or goods and/or services received. - In instances where there is a defect or impropriety in an invoice or in the goods or services received, the state agency shall notify the supplier of the defect or impropriety, if such defect or impropriety would prevent payment by the payment date, within fifteen days after receipt of such invoice or such goods or services.

Section 11-62.5. Interest penalty; exceptions. - A. Interest shall accrue, at the rate determined pursuant to subsection B of this section, on all amounts owed by a state agency to a vendor which remain unpaid after seven days following the payment date, provided, that nothing in this section shall affect any contract providing for a different rate of interest, or for the payment of interest in a different manner.

B. The rate of interest charged a state agency pursuant to subsection A of this section shall be the base rate on corporate loans (prime rate) at large United States money center commercial banks as reported daily in the publication entitled The Wall Street Journal. Whenever a split prime rate is published, the lower of the two rates is to be used. However, in no event shall the rate of interest charged exceed the rate of interest established pursuant to Section 58.1-1812.

C. Notwithstanding subsection A of this section, no interest penalty shall be charged when payment is delayed because of disagreement between a state agency and a vendor regarding the quantity, quality or time of delivery of goods or services or the accuracy of any invoice received for such goods or services. The exception from the interest penalty provided by this paragraph shall apply only to that portion of a delayed payment which is actually the subject of such a disagreement and shall apply only for the duration of such disagreement.

D. This section shall not apply to Section 11-56 pertaining to retainage on construction contracts, during the period of time prior to the date the final payment is due. Nothing contained herein shall prevent a contractor from receiving interest on such funds under an approved escrow agreement.

E. Notwithstanding subsection A of this section, no interest penalty shall be paid to any debtor on any payment, or portion thereof, withheld pursuant to the Comptroller's Debt Setoff Program, as authorized by the Virginia Debt Collection Act (Section 2.1-726 et seq.), commencing with the date the payment is withheld. If, as a result of an error, a payment or portion thereof is withheld, and it is determined that at the time of setoff no debt was owed to the Commonwealth, then interest shall

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accrue at the rate determined pursuant to subsection B of this section on amounts withheld which remain unpaid after seven days following the payment date.

Section 11-62.6. Date of postmark deemed to be date payment is made. - In those cases where payment is made by mail, the date of postmark shall be deemed to be the date payment is made for purposes of this chapter.

Section 11-62.7. Secretary of Administration to file annual report. - The Comptroller shall file an annual report with the Governor, the Senate Finance Committee, the House Finance Committee and the House Appropriations Committee on November 1 for the preceding fiscal year including (i) the number and dollar amounts of late payments by departments, institutions and agencies, (ii) the total amount of interest paid and (iii) specific steps being taken to reduce the incidence of late payments.

Section 11-62.8. Retainage to remain valid. - Notwithstanding the provisions of this article, the provisions of Section 11-56 relating to retainage shall remain valid.

Section 11-62.9. Exemptions. - The provisions of this article shall not apply to the late payment provisions contained in any public utility tariffs prescribed by the State Corporation Commission.

Section 11-62.10. Prompt payment of bills by localities. - Every agency of local government that acquires goods or services, or conducts any other type of contractual business with a nongovernmental, privately owned enterprise, shall promptly pay for the completed delivered goods or services by the required payment date. The required payment date shall be either: (i) the date on which payment is due under the terms of the contract for the provision of such goods or services; or (ii) if such date is not established by contract, not more than forty-five days after goods or services are received or not more than forty-five days after the invoice is rendered, whichever is later.

Separate payment dates may be specified for contracts under which goods or services are provided in a series of partial executions or deliveries to the extent that the contract provides for separate payment for partial execution or delivery.

Within twenty days after the receipt of the invoice or goods or services, the agency shall notify the business concern of any defect or impropriety which would prevent payment by the payment date.

Unless otherwise provided under the terms of the contract for the provision of goods or services, every agency that fails to pay by the payment date shall pay any finance charges assessed by the business concern which do not exceed one percent per month.

The provisions of this section shall not apply to the late payment provisions in any public utility

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tariffs or public utility negotiated contracts.

