Ord. No. 18-12

BOARD OF SUPERVISORS
COUNTY OF YORK
YORKTOWN, VIRGINIA

Ordinance

At a regular meeting of the York County Board of Supervisors held in York Hall, Yorktown, Virginia, on the 5th day of June, 2018:

Present	Vote
Sheila S. Noll, Chairman	Yea
Thomas G. Shepperd, Jr., Vice Chairman	Yea
Walter C. Zaremba	Yea
W. Chad Green	Yea

Absent

Jeffrey D. Wassmer

On motion of Mr. Shepperd, which carried 4:0, the following ordinance was adopted:

AN ORDINANCE TO AMEND SELECTED SECTIONS OF THE YORK COUNTY PURCHASING POLICY (ORD. NO 12-13[R]) TO REDEFINE PROFESSIONAL AND NONPROFESSIONAL SERVICES AND ESTABLISH DOLLAR THRESHOLDS FOR COMPETITIVE NEGOTIATION; TO AMEND THE REQUIREMENTS FOR COOPERATIVE PROCUREMENT; TO MODIFY DOLLAR THRESHOLDS FOR THE VARIOUS LEVELS OF COMPETITION REQUIREMENTS; TO MODIFY THE LEVELS AT WHICH BOARD APPROVAL IS REQUIRED FOR CONTRACT MODIFICATIONS; TO AMEND PROVISIONS RELATING TO THE WITHDRAWAL OF BIDS; TO INCLUDE A VIRGINIA PREFERENCE FOR TIE BIDS; TO AMEND THE PROCEDURES FOR BID PROTESTS AND FOR DISPOSITION OF SURPLUS PROPERTY; AND TO ADOPT STANDARDS FOR EXPENDITURES OF FEDERAL GRANT FUNDS

BE IT ORDAINED by the York County Board of Supervisors this 5th day of June, 2018, that the York County Procurement Policy be, and it is hereby, amended to read as follows:

ARTICLE I. PURPOSE, DEFINITIONS, APPLICATION OF POLICY

1-1. Purpose.

The purpose of this policy is to increase public confidence in purchasing by York

County, to provide for fair and equitable treatment of all persons involved in public purchasing by the County, to maximize the purchasing value of public funds, to foster competition in the procurement process to the maximum feasible extent, and to provide for a centralized purchasing system of quality and integrity for the County.

1-2. Effective Date.

This policy shall be in effect immediately upon its passage.

1-3. Authority.

This policy is adopted pursuant to §§ 2.2-4343(10) and 15.2-1231 of the Code of Virginia and is intended to supersede the operation of the Virginia Public Procurement Act as it applies to the procurement actions of the departments, agencies, officers, and employees subject to this policy. Those sections set forth in § 2.2-4343(12) of the Code of Virginia which, by law apply to all counties, are incorporated herein or are listed in an appendix to this policy for convenience. No other provisions of the Virginia Public Procurement Act shall apply unless specifically incorporated in this policy.

1-4. Definitions.

For purposes of this policy the following words and phrases shall have the meanings set forth below:

(a) Affiliate - means an individual or business that controls, is controlled by, or is under common control with another individual or business. A person controls an entity if the person owns, directly or indirectly, more than 10 percent of the voting securities of the entity. For the purposes of this definition "voting security" means a security that (i) confers upon the holder the right to vote for the election of members of the board of directors or similar governing body of the business or (ii) is convertible into, or entitles the holder to receive, upon its exercise, a security that confers such a right to vote. A general partnership interest shall be deemed to be a voting security.

(b) Approving Authority – "Approving Authority" shall mean the Board of Supervisors or the County School Board or the York-Poquoson Social Services Board.

(c) Best Value - "Best value," as predetermined in the solicitation, means the overall combination of quality, price, and various elements of required services that in total are optimal relative to a public body's needs.

(d) Board or Board of Supervisors – "Board" or "Board of Supervisors" shall mean the Board of Supervisors of York County, Virginia.

(e) Business - means any type of corporation, partnership, limited liability company, association, or sole proprietorship operated for profit.

(f) Competitive Negotiation - Competitive negotiation is a method of procure-

ment, which consists of the following elements:

1. Issuance of a written request for proposal indicating in general terms what is sought to be procured 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 offeror. In addition, offerors shall be informed of any ranking criteria that will be used by the public body in addition to the review of the professional competence of the offeror.

2. Public notice of the request for proposal at least ten (10) calendar days prior to the date set for receipt of proposals by posting a link to the solicitation on the county's website and by publication in at least one newspaper of general circulation in York County. In addition, proposals may be solicited directly from potential offerors.

3. For goods, nonprofessional services, and insurance, on the basis of the evaluation factors established by this policy and by the request for proposal, at least two (2) offerors deemed to be the most qualified, responsible and suitable on the basis of initial responses shall be selected. (If less than two (2) proposals are received, then less than two (2) offerors may be so selected.) Individual discussions shall then be had with each such offeror.

Review of the proposals submitted and discussions with offerors shall be conducted by a panel established by the using agency of not less than three County representatives that shall include one representative of the Purchasing Division designated by the Purchasing Agent.

Repetitive informal interviews shall be permissible. Offerors shall be encouraged to elaborate on their qualifications, scope of work, performance data, or expertise pertinent to the proposed project as well as any alternative concepts. These discussions may encompass non-binding estimates of total project costs, including, where appropriate, design, construction, and life cycle costs. Methods to be used in arriving at a price for services may also be discussed. Proprietary information from competing offerors shall not be disclosed to the public or to competitors. Price of service may be discussed and considered but will not be the sole determining factor in concluding negotiations.

After negotiations have been conducted with each offeror so selected, the offeror shall be selected which in the opinion of the panel has made the best proposal and the contract shall be offered to that offeror. Should the panel, after the initial submission of proposals, determine in writing that only one offeror is fully qualified, or that one offeror is clearly more qualified than the others under consideration, a contract may be negotiated and awarded to that offeror without further delay. A copy of such written determination shall be provided to the Purchasing Agent and to the approving authority when approval by other than the Purchasing Agent is required.

When the terms and conditions of multiple awards are so provided for in the request for proposal, awards may be made to more than one offeror.

4. The procedure for competitive negotiation for the procurement of professional services over $50,000 differs from the one defined here. (See Section 2-3(6) of this Policy.)

(g) Competitive Sealed Bidding - Competitive sealed bidding is a method of procurement which includes the following elements:

1. Issuance of a written invitation to bid containing or incorporating by reference specifications and contractual terms and conditions applicable to the procurement. When it is impractical to prepare initially a purchase description to support an award based on price, an invitation to bid may be issued requesting 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 (10) calendar days prior to the date set for receipt of bids by posting a link to the solicitation on the county's website or by publication in at least one newspaper of general circulation in York County. In addition, bids may be solicited directly from potential offerors.

3. Public opening and announcement of all bids received.

4. Evaluation of the bids based on requirements set forth in the invitation and the provisions of this policy.

5. Award to the lowest responsive and responsible bidder. When the terms and conditions of multiple bids are so provided for in the invitation to bid, awards may be made to more than one bidder. In the event only one bid is received and the Purchasing Agent in consultation with the using agency makes a determination that it would not be in the best interest of the County to re-bid the procurement, such determination shall be in writing and shall be provided to the approving authority when approval by other than the Purchasing Agent is required.

(h) Construction – "Construction" shall mean building, altering, repairing, improving or demolishing any structure, building, or roadway, and any draining, dredging, excavation, grading or similar work upon real property.

(i) County – "County" shall mean the County of York, Virginia, a political subdivision of the Commonwealth of Virginia, and shall include all other departments, public bodies corporate, agencies, sanitary districts and officers of the County to which this policy applies. It shall also include any other entity that has chosen to participate in this policy and has entered into a cooperative procurement agreement with the County.

(j) County Administrator – "County Administrator" shall mean the County Administrator of York County, or, a duly authorized designee.

(k) Goods – "Goods" shall mean all material, equipment, supplies, printing, and automated data processing hardware and software.

(l) Offeror – "Offeror" unless expressly indicated otherwise, shall mean both a bidder, i.e., a person who submits a competitive sealed bid in response to an Invitation to Bid, or a person who submits a proposal in response to a Request for Proposals.

(m) Purchasing Agent – "Purchasing Agent" shall mean the County Administrator of York County, Virginia, or any person designated by the County Administrator to implement all or a portion of this policy.

(n) "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 that will assure good faith performance, and who has been prequalified, if required.

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

(p) Reverse Auctioning - means a procurement method wherein bidders are invited to bid on specified goods or nonprofessional services through real-time electronic bidding, with the award being made to the lowest responsive and responsible bidder. During the bidding process, bidders' prices are revealed and bidders shall have the opportunity to modify their bid prices for the duration of the time period established for bid opening.

(q) Services – "Services" shall mean any work performed by an independent contractor wherein the service rendered does not consist primarily of the acquisition of equipment or materials or the rental of equipment, materials, or supplies.

(r) Using Agency – "Using Agency" shall mean any officer, employee, or other entity of the County requiring any goods, services, insurance, or construction to be procured under the policies and procedures established by this policy.

1-5. Application of Policy.

(a) This policy is intended to provide for centralized competitive purchasing and covers all purchasing by all departments, officers, elements and employees of the County, including specifically, but not limited to, the York County School Board, the York-Poquoson Department of Social Services, Constitutional Officers, and the York County Library. This policy is not intended to require review or approval by the Board of specific items procured by the York County School Board, the York-Poquoson Department of Social Services, the Constitutional Officers, the York County Library, or public bodies who have by agreement become subject to this policy, when sufficient funds have been ap-

propriated to such entity or officer for the purpose of the procurement and this policy has been followed. The Purchasing Agent with regard to such entities and officers shall, however, by signing all purchase orders for such procurements prior to the placement of a firm order, certify compliance with this policy and procedures issued pursuant to it. The Purchasing Agent shall not execute a purchase order if such procurement has not been in compliance with this policy and the procedures developed pursuant to it.

(b) This policy shall apply to all purchases or contracts for the purpose of procuring goods, services, insurance, and construction involving the expenditure of public funds.

(c) When any procurement involves the expenditure of state or federal assistance, grant, loan, or contract funds the procurement shall be conducted in accordance with the procedures set forth in Appendix 2 or any other mandatory federal or state requirements which are not reflected in this policy if the receipt of such funds is conditioned upon compliance with the mandatory procedures.

(d) This policy shall not prohibit compliance with the terms and conditions of any grant, gift, or bequest that are otherwise consistent with law.

(e) This policy shall not apply to contracts existing on its effective date and such contracts may be performed or extended according to their terms.

1-6. Joint and Cooperative Procurement.

(a) The County may participate in, sponsor, conduct, or administer a joint procurement agreement on behalf of or in conjunction with one or more other public bodies, or public agencies or institutions or localities of the several states, of the United States or its territories, the District of Columbia, the U.S. General Services Administration, or the Metropolitan Washington Council of Governments, for the purpose of combining requirements to increase efficiency or reduce administrative expenses in any acquisition of goods, services, or construction.

(b) The County may purchase from another public body's contract or from the contract of the Metropolitan Washington Council of Governments or the Virginia Sheriffs' Association, or from any authority, department, agency or institution of the Commonwealth even if it did not participate in the request for proposal or invitation to bid, if the request for proposal or invitation to bid specified that the procurement was a cooperative procurement being conducted on behalf of other public bodies, except for:

1. Contracts for architectural or engineering services; or

2. Construction, except for the installation of artificial turf and track surfaces, including all associated and necessary construction, which shall not be subject to the limitations prescribed in this subdivision.

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) Consistent with Code of Virginia § 2.2-4303(D), and as authorized by the United States Congress and consistent with applicable federal regulations, and provided the terms of the contract permit such purchases, the County may purchase goods and nonprofessional services from a U.S. General Services Administration contract or a contract awarded by any other agency of the U.S. government.

1-7. Contracts or Purchases Made in Violation of this Policy.

Except as provided herein, no official, elected or appointed, nor any employee, shall purchase or contract for any goods, services, insurance, or construction on behalf of the county. Any purchase or contract made contrary to the provisions of this policy shall be void, and the County will not be bound thereby. Any person who makes such a procurement or disposition may be personally liable therefore to the vendor or purchaser of the goods, services, or construction involved.

ARTICLE II. PURCHASING AGENT; COMPETITION REQUIREMENTS

2-1. Delegation of Authority to Purchasing Agent.

The Purchasing Agent shall serve as the principal public purchasing official for the County and shall be responsible, under the supervision of the Board, for the procurement of all goods, services, insurance, and construction as well as the management and disposal of surplus materials. The Purchasing Agent may delegate authority to a duly authorized agent or agents. The authority of the Purchasing Agent shall specifically, but without limitation, include the authority to select the method of procurement to be used and the authority to negotiate and execute contracts on behalf of the County for any and all procurements or for the disposition of materials. The Purchasing Agent shall conduct all purchasing activities in accordance with the provisions of this policy. The Purchasing Agent may not delegate approval of the use of competitive negotiation, as required by Subparagraph (h) of Section 2-3 of this policy, except in the case of purchases not exceeding $5,000.

2-2. Adoption of Procedures.

The Purchasing Agent shall prepare forms and administrative regulations for the purpose of implementing the provisions of this policy. Such forms and regulations shall be deemed a part of this policy and shall direct the actions of those to whom this policy applies.

2-3. Competition Requirements.

(a) Prior to any purchase of goods, insurance, services or construction, reasonable price competition is desired. Except as otherwise provided in this policy, the competitive pricing methods set forth below shall be followed. If deemed by the Purchasing Agent to be in the County's best interest, regulations and procedures may be established that are more stringent than those specified below.

1. For purchases in the amount of $5,000 or less, multiple quotes are not required; however, price reasonableness shall be considered prior to making a purchase.

   Purchases under $1,500 may be acquired using the County-provided "purchase card" (PCard) program. The PCard program includes the following limits:

   - No cash advances (prohibited by security settings).
   - No 'Gift Card' purchases for Employee Recognition Program (IRS regulations require taxes be withheld). Any requests of that nature must be made on a purchase requisition form for coordination with the payroll office.
   - Purchases of "equipment maintenance" services should also be requested on a purchase requisition form (NOT on a PCard) so that an accurate record of coverage can be maintained by staff.
   - Cell phones should be requested on a purchase requisition form (NOT on a PCard) utilizing the appropriate contract.

(2) For purchases in excess of $5,000 but not greater than $10,000, at least three suppliers shall be contacted. Written quotations shall be required.

(3) For purchases in excess of $10,000 but not greater than $50,000, an informal solicitation shall be issued by the Purchasing Agent or his designee, and should be published on the website utilized by the County for the posting of solicitations.

(4) When a procurement transaction is made under (1), (2), or (3) above, the purchase shall be made from the supplier quoting the lowest price, or best value, unless the Purchasing Agent, using the evaluation factors in this policy for competitive negotiation or competitive sealed bidding as the case may be, documents in writing a determination that, in the best interest of the County, such purchase should be made from another supplier quoting a higher price. Such determination for purchases in excess of $5,000 shall be approved by the County Administrator or the approving authority's designee.

(5) Purchases that in the aggregate or in the sum of all phases are expected to be in excess of $50,000 shall be made by either competitive sealed bidding or competitive negotiation.

(6) Purchases of professional services, as that term is defined in § 2.2-4301 of the Code of Virginia, when the cost of such services is expected to exceed $50,000, shall be made in accordance with sub-paragraph A.4 under the definition of competitive negotiation as set forth in § 2.2-

4302.2 of the Code of Virginia.

(7) The Purchasing Agent shall have the authority to use competitive negotiation to procure any goods, services or insurance, after documenting in advance the basis therefore in writing, as required by § 2.2-4303.C., Code of Virginia. 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 § 2.2-4301, Code of Virginia, if the basis for doing so is approved by the Board. 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 Purchasing Agent in writing, after making the findings required by §2.2-4303(D), Code of Virginia:

(i) contracts for the alteration, repair, renovation or demolition of buildings when the cost of the contract will not exceed $1,500,000; or

(ii) contracts for the construction of highways and any draining, dredging, excavation, grading or similar work upon real property.

(8) Goods, services other than professional services, and insurance may be procured by competitive sealed bidding or competitive negotiation. Upon a written determination made in advance by the Purchasing Agent 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 set forth in Code of Virginia Section 2.2-4302.2. The basis for this determination shall be documented in writing.

(9) Construction may be procured only by competitive sealed bidding, except that competitive negotiation may be used in the following instances:

- By the approving authority on a fixed price design-build basis or construction management basis as provided in Code of Virginia Section 2.2-4378 et seq; or

- By the approving authority for the construction of highways and any draining, dredging, excavation, grading or similar work upon real property upon a determination made in advance by the approving authority 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.

(10) The purchase of goods or nonprofessional services, but not construction or professional services, may be made by reverse auctioning. However, bulk purchases of commodities used in road and highway construction and maintenance and aggregates shall not be made by reverse auctioning.

(11) Nothing in this policy shall prevent the use of competitive sealed bidding or competitive negotiation in procurements under $30,000, if deemed appropriate by the Purchasing Agent.

2-4. Exceptions to Competition Requirements.

Section 2-3 of this policy shall not apply and no price competition other than specified in this section is required in the following procurement transactions:

(a) The purchase of items under procurement contracts made available to the County by the Commonwealth of Virginia or to purchases made available to the County through other state, federal, or public entities;

(b) Contracts for legal services, expert witnesses, and other services associated with litigation, regulatory proceedings, or other legal matters;

(c) Purchases for special police work when the Sheriff certifies that the purchases are needed for undercover law enforcement operations;

(d) Contracts and purchases by the Economic Development Authority with respect to any item of cost of an "authority facility" or "facilities" as defined in § 15.2-4902 of the Code of Virginia;

(e) Upon a determination by the Purchasing Agent in writing, which writing shall state the basis for such determination, 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 competition. The Purchasing Agent shall conduct appropriate negotiations as to price, delivery, and terms. A record of the sole source procurement shall be maintained listing the contractor's name, the amount, and qualifying circumstances. The Purchasing Agent shall provide a copy of the written determination to the County Administrator or other appropriate Approving Authority when approval is required by Section 3-17 of this policy.

(f) In cases of emergency provided, however, such procurement shall be made with such competition as is practicable under the circumstances. A written statement by the Purchasing Agent of the basis for the emergency and for the selection of the particular supplier shall be included in the papers relating to the procurement. The Purchasing Agent shall develop appropriate procedures regarding emergency purchases. The term "emergency" as used in this subparagraph means a situation where there exists a threat to public health, welfare, or safety or when an unforeseen circumstance causes disruption of an essential service.

(g) Agreements or contracts entered into between the County and private parties for cost participation or cost sharing in the extension or construction of public utilities or the provision of other public services. Any such agreements must be approved by the Board.

(h) Travel advances, travel reimbursements, or travel expenses;

(i) Meals, beverages, entertainment, awards, or similar purchases in conjunction with official county functions or meetings.