Section 11-62.11. Payment clauses to be included in contracts. Any contract awarded by any state agency, or any contract awarded by any agency of local government in accordance with Section 11.62-10, shall include:

1. A payment clause which obligates the contractor to take one of the two following actions within seven days after receipt of amounts paid to the contractor by the state agency or local government for work performed by the subcontractor under that contract:

a. Pay the subcontractor for the proportionate share of the total payment received from the agency attributable to the work performed by the subcontractor under that contract; or

b. Notify the agency and subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.

2. A payment clause that requires (i) individual contractors to provide their social security numbers and (ii) proprietorships, partnerships, and corporations to provide their federal employer identification numbers.

3. An interest clause that obligates the contractor to pay interest to the subcontractor on all amounts owed by the contractor that remain unpaid after seven days following receipt by the contractor of payment from the state agency or agency of local government for work performed by the subcontractor under that contract, except for amounts withheld as allowed in subdivision 1 b of this section.

4. An interest rate clause stating, "Unless otherwise provided under the terms of this contract, interest shall accrue at the rate of one percent per month."

Any such contract awarded shall further require the contractor to include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor.

A contractor's obligation to pay an interest charge to a subcontractor pursuant to the payment clause in this section may not be construed to be an obligation of the state agency or agency of local government. A contract modification may not be made for the purpose of providing reimbursement for such interest charge. A cost reimbursement claim may not include any amount for reimbursement for such interest charge.

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ARTICLE 3

Remedies

Section 11-63. Ineligibility. - A. Any bidder, offeror or contractor refused permission to participate, or disqualified from, participation in public contracts shall be notified in writing. Prior to the issuance of a written determination of disqualification or ineligibility, the public body shall (i) notify the bidder in writing of the results of the evaluation, (ii) disclose the factual support for the determination, and (iii) allow the bidder an opportunity to inspect any documents which relate to the determination, if so requested by the bidder within five business days after receipt of the notice.

Within ten business days after receipt of the notice, the bidder may submit rebuttal information challenging the evaluation. The public body shall issue its written determination of disqualification or ineligibility based on all information in the possession of the public body, including any rebuttal information, within five business days of the date the public body received such rebuttal information.

If the evaluation reveals that the bidder, offeror or contractor should be allowed permission to participate in the public contract, the public body shall cancel the proposed disqualification action. If the evaluation reveals that the bidder should be refused permission to participate, or disqualified from participation, in the public contract, the public body shall so notify the bidder, offeror or contractor. Such notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within ten days after receipt of the notice by invoking administrative procedures meeting the standards of § 11-71, if available, or in the alternative by instituting legal action as provided in § 11-70.

B. If, upon appeal, it is determined that the action taken was arbitrary or capricious, or not in accordance with the Constitution of Virginia, statutes or regulations, the sole relief shall be restoration of eligibility.

Section 11-64. Appeal of denial of withdrawal of bid. - A. A decision denying withdrawal of bid under the provisions of Section 11-54 shall be final and conclusive unless the bidder appeals the decision within ten days after receipt of the decision by invoking administrative procedures meeting the standards of Section 11-71, if available, or in the alternative by instituting legal action as provided in Section 11-70.

B. If no bid bond was posted, a bidder refused withdrawal of a bid under the provisions of Section 11-54, prior to appealing, shall deliver to the public body a certified check or cash bond in the amount of the difference between the bid sought to be withdrawn and the next low bid. Such security shall be released only upon a final determination that the bidder was entitled to withdraw the bid.

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C. If, upon appeal, it is determined that the decision refusing withdrawal of the bid was arbitrary or capricious, the sole relief shall be withdrawal of the bid.