(j) Payments for services to jurors, board and commission members, sports officials, and medical examiners;

(k) Contracts for local telephone service (excepting cellular and paging services), or other regulated utility services;

(l) Interdepartmental or interagency expenses or purchases;

(m) Contracts of employment;

(n) Advertising and legal notices;

(o) Dues and subscriptions;

(p) Employee educational expenses;

(q) Textbooks, library books, and other library items for circulation to, or use by students, acquired by the public schools;

(r) Public library books and other library items for circulation to, or use by the public;

(s) Services rendered to or payments received by clients of the Department of Social Services;

(t) Foster home placements;

(u) Treatment services provided to clients by the Department of Community Services;

(v) Clinical supervision services for counselors in County employment;

(w) Occupational therapy, physical therapy, student evaluations;

(x) Mail and mail-related costs (e.g. postage meter expense, stamps, etc.);

(y) Instructional/specialty educational materials, promotional items, crafts.

2-5. Purchases at Auction.

Notwithstanding any other provision of this policy, upon a determination by the Purchasing Agent that the purchase of certain designated goods from a public auction sale is in the best interest of the County, such items may be purchased at auction sale. The Purchasing Agent shall document the basis for any such determination.

2-6. Documentation Required.

Documentation of competitive pricing or other documentation required by this policy, including a complete copy of the solicitation for competitive bids or proposals, shall be retained along with other papers related to the procurement in the office of the Division of Purchasing. The documentation may be retained electronically as may be permitted by the records retention guidelines promulgated by the Library of Virginia. Such documentation shall be retained until the acquisition of goods is completed or the services have been rendered and after such time may be destroyed in accordance with County and State procedures governing records retention.

ARTICLE III. ADMINISTRATIVE PROVISIONS

3-1. Division of Requirements.

No using agency shall artificially divide contract requirements so as to avoid any dollar limitations set forth in this policy.

3-2. Bid List.

The County does not accept the responsibility for maintaining a bid list or the responsibility for the failure of any competitor to receive a solicitation directly from the County. The Purchasing Agent may, for the convenience of the County, maintain a bidders list containing the names of prospective offerors. The maintenance of such list shall not be construed as the acceptance of an obligation to notify any or all of the prospective offerors on such list of procurement transactions by the County.

3-3. Cost Plus Percentage of Cost Contracts Prohibited.

Except in the case of an emergency affecting the public health, safety or welfare, no contract shall be awarded on the basis of cost plus a percentage of cost. This paragraph shall not apply to contracts of insurance. Public contracts may be awarded on any other basis.

3-4. Modification of Contracts.

Contracts entered into by the County may include provisions for modification of the contract during performance but no fixed price contract may be increased by more than 25 percent of the amount of the contract or $50,000, whichever is greater, without prior approval by the Board or other approving authority. Following such approval the Contract price will consist of the original Contract amount plus all such approved modifications. Any such modifications shall not exceed appropriations available for the project. 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.

3-5. Prequalification of Offerors.

The Purchasing Agent may pre-qualify prospective offerors for any solicitation. Consideration of bids or proposals may be limited to pre-qualified offerors. The opportunity to pre-qualify shall be given to any prospective offeror who has not been suspended or debarred under this policy.

(a) Pre-qualification of prospective contractors for construction. If the Purchasing Agent chooses to pre-qualify prospective contractors for construction, an application form shall be used which sets forth the criteria upon which the qualifications of prospective contractors will be evaluated. The application form shall request of prospective contractors only such information and documents as are appropriate for an objective evaluation of all prospective contractors pursuant to such criteria.

The form shall contain a box, which the prospective contractor may check to request that all information submitted by the contractor in connection with the pre-qualification process shall be deemed a trade secret or proprietary information pursuant to subdivision B 55 of §2.2-4342(F), Code of Virginia. In all instances in which the Purchasing Agent requires pre-qualification of potential contractors for construction projects, advance notice shall be given of the deadline for the submission of pre-qualification 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 section to be accomplished. At least thirty (30) days prior to the date established for submission of bids or proposals under the procurement of the contract for which the pre-qualification applies, the Purchasing Agent shall advise in writing each contractor which submitted an application whether that contractor has been pre-qualified. In the event that a contractor is denied pre-qualification, the written notification to such contractor shall state the reasons for such denial of pre-qualification and the factual basis of such reasons. The Purchasing Agent may deny pre-qualification to any contractor only if the Agent 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 has had judgments entered against him for the breach of contracts for construction;

(4) The contractor has been in substantial noncompliance with the terms and conditions of prior construction contracts with the County without good cause, or if the contractor has been in substantial noncompliance with the terms and conditions of comparable construction contracts with another locality without good cause. In all instances, any such substantial noncompliance shall be documented;

(5) The contractor has been convicted within the past five years of a felony involving moral turpitude regarding any procurement of or performance of a construction contract;

(6) The contractor failed to provide to the Purchasing Agent in a timely manner any information requested relevant to subdivisions 1 through 5 above.

(b) Pre-qualification for prospective offerors for other than construction solicitations.

If the Purchasing Agent chooses to prequalify prospective offerors for procurements for other than construction, the procedure set forth in subsection (a) above shall be followed, except that reasonable notice in writing of less than thirty (30) days prior to the date established for the submission of bids or proposals may be given to prospective offerors as to whether they are deemed prequalified or not. The Purchasing Agent may include in the application form for the pre-qualification of prospective offerors of this type reasonable criteria in addition to those set forth in subsection (a) above for the pre-qualification evaluation.

(c) Pre-qualification generally.

In pre-qualifying offerors pursuant to either (a) or (b) above:

(1) Pre-qualification of a prospective offeror shall not constitute a conclusive determination that an offeror is responsible, and such offeror may be rejected as not responsible on the basis of subsequently discovered information.

(2) The failure of a prospective offeror to pre-qualify with respect to a given procurement shall not bar the offeror from seeking pre-qualification as to future procurements or from bidding or submitting proposals on procurements which do not require pre-qualification.

A decision by the Purchasing Agent denying pre-qualification shall be final and conclusive unless the offeror appeals the decision by instituting legal action pursuant to § 2.2-4364, Code of Virginia.

3-6. Pre-Bid and Pre-Proposal Conferences.

When deemed necessary by the Purchasing Agent, a pre-bid or pre-proposal conference

with prospective bidders may be held prior to the date established for submitting a bid or proposal. Such conferences are for the purpose of detecting unclear provisions, removing or editing restrictive language, and in the discretion of the Purchasing Agent identifying alternative specifications, methods or means to the benefit of the County, or for increasing competition or providing greater value for the County. After such conference, when appropriate, the Purchasing Agent may issue a written addendum to the solicitation, clarifying or revising specifications or other submittal and contract requirements. Bidders shall not rely upon any oral instructions.

3-7. Comments or Questions Regarding Invitations for Bid or Requests for Proposal.

Should a prospective bidder or offeror find any discrepancy in, or omissions from, the specifications, request for proposal, or other contract documents, or should he be in doubt as to their meaning, he shall at once notify the specified contact person who may issue a written Addendum to the solicitation. The Addendum shall be made available in the same manner as the original solicitation documents were offered. Bidders shall not rely upon any oral instructions.

3-8. Bonds.

In addition to any bonds which may be required by state law, the Purchasing Agent may, in the Agent's sole discretion, require a bid, performance, or payment bond or other specified surety arrangement in any procurement solicitation, provided that for construction or renovation contracts in excess of $100,000, performance and payment bonds shall be required in the amount of the contract. The requirement for such surety shall be clearly stated in the solicitation.

3-9. Offeror's Responsibilities.

By submitting a bid or proposal an offeror agrees and warrants that it has examined all contract documents and, if appropriate, the subject of the contract, and where the specifications require a given result to be produced, that the specifications are adequate and the required results can be produced under the specifications in the contract. Omissions from the specifications shall not relieve the offeror from the responsibility of complying with the general terms and intent of the contract as indicated by the specifications. Once the award has been made, failure to have read all the conditions, instructions, and specifications of the contract will not be cause to alter the original bid, quote, or proposal, or for the offeror to request additional compensation.

3-10. Signatures on Offers or Bids.

The firm, corporation, or individual name of the offeror must be signed to any proposals or bids submitted. In the case of a corporation, the title of the officer signing must be stated and each officer must be duly authorized. In the case of a partnership, the signature of at least one of the partners must follow the firm name using the term "member of the firm" or "general partner."

3-11. Withdrawal or Cancellation of Bids.

(a) Except as provided in paragraph 3-11.B below, an offeror may withdraw or cancel a bid or proposal at any time prior to the date set for opening. After such time the offeror or bidder may not withdraw for a period of sixty (60) calendar days, unless otherwise specified in the solicitation document. Any offeror may be required to clarify its offer or bid or acknowledge by written confirmation that the minimum requirements of the specifications are included in the offeror's bid or proposal.

(b) A bidder or offeror seeking withdrawal of a bid for construction shall give notice in writing to the Purchasing Agent 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.

(c) No bid shall 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 in accordance with 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) The County shall notify the bidder in writing within five business days of its decision regarding the bidder's request to withdraw its bid. If the public body denies the withdrawal of a bid under the provisions of this section, it shall state in such notice 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. At the same time that the notice is provided, the public body shall return all work papers and copies thereof that have been submitted by the bidder.

3-12. Evaluation of Sealed Bids.

When competitive sealed bidding is used, the following factors shall be considered, in addition to price, when determining the lowest responsible bidder and the responsiveness of the bid:

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

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

(c) The character, integrity, reputation, judgment, experience, and efficiency of

the bidder.

(d) The quality of performance of previous contracts or services.

(e) The previous and existing compliance by the bidder with laws and ordinances relating to the contract or service.

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

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

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

(i) The number and scope of conditions attached to the bid.

(j) Any other condition or criteria included in the solicitation, its terms, conditions or the solicitation's instructions.

3-13. Evaluation of Proposals Under Competitive Negotiation.

When competitive negotiation is the method of procurement selected, the factors specified in the written Request for Proposal shall be listed in a descending order of importance and shall be used in determining the most qualified firm or individual.

3-14. 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 County of York 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. For purposes of this section, a Virginia person, firm or corporation means a person, firm or corporation organized pursuant to Virginia law or maintaining a principal place of business in Virginia.

3-15. Negotiations When Bids Exceed Available Funds.

If the lowest acceptable bid exceeds available funds, the Purchasing Agent may negotiate with the bidder to obtain a contract price within available funds.

3-16. Cancellation or Rejection of Bids.

An invitation to bid, a request for proposal, any other solicitation, or any and all bids or proposals received may be canceled or rejected when the Purchasing Agent determines that it is in the best interest of the County to do so. The reasons therefore shall be made a part of the contract file. Any bid which is incomplete, conditional, ob-

scure, or which is not in conformance with the specifications may be rejected or any such irregularities may be waived at the option of the Purchasing Agent provided they do not affect the price, quality, quantity, or delivery schedule for the goods, services, or construction to be procured.

No bidder shall be permitted to alter, modify or amend its bid after the time fixed for submission of bids, except as provided in Section 3-11 of this Policy.

No bid received after the time fixed for submission of bids shall be opened or considered.

No statement or notation whatsoever, written, printed, typed or otherwise set out on any bid or offer envelope, including any addition or deduction in contract price, shall be recognized or considered in the review and tabulation of any bid or offer or for any other purpose.

If the solicitation is cancelled prior to the opening of bids or proposals, a bidder or offeror who has already submitted their bid/proposal may request that it be returned, and the sealed document will be returned to them (at their expense). Any remaining submittals not returned to the submitting bidder or offeror shall remain permanently sealed in the procurement file. File retention and disposal shall be in accordance with applicable records destruction policy.

If the solicitation is cancelled after the opening of bids or proposals, the documents will not be returned to the bidder or offeror, but shall be re-sealed and retained by the Purchasing Agent in the procurement file. File retention and disposal shall be in accordance with applicable records destruction policy.

3-17. Approvals.

Except as provided for emergency purchases, all purchases in excess of $25,000 shall be specifically approved by the County Administrator, or the Approving Authority's designee, prior to the placement of a firm order. Purchases of goods or services not previously included in the approved Capital Improvements Program (CIP) in excess of $50,000, and purchases of goods and services previously included in the approved CIP in excess of $100,000, shall be specifically approved by the Board of Supervisors or the appropriate Approving Authority prior to placement of a firm order (excepting the purchase of vehicles, wherein the cost of a single unit does not exceed $50,000, or the bulk purchase of gasoline for the Department of Public Works' Vehicle Services Division; and acquisition of Public Utility Services (Data Access services, phone ("land-line" only)/water/electricity/gas); such purchases, subject to fund availability, may be made without Approving Authority). Emergency purchases may be approved after the fact. The request for approval shall identify the method of price competition used in the procurement.

The Board shall be notified no later than the Board's next regular meeting of any purchases of goods and services previously included in the approved CIP that are in excess of $50,000 but not more than $100,000.

This policy is not intended to require review or approval by the Board of specific items procured by the York County School Board, the York-Poquoson Department of Social Services, the Constitutional Officers, the York County Library, or public bodies who have by agreement become subject to this policy, when sufficient funds have been appropriated to such entity or officer for the purpose of the procurement and this policy has been followed. The Purchasing Agent with regard to such entities and officers shall, however, by signing all purchase orders for such procurements prior to the placement of a firm order, certify compliance with this policy and procedures issued pursuant to it. The Purchasing Agent shall not execute a purchase order if such procurement has not been in compliance with this policy and the procedures developed pursuant to it.

3-18. Contract Requirements and Legal Review.

The terms and conditions of procurements in excess of $25,000 shall be reviewed and approved as to form by the County Attorney prior to issuance by the Purchasing Agent. Contracts signed by all parties and containing, or incorporating by reference, all applicable terms and conditions shall be required for procurements of services or construction in excess of $25,000. Formal Invitations for Bids (IFB) and Requests for Proposals (RFP) shall be reviewed by the County Attorney prior to issuance and publication to the public. Whenever a contract, signed by all parties and containing, or incorporating by reference, all applicable terms and conditions is to be used in a procurement, it and all amendments and changes thereto shall be approved as to form by the County Attorney.

3-19. Protests of Awards or Decisions to Award; Decisions of Purchasing Agent

All bids and offers are subject to the decision of the Purchasing Agent as to the quality of what is offered, responsiveness of the offer or bid, responsibleness of the offeror or bidder, and the qualifications of the offeror or bidder.

A bidder or offeror may protest the award or decision to award by submitting such protest in writing to the Purchasing Agent no later than ten (10) days after the award or the announcement of the decision to award. No protest shall lie for a claim that the selected Bidder is not a responsible Bidder. The written protest shall include the basis for the protest and the relief sought. The Purchasing Agent shall consider all information available, and shall issue a decision in writing within ten days stating the reasons for the action taken. The Purchasing Agent's decision shall be final. Every bidder or offeror submitting a bid or proposal agrees, as a condition precedent to the submission, to abide by the Purchasing Agent's decision and all of the provisions of this policy.

3-20. Debarment and Suspension.

After giving fifteen (15) days' written notice and providing an opportunity to be heard, the Purchasing Agent, after consultation with the County Attorney, is authorized to debar any offeror for cause from consideration for the award of contracts. The debarment shall not be for a period of more than three (3) years.

After consultation with the County Attorney, the Purchasing Agent is authorized to

suspend an offeror from consideration for the award of contract if there is probable cause to believe that the offeror has engaged in any activity that might lead to debarment. The suspension shall not be for a period exceeding three (3) months. Notice of any debarment or suspension shall be provided to the Board, and to the contractor, stating the reasons for the action taken.

The causes for any such debarment or suspension may include, but are not necessarily limited to, the following:

(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 or subcontract;

(b) Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense of moral turpitude indicating a lack of business or personal integrity or honesty which currently, seriously, and directly affects responsibility as a County offeror;

(b) Conviction under state or federal antitrust statutes arising out of the submission of bids or proposals;

(d) Violation of contract provisions of a character which is regarded by the Purchasing Agent to be so serious as to justify a debarment action including, but not limited to:

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

(2) A record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts.

(e) Any other cause the Purchasing Agent determines to be so serious and compelling as to affect responsibility as a County contractor including debarment by another governmental entity.

3-21. Freedom of Information Act.

With the following exceptions, procurement documents are subject to the Virginia Freedom of Information Act:

(a) Cost estimates relating to a proposed procurement transaction prepared by or for the County shall not be open to public inspection.

(b) Bid and proposal records shall be open to public inspection only after award of the contract. Any bidder or offeror may be allowed to inspect the bid or proposal records after bid opening or after the evaluation and negotiation of proposals are completed, and prior to award unless the County decides not to

accept any bids or not to accept any of the proposals and to reopen the contract.

(c) Trade secrets or proprietary information submitted to the County are not subject to disclosure if requested by the person submitting such information prior to or upon submission of the data or other materials. Any such request must identify what is to be protected and state the reasons therefor.

(d) Any inspection of procurement transaction records under this section shall be subject to reasonable restrictions imposed by the Purchasing Agent to insure security and integrity of the records.

3-22. Claims.

(a) Contractual claims, whether for money or other relief, shall be submitted to the Purchasing Agent in writing no later than 60 days after receipt of final payment; however, written notice of the contractor's intention to file a claim shall be given at the time of the occurrence or at the beginning of the work upon which the claim is based.

(b) No written decision denying a claim or addressing issues related to the claim shall be considered a denial of the claim unless the written decision is signed by the Purchasing Agent or his designee. The contractor may not institute legal action prior to receipt of the final written decision on the claim unless the Purchasing Agent fails to render a decision within 90 days of submission of the claim. Failure of the Purchasing Agent to render a decision within 90 days shall not result in the contractor being awarded the relief claimed or in any other relief or penalty. The sole remedy for the Purchasing Agent's failure to render a decision within 90 days shall be the contractor's right to institute immediate legal action.

A contractor may not institute legal action prior to receipt of the Purchasing Agent's decision on the claim, unless the Purchasing Agent fails to render such decision within 90 calendar days. A failure of the Purchasing Agent to render a final decision within the time provided in subsection C shall be deemed a final decision denying the claim by the Purchasing Agent.

The decision of the Purchasing Agent shall be final and conclusive unless the contractor appeals within six months of the date of the final decision on the claim by the Purchasing Agent.

3-23. Illegal Alien Employment.

The Purchasing Agent shall provide in every written contract that the Contractor does not, and shall not during the performance of the contract for goods and services in the Commonwealth, knowingly employ an unauthorized alien as defined in the federal Immigration Reform and Control Act of 1986.

3-24 Foreign and Domestic Businesses Authorized to Transact Business.

(a) The Purchasing Agent shall include in every written contract a provision that a contractor organized as a stock or non-stock corporation, limited liability company, business trust, or limited partnership or registered as a registered limited liability partnership shall be authorized to transact business in the Commonwealth as a domestic or foreign business entity if so required by Title 13.1 or Title 50 or as otherwise required by law.