Section 11-65. Determination of nonresponsibility. - A. Following public opening and announcement of bids received on an Invitation to Bid, the public body shall evaluate the bids in accordance with element 4 of the definition of “Competitive sealed bidding” in Section 11-37. At the same time, the public body shall determine whether the apparent low bidder is responsible. If the public body so determines, then it may proceed with an award in accordance with element 5 of the definition of “Competitive sealed bidding” in Section 11-37. If the public body determines that the apparent low bidder is not responsible, it shall proceed as follows:

1. Prior to the issuance of a written determination of nonresponsibility, the public body shall (i) notify the apparent low bidder in writing of the results of the evaluation, (ii) disclose the factual support for the determination, and (iii) allow the apparent low bidder an opportunity to inspect any documents which relate to the determination, if so requested by the bidder within five business days after receipt of the notice.

2. Within ten business days after receipt of the notice, the bidder may submit rebuttal information challenging the evaluation. The public body shall issue its written determination of responsibility based on all information in the possession of the public body, including any rebuttal information, within five business days of the date the public body received such rebuttal information. At the same time, the public body shall notify with return receipt requested, the bidder in writing of its determination.

3. Such notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within ten days after receipt of the notice by invoking administrative procedures meeting the standards of Section 11-71, if available, or in the alternative by instituting legal action as provided in Section 11-70.

The provisions of this subsection shall not apply to procurements involving the prequalification of bidders and the rights of any potential bidders under such prequalification to appeal a decision that such bidders are not responsible.

B. If, upon appeal pursuant to Section 11-70 or Section 11-71, it is determined that the decision of the public body was not an honest exercise of discretion, but rather was arbitrary or capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid, and the award of the contract in question has not been made, the sole relief shall be a finding that the bidder is a responsible bidder for the contract in question. If it is

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determined that the decision of the public body was not an honest exercise of discretion, but rather was arbitrary or capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid, the relief shall be as set forth in subsection B of Section 11-66.

C. A bidder contesting a determination that he is not a responsible bidder for a particular contract shall proceed under this section, and may not protest the award or proposed award under Section 11-66.

D. Nothing contained in this section shall be construed to require a public body, when procuring by competitive negotiation, to furnish a statement of the reasons why a particular proposal was not deemed to be the most advantageous.

Section 11-66. Protest of award or decision to award. - A. Any bidder or offeror who desires to protest the award or decision to award a contract shall submit such protest in writing to the public body, or an official designated by the public body, no later than ten days after the award or the announcement of the decision to award, whichever occurs first. Any potential bidder or offeror on a contract negotiated on a sole source or emergency basis who desires to protest the award or decision to award such contract shall submit such protest in the same manner no later than ten days after posting or publication of the notice of such contract as provided in Section 11-41. However, if the protest of any actual or potential bidder or offeror depends in whole or in part upon information contained in public records pertaining to the procurement transaction which are subject to inspection under Section 11-52, then the time within which the protest must be submitted shall expire ten days after those records are available for inspection by such bidder or offeror under Section 11-52, or at such later time as provided in this section. No protest shall lie for a claim that the selected bidder or offeror is not a responsible bidder or offeror. The written protest shall include the basis for the protest and the relief sought. The public body or designated official shall issue a decision in writing within ten days stating the reasons for the action taken. This decision shall be final unless the bidder or offeror appeals within ten days of the written decision by invoking administrative procedures meeting the standards of Section 11-71, if available, or in the alternative by instituting legal action as provided in Section 11-70. Nothing in this subsection shall be construed to permit a bidder to challenge the validity of the terms or conditions of the Invitation to Bid or Request for Proposal.

B. If prior to an award it is determined that the decision to award is arbitrary or capricious, then the sole relief shall be a finding to that effect. The public body shall cancel the proposed award or revise it to comply with the law. If, after an award, it is determined that an award of a contract was arbitrary or capricious, then the sole relief shall be as hereinafter provided. Where the award has been made but performance has not begun, the performance of the contract may be enjoined. Where the award has been made and performance has begun, the public body may declare the contract void upon a finding

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that this action is in the best interest of the public. Where a contract is declared void, the performing contractor shall be compensated for the cost of performance up to the time of such declaration. In no event shall the performing contractor be entitled to lost profits.

C. Where a public body, an official designated by that public body, or an appeals board determines, after a hearing held following reasonable notice to all bidders, that there is probable cause to believe that a decision to award was based on fraud or corruption or on an act in violation of Article 4 (Section 11-72 et seq.) of this chapter, the public body, designated official or appeals board may enjoin the award of the contract to a particular bidder.