(b) Pursuant to competitive sealed bidding or competitive negotiation, the Purchasing Agent shall include in the solicitation a provision that requires a bidder or offeror organized or authorized to transact business in the Commonwealth pursuant to Title 13.1 or Title 50 to include in its bid or proposal the identification number issued to it by the State Corporation Commission. Any bidder or offeror that is not required to be authorized to transact business in the Commonwealth as a foreign business entity under Title 13.1 or Title 50 or as otherwise required by law shall include in its bid or proposal a statement describing why the bidder or offeror is not required to be so authorized.

(c) Any bidder or offeror described in subsection (b) that fails to provide the required information shall not receive an award unless a waiver of this requirement and the administrative policies and procedures established to implement this section is granted by chief executive of the local governing body.

(d) Any business entity described in subsection A that enters into a contract shall not allow its existence to lapse or its certificate of authority or registration to transact business in the Commonwealth, if so required under Title 13.1 or Title 50, to be revoked or cancelled at any time during the term of the contract.

ARTICLE IV. DISPOSITION OF SURPLUS PROPERTY

4-1. Sale of Surplus Property.

The Purchasing Agent shall have the responsibility for disposal of County surplus, worn out, or obsolete items. The Purchasing Agent shall have the authority to transfer such surplus stock to other internal and external departments and public bodies and agencies. All property not so transferred shall be exchanged, traded in on new items, salvaged, destroyed, or sold as deemed appropriate by the Purchasing Agent. Notwithstanding the foregoing, any library books purchased for circulation by the York County public Library which have been declared to be surplus by the York County Librarian may be donated by the Librarian to the York County Friends of the Library, or to any similar organization the main function of which is to support the activities of the York County public library system. The Librarian shall keep a record of all books so donated for review upon request by the Purchasing Agent.

The York County School Division may donate such obsolete educational technology hardware and software and other obsolete personal property to a Virginia nonprofit organization which is exempt from taxation under § 501 (c) (3) of the Internal Reve-

nue Code. Such donations shall be coordinated with the Purchasing Agent.

In general, the sale of surplus property may be made through competitive methods to include, but not limited to, public auction, sealed bids, or an appropriate website to the highest bidder. The sale of property having an estimated value of $500 or less shall not require a competitive process. Individual items may be scrapped, if in the opinion of the Purchasing Agent, the cost of storage and sale exceeds the value of the item. The Board, upon the request of the Purchasing Agent, may make a special dispensation of any individual item if, in the opinion of the Board, such dispensation is in the public interest.

4-2. Participation at County Auctions.

County and School employees are prohibited from bidding on surplus property sold for their respective entity. Central Purchasing staff are prohibited from purchasing any surplus property from either entity, regardless of disposal method used.

ARTICLE V. PUBLIC-PRIVATE EDUCATION FACILITIES AND INFRASTRUCTURE ACT

5-1 Introduction

The Public-Private Education Facilities and Infrastructure Act of 2002 (the "PPEA") grants the County of York (the "County"), a responsible public entity as defined in the PPEA, the authority to enter public-private agreements for the development of a wide range of projects for public use if the County determines there is a public need for the project and that private involvement may provide the project to the public in a timely or cost-effective fashion. Individually negotiated comprehensive agreements between an operator, as defined in the PPEA, and the County will define the respective rights and obligations of the County and the private operator. Although guidance with regard to the application of the PPEA is provided herein, it will be incumbent upon the County and all private entities to comply with the provisions of the PPEA.

In order for a project to come under the PPEA, it must meet the definition of a "qualifying project." The PPEA contains a broad definition of qualifying project that includes public buildings and facilities of all types; for example:

(a) An education facility, including, but not limited to, a school building (including any stadium or other facility primarily used for school events), any functionally-related and subordinate facility and land to a school building, and any depreciable property provided for use in a school facility that is operated as part of the public school system or as an institution of higher education;

(b) A building or facility for principal use by any public entity;

(c) Improvements, together with equipment, necessary to enhance public safety and security of buildings to be principally used by a public entity;

(d) Utility and telecommunications and other communications infrastructure;

(e) A recreational facility;

(f) Certain service contracts; or

(g) Technology Applications.

The PPEA establishes requirements to which the County must adhere when reviewing and approving proposals received pursuant to the PPEA. In addition, the PPEA specifies the criteria that must be used to select a proposal and the contents of the comprehensive agreement detailing the relationship between the County and the private entity.

The individual designated by the County Administrator to serve as the point of contact for implementation of procedures, to receive proposals submitted under the PPEA and to respond to inquiries regarding the PPEA or this adopted policy shall be the designated County Purchasing Agent.

5-2. General Provisions

(a) Proposal Submission - A proposal may be either solicited by the County or delivered by a private entity on an unsolicited basis. In either case, the proposal shall be clearly identified as a "PPEA Proposal". To be considered, one original and nine (9) copies of any unsolicited proposal must be submitted along with the applicable fee to the Purchasing Agent, 120 Alexander Hamilton Boulevard, P.O. Box 532, 23690, Yorktown, Virginia. Proposers may be required to follow a two-part proposal submission process consisting of a conceptual phase and a detailed phase, as described herein. The County may discontinue its evaluation of any proposal at any time during the conceptual or detailed phase.

The PPEA allows private entities to include innovative financing methods, including the imposition of user fees or service payments, in a proposal. Such financing arrangements may include the issuance of debt instruments, equity securities, or other securities or obligations. Proposals may include, if applicable, the portion of the tax-exempt private activity bond limitation amount to be allocated annually to the Commonwealth of Virginia pursuant to the Economic Growth and Tax Relief Reconciliation Act of 2001 for the development of education facilities using public-private partnerships.

Proposals should be prepared simply and economically, providing a concise description of the proposer's capabilities to complete the proposed qualifying project and the benefits to be derived from the project by the County. Project benefits to be considered are those occurring during the construction, renovation, expansion or improvement phase and during the life cycle of the project. Proposals also should include a comprehensive scope of work and a financial plan for the project, containing enough detail to allow an analysis by the Coun-

ty of the financial feasibility of the proposed project. Any facility, building, infrastructure, or improvement included in a proposal shall be identified specifically or conceptually. The County may request, in writing, clarification to the submission.

The PPEA is intended to encourage proposals from the private sector that offer the provision of private financing in support of the proposed public project and the assumption of commensurate risk by the private operator, but also benefits to the operator through innovative approaches to project financing, development and use. However, while substantial private sector involvement is encouraged, qualifying facilities will still be devoted primarily to public use and typically involve facilities critical to the public health, safety and welfare. Accordingly, staff shall continue to exercise full and proper due diligence in the evaluation and selection of operators for these projects. In this regard, the qualifications, capabilities, resources, and other attributes of a prospective operator and its whole team shall be carefully examined for every project. In addition, operators proposing projects shall be held strictly accountable for representations or other information provided regarding their qualifications, experience, or other contents of their proposals, including all specific aspects of proposed plans to be performed by the operator.

(b) Affected Jurisdictions - Any private entity requesting approval from or submitting a conceptual or detailed proposal to the County must provide any affected jurisdiction with a copy of the private entity's request or proposal by certified mail, express delivery or hand delivery within 5 business days after the County decides to accept the proposal. Any affected jurisdiction shall have 60 days from the receipt of the request or proposal to submit written comments to the County and to indicate whether the proposed qualifying project is compatible with the (i) jurisdiction's comprehensive plan, (ii) jurisdiction's infrastructure development plans, and (iii) capital improvements budget or other government spending plan. Comments received within the 60-day period shall be given consideration by the County.

(c) Proposal Review Fee - The PPEA authorizes the County to charge a reasonable fee to cover the costs of processing, reviewing, and evaluating proposals.

(1) A fee of $1,000 shall accompany the initial proposal to cover staff time to determine whether it is a qualifying project with a reasonable expectation of satisfying the criteria of 56-575.4 C of public need or benefit, reasonable estimated cost, and timely acquisition of the project. Such sum shall be paid with certified funds.

(2) If the County determines that the proposal is a qualifying project as described above, and to proceed with publication and further stages of review, the County may impose additional review fees if the County reasonably anticipates incurring costs in excess of the initial fee. Additional fees may include the reasonable cost of staff time, attorney's fees, and fees for financial, engineering, and other necessary advisors or consultants. The County will notify the private entity of the amount of

such additional fees as and when it anticipates incurring such costs. The private entity shall pay such additional fees before the County will continue to process, review, and evaluate the proposal.

The County will refund any portion of fees paid in excess of its costs associated with evaluating the proposal.

Freedom of Information Act - Generally, proposal documents submitted by private entities are subject to the Virginia Freedom of Information Act ("FOIA"). In accordance with § 2.2-3705.1(12) and 2.2-3705.6 of FOIA, such documents are releasable if requested, except to the extent that they relate to (a) confidential proprietary information submitted to the County under a promise of confidentiality or (b) memoranda, working papers or other records related to proposals if making public such records would adversely affect the financial interest of the County or the private entity or the bargaining position of either party. Proprietary, commercial or financial information, balance sheets, financial statements, or trade secrets provided by a private entity as evidence of its qualifications are not considered procurement records. Once a comprehensive agreement has been entered into, and the process of bargaining of all phases or aspects of the comprehensive agreement is complete, the responsible public entity shall make the procurement records available upon request in accordance with § 2.2-4342.

When the private entity seeks a promise of confidentiality from the County as to proprietary information under (a) above, the private entity must (i) invoke the exclusion when the data or materials are submitted to the County or before such submission, (ii) identify the data and materials for which protection from disclosure is sought, and (iii) state why the exclusion from disclosure is necessary. The County will not protect any portion of a proposal from disclosure if the entire proposal has been designated confidential by the proposer without reasonably differentiating between the proprietary and non-proprietary information contained therein.