Section 11-67. Effect of appeal upon contract. - Pending final determination of a protest or appeal, the validity of a contract awarded and accepted in good faith in accordance with this chapter shall not be affected by the fact that a protest or appeal has been filed.

Section 11-68. Stay of award during protest. - An award need not be delayed for the period allowed a bidder or offeror to protest, but in the event of a timely protest, as provided in section 11-66, or the filing of a timely legal action as provided in Section 11-70, no further action to award the contract will be taken unless there is a written determination that proceeding without delay is necessary to protect the public interest or unless the bid or offer would expire.

Section 11-69. Contractual disputes. - A. Contractual claims, whether for money or other relief, shall be submitted in writing no later than sixty days after final payment; however, written notice of the contractor's intention to file such claim shall have been given at the time of the occurrence or beginning of the work upon which the claim is based. Nothing herein shall preclude a contract from requiring submission of an invoice for final payment within a certain time after completion and acceptance of the work or acceptance of the goods. Pendency of claims shall not delay payment of amounts agreed due in the final payment.

B. Each public body shall include in its contracts a procedure for consideration of contractual claims. Such procedure, which may be incorporated into the contract by reference, shall establish a time limit for a final decision in writing by the public body.

C. A contractor may not invoke administrative procedures meeting the standards of Section 11-71, if available, or institute legal action as provided in Section 11-70, prior to receipt of the public body's decision on the claim, unless the public body fails to render such decision within the time specified in the contract.

D. The decision of the public body shall be final and conclusive unless the contractor appeals within six months of the date of the final decision on the claim by the public body by invoking

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administrative procedures meeting the standards of Section 11-71, if available, or in the alternative by instituting legal action as provided in Section 11-70.

Section 11-70. Legal actions. - A. A bidder or offeror, actual or prospective, who is refused permission or disqualified from participation in bidding or competitive negotiation, or who is determined not to be a responsible bidder or offeror for a particular contract, may bring an action in the appropriate circuit court challenging that decision, which shall be reversed only if the petitioner establishes that the decision was not an honest exercise of discretion, but rather was arbitrary or capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid, or, in the case of denial of prequalification, that the decision to deny prequalification was not based upon the criteria for denial of prequalification set forth in subsection B of Section 11-46. In the event the apparent low bidder, having been previously determined by the public body to be not responsible in accordance with Section 11-37, is found by the court to be a responsible bidder, the court may direct the public body to award the contract, forthwith, to such bidder in accordance with the requirements of this section and the Invitation to Bid.

B. A bidder denied withdrawal of a bid under Section 11-64 may bring an action in the appropriate circuit court challenging that decision, which shall be reversed only if the bidder establishes that the decision of the public body was clearly erroneous.

C. A bidder, offeror or contractor, or a potential bidder or offeror on a contract negotiated on a sole source or emergency basis in the manner provided in Section 11-41, whose protest of an award or decision to award under Section 11-66 is denied, may bring an action in the appropriate circuit court challenging a proposed award or the award of a contract, which shall be reversed only if the petitioner establishes that the proposed award or the award is not an honest exercise of discretion, but rather is arbitrary or capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms and conditions of the Invitation to Bid or Request for Proposal.

D. If injunctive relief is granted, the court, upon request of the public body, shall require the posting of reasonable security to protect the public body.

E. A contractor may bring an action involving a contract dispute with a public body in the appropriate circuit court. Notwithstanding any other provision of law, the Comptroller shall not be named as a defendant in any action brought pursuant to this chapter or pursuant to § 33.1-387, except for disputes involving contracts of the Office of the Comptroller or the Department of Accounts.

F. A bidder, offeror or contractor need not utilize administrative procedures meeting the

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standards of Section 11-71, if available, but if those procedures are invoked by the bidder, offeror or contractor, the procedures shall be exhausted prior to instituting legal action concerning the same procurement transaction unless the public body agrees otherwise.