Upon receipt of a request that designated portions of a proposal be protected from disclosure as confidential and proprietary, the County shall determine whether such protection is appropriate under applicable law and, if appropriate, the scope of such appropriate protection, and shall communicate its determination to the private entity. If the determination regarding protection or the scope thereof differs from the private entity's request, then the County will accord the private entity a reasonable opportunity to clarify and justify its request. Upon a final determination by the County to accord less protection than requested by the private entity, the private entity may withdraw its proposal.

Use of Public Funds - Virginia constitutional and statutory requirements and County ordinances and policies as they apply to appropriation and expenditure of public funds apply to any comprehensive agreement entered into under the PPEA. Accordingly, the processes and procedural requirements associated with the expenditure or obligation of public funds shall be incorporated into planning for any PPEA project or projects and shall be in compliance with the County's Fiscal Policies as adopted by the Board.

Applicability of Other Laws - Nothing in the PPEA shall affect the duty of the

County to comply with all other applicable law not in conflict with the PPEA. Article 6 Ethics in Public Contracting of the Virginia Public Procurement Act (the VPPA) is hereby incorporated herein by reference. Otherwise, the applicability of the VPPA is as set forth in the PPEA and herein.

5-3. Solicited Proposals

The County may invite bids or proposals from private entities to acquire, design, construct, improve, renovate, expand, equip, maintain or operate qualifying projects. The County may use a two-part process consisting of an initial conceptual phase and a detailed phase. The County will set forth in the solicitation the format and supporting information that is required to be submitted, consistent with the provisions of the PPEA.

The solicitation will specify, but not necessarily be limited to, information and documents that must accompany each proposal and the factors that will be used in evaluating the submitted proposals. The solicitation will be posted in such public areas as are normally used for posting of the County's notices, including the County's website. The solicitation will also contain or incorporate by reference other applicable terms and conditions, including any unique capabilities or qualifications that will be required of the private entities submitting proposals. Pre-proposal conferences may be held as deemed appropriate by the County.

5-4. Unsolicited Proposals

The PPEA permits the County to receive and evaluate unsolicited proposals from private entities to acquire, design, construct, improve, renovate, expand, equip, maintain, or operate a qualifying project.

The County may publicize its needs and may encourage or notify interested parties to submit proposals subject to the terms and conditions of the PPEA. When such proposals are received without issuance of a solicitation, the proposal shall be treated as an unsolicited proposal.

To ensure the County receives the best value for any qualifying project, the County will seek and encourage competing unsolicited proposals.

Decision to Accept and Consider Unsolicited Proposal; Notice

a. Upon receipt of any unsolicited proposal or group of proposals and payment of any required fee by the proposer or proposers, the County will determine whether to accept the unsolicited proposal for publication and conceptual-phase consideration. If the County determines not to accept the proposal and not to proceed to publication and conceptual-phase consideration, staff will return the proposal, together with all fees and accompanying documentation, to the proposer.

b. If the County chooses to accept an unsolicited proposal for conceptual-phase consideration, staff shall post a notice in a public area regularly used by the County for posting of public notices and on the County

website for a period of not less than 45 days. The County shall also publish the same notice at least once in a newspaper of general circulation in the County and advertise the notice in the Virginia Business Opportunities publication and post a copy of the notice on the Commonwealth's electronic procurement website to notify any parties that may be interested in submitting competing unsolicited proposals. Interested parties shall have adequate time as specified in the notice, but in no event less than 45 days from the date the notice is published to submit competing unsolicited proposals. The notice shall state that the County (i) has received and accepted an unsolicited proposal under the PPEA, (ii) intends to evaluate the proposal, (iii) may negotiate a comprehensive agreement with the proposer based on the proposal, and (iv) will accept for simultaneous consideration any competing unsolicited proposals that comply with the procedures adopted by the County and the PPEA. The notice also shall summarize the proposed qualifying project or projects, and identify their proposed locations.

Initial Review at the Conceptual Stage

c. Only proposals complying with the requirements of the PPEA that contain sufficient information for a meaningful evaluation and that are provided in an appropriate format will be considered by the County for further review at the conceptual stage. Unsolicited proposals at the conceptual stage shall include the information described in Section V. (a).

d. The County will determine at this initial stage of review whether it will proceed to evaluate the unsolicited proposals using either method i. or ii. below:

i. Procedures normally used by the County for the evaluation of bids resulting from "competitive sealed bidding" with award to the lowest responsive and responsible private entity. Evaluation may include special qualifications of private entities, 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. Awards may be made to more than one private entity. The County may reject any or all proposals at any time and for any reason.

ii. Procedures normally used by the County for the evaluation of proposals resulting from the procurement of other than professional services through "competitive negotiation" as follows: Selection shall be typically made of two private entities deemed to be fully qualified and best suited among those submitting proposals. Negotiations shall then be conducted with each of the private entities so selected. Price shall be considered, but need not be the sole determining factor. After negotiations have been conducted with each private entity so selected, the County shall

select the private entity, which, in its opinion, has made the best proposal. Awards may be made to more than one private entity. Should the public body determine in writing and in its sole discretion that only one private entity is fully qualified, or that one private entity is clearly more highly qualified than the others under consideration, negotiations may be limited to that private entity. The County may reject any or all proposals at any time and for any reason.

The County may proceed using competitive negotiation procedures described in b. above only if it makes a written determination that doing so is likely to be advantageous to the County and the public based upon either (i) the probable scope, complexity or urgency of need, or (ii) the risk sharing, added value, increase in funding or economic benefit from the project would otherwise not be available.

e. In reviewing the proposals, the County shall engage the services of qualified professionals, including as may appear appropriate an architect, professional engineer or certified public accountant not employed by the County to provide an independent analysis regarding the specifics, advantages, disadvantages, and long-term and short-term costs of the proposed project, unless the board of supervisors determines that such analysis shall be performed by County employees.

f. After reviewing the original proposal and any competing unsolicited proposals submitted during the notice period, the County may determine:

i. not to proceed further with any proposal,

ii. to proceed to the detailed phase of review with the original proposal,

iii. to proceed to the detailed phase with a competing proposal, or

iv. to proceed to the detailed phase with multiple proposals.

5-5. Proposal Preparation and Submission

Format for Submissions at the Conceptual Stage

Proposals at the conceptual stage shall contain the following information in the following format plus any additional information as the County may reasonably request to comply with the requirements of the PPEA:

a. Qualifications and Experience

i. Identify the legal structure of the firm or consortium of firms making the proposal. Identify the organizational structure for the pro-

ject, the management approach, and how each partner and major subcontractor (over $100,000) in the structure fits into the overall team. All members of the operator's team, including major subcontractors known to the proposer must be identified at the time a proposal is submitted for the Conceptual Stage. Identified team members, including major subcontractors, may not be substituted or replaced once a project is approved and comprehensive agreement entered into, without the written approval of the County. Include the status of the Virginia license of each partner, proposer, contractor, and major subcontractor.

ii. Describe the experience of the firm or consortium of firms making the proposal, the key principals and project managers involved in the proposed project including experience with projects of comparable size and complexity, including prior experience bringing similar projects to completion on budget and in compliance with design, land use, service and other standards. Describe the past safety performance record and current safety capabilities of the firm or consortium of firms. Describe the past technical performance history on recent projects of comparable size and complexity, including disclosure of any legal claims, of the firm or consortium of firms.

Describe the length of time in business, business experience, public sector experience, and other engagements of the firm or consortium of firms. Include the identity of any firms that will provide design, construction and completion guarantees and warranties, and a description of such guarantees and warranties.

iii. For each firm or major subcontractor that will be utilized in the project, provide a statement listing all of the firm's prior projects and clients for the past 3 years and contact information for same (name, address, telephone number, e-mail address). If a firm has worked on more than ten (10) projects during this period, it may limit its prior project list to ten (10), but shall first include all projects similar in scope and size to the proposed project and, second, it shall include as many of its most recent projects as possible. Each firm or major subcontractor shall be required to submit all performance evaluation reports or other documents, which are in its possession evaluating the firm's performance during the preceding three years in terms of cost, quality, schedule maintenance, safety and other matters relevant to the successful project development, operation, and completion.

iv. Provide the names, prior experience, addresses, telephone numbers and e-mail addresses of persons within the firm or consortium of firms who will be directly involved in the project or who may be contacted for further information.

v. Provide a current or most recently audited financial statement of the firm or firms and each partner with an equity interest of twenty percent or greater.

vi. Identify any persons known to the proposer who would be obligated to disqualify themselves from participation in any transaction arising from or in connection to the project pursuant to The Virginia State and Local Government Conflict of Interest Act, Chapter 31 (§ 2.2-3100 et seq.) of Title 2.2.

vii. Identify proposed plan for obtaining sufficient numbers of qualified workers in all trades or crafts required for the project.

viii. For each firm or major subcontractor that will perform construction and/or design activities, provide the following information:

1. A sworn certification by an authorized representative of the firm attesting to the fact that the firm is not currently debarred or suspended by any federal, state or local government entity.

2. A completed qualification statement that reviews all relevant information regarding technical qualifications and capabilities, firm resources and business integrity of the firm, including but not limited to, bonding capacities, insurance coverage and firm equipment. This statement shall also include a mandatory disclosure by the firm for the past three years any of the following conduct:

a. Bankruptcy filings

b. Liquidated damages

c. Fines, assessments or penalties

d. Judgments or awards in contract disputes

e. Contract defaults, contract terminations

f. License revocations, suspensions, or other disciplinary actions

g. Prior debarments or suspensions by a governmental entity

h. Denials of prequalification, findings of non-responsibility

i. Safety past performance data, including fatality in-

cidents, "Experience Modification Rating," "Total Recordable Injury Rate," and "Total Lost Workday Incidence Rate"

j. Violations of any federal, state or local criminal or civil law

k. Criminal indictments or investigations

l. Legal claims filed by or against the firm

ix. Worker Safety Programs: Describe worker safety training programs, job-site safety programs, accident prevention programs, written safety and health plans, including incident investigation and reporting procedures.

b. Project Characteristics

i. Provide a description of the project, including the conceptual design. Describe the proposed project in sufficient detail so that type and intent of the project, the location, and the communities that may be affected are clearly identified.

ii. Identify and fully describe any work to be performed by the County or any other public entity.

iii. Include a list of all federal, state and local permits and approvals required for the project and a schedule for obtaining such permits and approvals.

iv. Identify any anticipated adverse social, economic, environmental and transportation impacts of the project measured against the County's comprehensive land use plan and applicable ordinances and design standards. Specify the strategies or actions to mitigate known impacts of the project. Indicate if an environmental and archaeological assessment has been completed.

v. Identify the projected positive social, economic, environmental and transportation impacts of the project measured against the County's comprehensive land use plan and applicable ordinances and design standards.

vi. Identify the proposed schedule for the work on the project, including sufficient time for the County's review and the estimated time for completion.

vii. Identify contingency plans for addressing public needs in the event that all or some of the project is not completed according to projected schedule.

viii. Propose allocation of risk and liability, and assurances for timely completion of the project.

ix. State assumptions related to ownership, legal liability, law enforcement and operation of the project and the existence of any restrictions on the County's use of the project.

x. Provide information relative to phased openings of the proposed project.

c. Project Financing

i. Provide a preliminary estimate and estimating methodology of the cost of the work by phase, segment, or both.

ii. Submit a plan for the development, financing and operation of the project showing the anticipated schedule on which funds will be required. Describe the anticipated costs of and proposed sources and uses for such funds, including any anticipated debt service costs. The operational plan should include appropriate staffing levels and associated costs based upon the County's adopted operational standards. Include any supporting due diligence studies, analyses, or reports.

iii. Include a list and discussion of assumptions underlying all major elements of the plan.

iv. Identify the proposed risk factors and methods for dealing with these factors. Describe methods and remedies associated with any financial default.

v. Identify any local, state or federal resources that the proposer contemplates requesting for the project along with an anticipated schedule of resource requirements. Describe the total commitment, if any, expected from governmental sources and the timing of any anticipated commitment, both one-time and on-going.

vi. Identify the need, if any, for the County to provide either its general obligation or moral obligation backing. The underlying assumptions should address this need and/or state that the credit would be via a "Service Agreement", for example. Any debt issuance should be expected to receive an investment grade rating from a nationally recognized bond rating agency. If the unenhanced rating is not investment grade, the County may require the use of credit enhancements.

vii. Outline what impact, if any, a drop in interest rates would have on the ultimate annual project cost. Indicate if there is a method

to refinance for cost savings. Indicate who would receive the benefit of any cost savings from a refinancing. Would the savings go to the County, would the savings be shared and to what extent, or does the firm only receive benefit of this potential?

viii. Outline the financial penalties, if any, that would result should the County wish to terminate a project early or restructure the cash flows for some reason of its own choosing. The firm should be specific on this point.

ix. If the firm has already chosen an underwriter(s), provide a breakout of the fees to any underwriting firm(s) and the type of obligation the firm(s) are using with a financing component. Be specific as to tax-exempt, taxable, floating rate, fixed rate, etc. If the firm has not yet chosen an underwriter(s), the County reserves the right to have input into the selection of that underwriter(s).

d. Project Benefit and Compatibility

i. Identify community benefits, including the economic impact the project will have on the local community in terms of amount of tax revenue to be generated for the County, the number jobs generated for area residents and level of pay and fringe benefits of such jobs, and the number and value of subcontracts generated for area subcontractors.

ii. Identify any anticipated public support or opposition, as well as any anticipated government support or opposition (including that in any affected jurisdiction), for the project.

iii. Explain the strategy and plans, including the anticipated timeline that will be carried out to involve and inform the general public, business community, and governmental agencies in areas affected by the project.

iv. Describe any anticipated significant benefits to the community and the County, including anticipated benefits to the economic, social, environmental, transportation, etc., condition of the County and whether the project is critical to attracting or maintaining competitive industries and businesses to the County.

v. Compatibility with the County's and/or affected jurisdiction's local comprehensive plan (including related environmental, land use and facility standards ordinances, where applicable), infrastructure development plans, transportation plans, the capital improvements plan and capital budget or other government spending plan.

e. Any Additional Information As the County May Reasonably Request

Format for Submissions at the Detailed Stage

If the County decides to proceed to the detailed phase of review with one or more proposals, the following information should be provided by the private entity unless waived by the County:

i. A topographical map (1:2,000 or other appropriate scale) depicting the location of the proposed project.

ii. Conceptual site plan indicating proposed location and configuration of the project on the proposed site;

iii. Conceptual (single line) plans and elevations depicting the general scope, appearance and configuration of the proposed project;

iv. Detailed description of the proposed participation, use and financial involvement of the County. Include the proposed terms and conditions for the project;

v. A list of public utility facilities, if any, that will be crossed by the qualifying project and a statement of the plans of the proposer to accommodate such crossings.

vi. Information relating to the current plans for development of facilities to be used by a public entity that are similar to the qualifying project being proposed by the private entity, if any, of each affected jurisdiction;

vii. A statement and strategy setting out the plans for securing all necessary property and/or easements. The statement must include the names and addresses, if known, of the current owners of the subject property as well as a list of any property the proposer intends to request the County or affected jurisdiction to condemn.

viii. A detailed listing of all firms, along with their relevant experience and abilities, that will provide specific design, construction and completion guarantees and warranties, and a brief description of such guarantees and warranties along with a record of any prior defaults for performance.

ix. A total life-cycle cost, including maintenance, specifying methodology and assumptions of the project or projects including major building systems (e.g., electrical, mechanical, etc.), and the proposed project start date. Include anticipated commitment of all parties; equity, debt, and other financing mechanisms; and a schedule of project revenues and project costs. The life-cycle cost analysis should include, but not be limited to, a detailed analysis

of the projected return, rate of return, or both, expected useful life of facility and estimated annual operating expenses using County adopted service levels and standards.

x. A detailed discussion of assumptions about user fees or rates, lease payments and other service payments, and the methodology and circumstances for changes, and usage of the projects over the useful life of the projects.

xi. Identification of any known government support or opposition, or general public support or opposition for the project. Government or public support should be demonstrated through resolution of official bodies, minutes of meetings, letters, or other official communications.

xii. Demonstration of consistency with appropriate County and/or affected jurisdiction comprehensive plans (including related environmental, land use and facility standards ordinances, where applicable), infrastructure development plans, transportation plans, the capital improvement plan and capital budget, or indication of the steps required for acceptance into such plans.

xiii. Explanation of how the proposed project would impact the County's or affected jurisdiction's development plans.

xiv. Description of an ongoing performance evaluation system or database to track key performance criteria, including but not limited to, schedule, cash management, quality, worker safety, change orders, and legal compliance.

xv. Identification of any known conflicts of interest or other factors that may impact the County's consideration of the proposal, including the identification of any persons known to the proposer who would be obligated to disqualify themselves from participation in any transaction arising from or in connection to the project pursuant to The Virginia State and Local Government Conflict of Interest Act, Chapter 31 (§ 2.2-3100 et seq.) of Title 2.2.

xvi. Acknowledge conformance with Sections 2.2–4367 through 2.2-4377 of the Code of Virginia, the Ethics in Public Contracting Act;

xvii. Additional material and information as the County may reasonably request.

5-6. Proposal Evaluation and Selection Criteria

The following items, along with the specified information required under V.A and V.B above, shall be considered in the evaluation and selection of PPEA proposals.

Qualifications and Experience

Factors to be considered in either phase of the County's review to determine whether the proposer possesses the requisite qualifications and experience will include the following:

a. Experience, training, and preparation with similar projects;

b. Demonstration of ability to perform work;

c. Demonstrated record of successful past performance, including timeliness of project delivery, compliance with plans and specifications, quality of workmanship, cost-control and project safety;

d. Demonstrated conformance with applicable laws, codes, standards, regulations, and agreements on past projects;

e. Leadership structure;

f. Project manager's experience;

g. Management approach;

h. Project staffing plans, the skill levels of the proposed workforce, and the proposed safety plans for the project;

i. Financial condition; and

j. Project ownership. Project Characteristics

Factors to be considered in determining the project characteristics include the following:

a. Project definition;

b. Proposed project schedule;

c. Operation of the project;

d. Technology; technical feasibility;

e. Conformity to State, County or affected jurisdiction laws, regulations, and standards;

f. Environmental impacts;

g. Condemnation impacts;

h. State and local permits; and

i. Maintenance of the project. Project Financing

Factors to be considered in determining whether the proposed project financing allows adequate access to the necessary capital to finance the project include the following:

a. Cost and cost benefit to the County;

b. Financing and the impact on the debt or debt burden of the County;

c. Financial plan including overall feasibility and reliability of plan; default implications; operator's past performance with similar plans and similar projects; degree to which operator has conducted due diligence investigation and analysis of proposed financial plan and results of any such inquiries or studies.

d. Estimated cost; including debt source, operating costs, etc., and

e. Life-cycle cost analysis.