G. Nothing herein shall be construed to prevent a public body from instituting legal action against a contractor.

Section 11-71. Administrative appeals procedure. - A. A public body may establish an administrative procedure for hearing protests of a decision to award or an award, appeals from refusals to allow withdrawal of bids, appeals from disqualifications and determinations of nonresponsibility, and appeals from decisions on disputes arising during the performance of a contract, or any of these. Such administrative procedure shall provide for a hearing before a disinterested person or panel, the opportunity to present pertinent information and the issuance of a written decision containing findings of fact. The disinterested person or panel shall not be an employee of the governmental entity against whom the claim has been filed. The findings of fact shall be final and conclusive and shall not be set aside unless the same are (i) fraudulent, arbitrary or capricious; (ii) so grossly erroneous as to imply bad faith; or (iii) in the case of denial of prequalification, such findings were not based upon the criteria for denial of prequalification set forth in subsection B of Section 11-46. No determination on an issue of law shall be final if appropriate legal action is instituted in a timely manner.

B. Any party to the administrative procedure, including the public body, shall be entitled to institute judicial review if such action is brought within thirty days of receipt of the written decision.

Section 11-71.1. Alternative dispute resolution. - Public bodies are authorized to enter into agreements to submit disputes arising from contracts entered into pursuant to this chapter to arbitration and to utilize mediation and other alternative dispute resolution procedures; however, such procedures entered into by the Commonwealth, or any department, institution, division, commission, board or bureau thereof, shall be nonbinding and subject to Section 2.1-127, as applicable, and such procedures entered into by school boards shall be nonbinding.

ARTICLE 4

Ethics in Public Contracting

Section 11-72. Purpose. - The provisions of this article supplement, but do not supersede, other provisions of law including, but not limited to, the State and Local Government Conflict of Interests Act (Section 2.1-639.1 et seq.), the Virginia Governmental Frauds Act (Section 18.2-498.1 et seq.), and Articles 2 (Section 18.2-438 et seq.) and 3 (Section 18.2-446 et seq.) of Chapter 10 of Title 18.2. The

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provisions of this article apply notwithstanding the fact that the conduct described may not constitute a violation of the State and Local Government Conflict of Interests Act.

Section 11-73. Definitions. - The words defined in this section shall have the meanings set forth below throughout this article.

"Immediate family" shall mean a spouse, children, parents, brothers and sisters, and any other person living in the same household as the employee.

"Official responsibility" shall mean administrative or operating authority, whether intermediate or final, to initiate, approve, disapprove or otherwise affect a procurement transaction, or any claim resulting therefrom.

"Pecuniary interest arising from the procurement" shall mean a personal interest in a contract as defined in the State and Local Government Conflict of Interests Act (Section 2.1-639.1 et seq.).

"Procurement transaction" shall mean all functions that pertain to the obtaining of any goods, services or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

"Public employee" shall mean any person employed by a public body, including elected officials or appointed members of governing bodies.

Section 11-74. Proscribed participation by public employees in procurement transactions. - Except as may be specifically allowed by subdivisions A2 and A3 of Section 2.1-639.11, no public employee having official responsibility for a procurement transaction shall participate in that transaction on behalf of the public body when the employee knows that:

1. The employee is contemporaneously employed by a bidder, offeror or contractor involved in the procurement transaction; or
2. The employee, the employee's partner, or any member of the employee's immediate family holds a position with a bidder, offeror or contractor such as an officer, director, trustee, partner or the like, or is employed in a capacity involving personal and substantial participation in the procurement transaction, or owns or controls an interest of more than five percent; or
3. The employee, the employee's partner, or any member of the employee's immediate family has a pecuniary interest arising from the procurement transaction; or

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4. The employee, the employee's partner, or any member of the employee's immediate family is negotiating, or has an arrangement concerning, prospective employment with a bidder, offeror or contractor.

Section 11-75. Solicitation or acceptance of gifts. - No public employee having official responsibility for a procurement transaction shall solicit, demand, accept, or agree to accept from a bidder, offeror, contractor or subcontractor any payment, loan, subscription, advance, deposit of money, services or anything of more than nominal or minimal value, present or promised, unless consideration of substantially equal or greater value is exchanged. The public body may recover the value of anything conveyed in violation of this section.

Section 11-76. Disclosure of subsequent employment. - No public employee or former public employee having official responsibility for procurement transactions shall accept employment with any bidder, offeror or contractor with whom the employee or former employee dealt in an official capacity concerning procurement transactions for a period of one year from the cessation of employment by the public body unless the employee or former employee provides written notification to the public body, or a public official if designated by the public body, or both, prior to commencement of employment by that bidder, offeror or contractor.

Section 11-77. Gifts by bidders, offerors, contractors or subcontractors. - No bidder, offeror, contractor or subcontractor shall confer upon any public employee having official responsibility for a procurement transaction any payment, loan, subscription, advance, deposit of money, services or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is exchanged.

Section 11-78. Kickbacks. - A. No contractor or subcontractor shall demand or receive from any of his suppliers or his subcontractors, as an inducement for the award of a subcontract or order, any payment, loan, subscription, advance, deposit of money, services or anything, present or promised, unless consideration of substantially equal or greater value is exchanged.

B. No subcontractor or supplier shall make, or offer to make, kickbacks as described in this section.

C. No person shall demand or receive any payment, loan, subscription, advance, deposit of money, services or anything of value in return for an agreement not to compete on a public contract.

D. If a subcontractor or supplier makes a kickback or other prohibited payment as described in this section, the amount thereof shall be conclusively presumed to have been included in the price of the subcontract or order and ultimately borne by the public body and will be recoverable from both

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the maker and recipient. Recovery from one offending party shall not preclude recovery from other offending parties.

Section 11-78.1. Participation in bid preparation; limitation on submitting bid for same procurement. - No person who, for compensation, prepares an invitation to bid or request for proposal for or on behalf of a public body shall (i) submit a bid or proposal for that procurement or any portion thereof or (ii) disclose to any bidder or offeror information concerning the procurement which is not available to the public. However, a public body may permit such person to submit a bid or proposal for that procurement or any portion thereof if the public body determines that the exclusion of such person would limit the number of potential qualified bidders or offerors in a manner contrary to the best interests of the public body.

Section 11-79. Purchase of building materials, etc., from architect or engineer prohibited. - A. No building materials, supplies or equipment for any building or structure constructed by or for a public body shall be sold by or purchased from any person employed as an independent contractor by the public body to furnish architectural or engineering services, but not construction, for such building or structure or from any partnership, association or corporation in which such architect or engineer has a personal interest as defined in Section 2.1-639.2.

B. No building materials, supplies or equipment for any building or structure constructed by or for a public body shall be sold by or purchased from any person which has provided or is currently providing design services specifying a sole source for such materials, supplies or equipment to be used in such building or structure to the independent contractor employed by the public body to furnish architectural or engineering services in which such person has a personal interest as defined in Section 2.1-639.2.

C. The provisions of subsections A and B shall not apply in cases of emergency or for transportation-related projects conducted by the Department of Transportation and the Virginia Port Authority.

Section 11-79.1. Certification of compliance required; penalty for false statements. - A. Public bodies may require public employees having official responsibility for procurement transactions in which they participated to annually submit for such transactions a written certification that they complied with the provisions of this article.

B. Any public employee required to submit a certification as provided in subsection A of this section who knowingly makes a false statement in such certification shall be punished as provided in Section 11-80.

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Section 11-79.2. Misrepresentations prohibited. - No public employee having official responsibility for a procurement transaction shall knowingly falsify, conceal, or misrepresent a material fact; knowingly make any false, fictitious or fraudulent statements or representations; or make or use any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry.

Section 11-80. Penalty for violation. - Willful violation of any provision of this article shall constitute a Class 1 misdemeanor. Upon conviction, any public employee, in addition to any other fine or penalty provided by law, shall forfeit his employment.

*** FOR JUDICIAL OR OTHER LEGAL USES, CONSULT THE CODE OF VIRGINIA.**

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