Project Benefit and Compatibility

Factors to be considered in determining the proposed project's compatibility with the County's, affected jurisdiction's, or regional comprehensive or development plans include the following:

a. Community benefits; including the economic impact the project will have on the County in terms of amount of tax revenue to be generated for the County, the number jobs generated for area residents and level of pay and fringe benefits of such jobs, and the number and value of subcontracts generated for area subcontractors.

b. Community support or opposition, or both;

c. Public involvement strategy;

d. Public involvement strategy;

e. Compatibility with existing and planned facilities;

f. Compatibility with County, regional, and state economic development efforts; and

g. Compatibility with County's and affected jurisdiction's land use and transportation plans,

5-7. Comprehensive Agreement

At least 30 days prior to entering into an interim or comprehensive agreement under the Public-Private Educational Facilities and Infrastructure Act, a responsible public entity must hold a public hearing on the proposals. Prior to acquiring, designing, constructing, improving, renovating, expanding, equipping, maintaining, or operating the qualifying project, the selected proposer shall enter into a comprehensive agreement with the County. Each comprehensive agreement shall define the rights and obligations of the County and the selected proposer with regard to the project.

The terms of the comprehensive agreement shall be tailored to address the specifics of the project and shall include but not be limited to:

(a) The delivery of maintenance, performance and payment bonds or letters of credit in connection with any acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, or operation of the qualifying project in the forms and amounts satisfactory to the County and in compliance with Code of Virginia section 2.2-4337 for those components of the qualifying project that involve construction;

(b) The review and approval of plans and specifications for the qualifying project by the County;

(c) The rights of the County to inspect the qualifying project to ensure compliance with the comprehensive agreement;

(d) The maintenance of a policy or policies of liability insurance or self- insurance reasonably sufficient to insure coverage of the project and the tort liability to the public and employees and to enable the continued operation of the qualifying project;

(e) The monitoring of the practices of the operator by the County to ensure proper maintenance, safety, use and management of the qualifying project;

(f) The terms under which the operator will reimburse the County for services provided;

(g) The policy and procedures that will govern the rights and responsibilities of the County and the operator in the event that the comprehensive agreement is terminated or there is a material default by the operator including the conditions governing assumption of the duties and responsibilities of the operator by the County and the transfer or purchase of property or other interests of the operator by the County;

(h) The terms under which the operator will file appropriate financial statements on a periodic basis.

(i) The mechanism by which user fees, lease payments, or service payments, if any, may be established from time to time upon agreement of the parties.

Any payments or fees shall be the same for persons using the facility under like conditions and that will not materially discourage use of the qualifying project; classifications according to reasonable categories for assessment of user fees may be made.

(j) The terms and conditions under which the County will contribute financial resources, if any, for the qualifying project; and

(k) Other requirements of the PPEA or provisions that the County determines serve the public purpose of the PPEA.

(l) The County may include a gain-sharing component in any interim or comprehensive agreement for a qualifying project consisting of technology infrastructure, services or applications. "Gain sharing" is defined as a provision of an interim or comprehensive agreement where the County and the private entity agree to share a percentage of any savings that are realized and that can be attributed to the efforts of the private entity.

The comprehensive agreement and any amendments thereto shall be approved and entered into in writing by the Board of Supervisors.

Parties submitting proposals understand that representations, information and data supplied in support of, or in connection with proposals plays a critical role in the competitive evaluation process and in the ultimate selection of a proposal by the County. Accordingly, as part of the Comprehensive Agreement, the prospective operator and its team members shall certify that all material representations, information and data provided in support of, or in connection with, a proposal is true and correct. Such certifications shall be made by authorized individuals who have knowledge of the information provided in the proposal. In the event that material changes occur with respect to any representations, information or data provided for a proposal, the prospective operator shall immediately notify the County of same. Any violation of this section of the Comprehensive Agreement shall give the County the right to terminate the Agreement, withhold payment or other consideration due, and seek any other remedy available under the law.

5-8. Projects Intended for Use by the York County School Board

Proposals for qualifying projects for which the York County School Board shall be the sole using public entity shall be submitted to the County's Purchasing Office, and the County shall provide all required public notices. However, decisions whether to accept and consider any such proposal, and the evaluation or review of any such proposal, shall be by the School Board, and the School Board shall approve and execute the Comprehensive agreement.

APPENDIX 1

VIRGINIA CODE PROVISIONS APPLICABLE TO COUNTY PROCUREMENT

The following provisions of the Code of Virginia apply to the purchasing procedures of the County and are incorporated in this policy for the convenience of the user:

§ 2.2-4302.2.A.4: Competitive Negotiation, (Discussions, Negotiations and Award)

A. For 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. In addition, offerors shall be informed of any ranking criteria that will be used by the public body in addition to the review of the professional competence of the offeror. 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. In accordance with § 2.2-4342, proprietary information from competing offerors shall not be disclosed to the public or to competitors. For architectural or engineering services, the public body shall not request or require offerors to list any exceptions to proposed contractual terms and conditions, unless such terms and conditions are required by statute, regulation, ordinance, or standards developed pursuant to § 2.2-1132, until after the qualified offerors are ranked for negotiations. 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 and pursuant to contractual terms and conditions acceptable to the public body, 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. Notwithstanding the foregoing, if the terms and conditions for multiple awards are included in the Request for Proposal, a public body may award contracts to more than one offeror.

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.

B. Multiphase professional services contracts satisfactory and advantageous to the completion of large, phased, or long-term projects may be negotiated and awarded based on a fair and reasonable price for the first phase only, where the completion of the earlier phases is necessary to provide information critical to the negotiation of a fair and reasonable price for succeeding phases. Prior to entering into any such contract, the public body shall (i) state the anticipated intended total scope of the project and (ii) determine in writing that the nature of the work is such that the best interests of the public body require awarding the contract.

For the purposes of subdivision A 1, "experience modification factor" means a value assigned to an employer as determined by a rate service organization in accordance with its uniform experience rating plan required to be filed pursuant to subsection D of § 38.2-1913.

§ 2.2-4305. Competitive procurement by localities 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 governing body or subdivision thereof for which state funds of not more than $50,000 in the aggregate of 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 subsection D of §2.2-4303. The procedure for the advertising for bids or for proposals and for letting of the contract shall conform, mutatis mutandis, to this chapter.

§ 2.2-4311. Employment discrimination by contractor prohibited.

All public bodies shall include in every contract of over $10,000 the following provisions:

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

   a. The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, or other basis prohibited by state law relating to discrimination in employment, except where there 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.

§ 2.2-4312. Drug-free workplace to be maintained by contractor; required contract provisions.

All public bodies shall include in every contract over $10,000 the following provisions:

During the performance of this contract, the contractor agrees to (i) provide a drug-free workplace for the contractor's employees; (ii) post in conspicuous places, available to employees and applicants for employment, a statement notifying employees that the unlawful manufacture, sale, distribution, dispensation, possession, or use of a controlled substance or marijuana is prohibited in the contractor's workplace and specifying the actions that will be taken against employees for violations of such prohibition; (iii) state in all solicitations or advertisements for employees placed by or on behalf of the contractor that the contractor maintains a drug-free workplace; and (iv) include the provisions of the foregoing clauses in every subcontract or purchase order of over $10,000, so that the provisions will be binding upon each subcontractor or vendor.

For the purposes of this section, "drug-free workplace" means a site for the performance of work done in connection with a specific contract awarded to a contractor in accordance with this chapter, the employees of whom are prohibited from engaging in the unlawful manufacture, sale, distribution, dispensation, possession or use of any controlled substance or marijuana during the performance of the contract.

§ 2.2-4315. Use of brand names.

Unless otherwise provided in the Invitation to Bid, the name of a certain brand, make or manufacturer shall not restrict bidders to the specific brand, make or manufacturer named; and shall be deemed to conveys the general style, type, character, and quality of the article desired, and any article which that 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.

§ 2.2-4317. 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 shall be pursuant to a prequalification process for construction projects adopted by the public body. The process shall be consistent with the provisions of this section.

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. The 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 § 2.2-4342.

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.

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 who submitted an application whether that contractor has been prequalified. In the event that a contractor is denied prequalification, the written notification to the contractor shall state the reasons for the 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 § 2.2-4357.

C. 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 the 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 judg-

ments 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 6 (§ 2.2-4367 et seq.) of this chapter, (ii) the Virginia Governmental Frauds Act (§ 18.2-498.1 et seq.), (iii) Chapter 4.2 (§ 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.

D. If a public body has a prequalification ordinance that provides for minority participation in municipal construction contracts, that public body may also deny prequalification based on minority participation criteria. However, 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.

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

§ 2.2-4330. 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 consid-

eration if the price bid was substantially lower than the other bids due solely to a mistake in the bid, 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.

If a bid contains both clerical and judgment mistakes, a bidder may withdraw his bid from consideration if the price bid would have been substantially lower than the other bids due solely to the clerical mistake, that was an unintentional arithmetic error or an unintentional omission of a quantity of work, labor or material made directly in the compilation of a bid that shall 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, the work papers, documents and materials may be considered as trade secrets or proprietary information subject to the conditions of subsection F of § 2.2-4342. 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. The 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 construction contracts.

C. No bid shall 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 in accordance with 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.

§ 2.2-4333. Retainage on construction contracts.

A. In any public contract for construction that 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 ensure faithful performance of the contract. All amounts withheld may be included in the final payment.

B. Any subcontract for a public project that provides for similar progress payments shall be subject to the provisions of this section.

§ 2.2-4334 Deposit of certain retained funds on certain contracts with local 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 adopted by the political subdivision entering into the contract shall be substantially the same as that used by the 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 elec-

tric 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 that provides for similar progress payment shall be subject to the provisions of this section.

§ 2.2-4335. Public construction contract provisions barring damages for unreasonable delays declared void.

A. Any provisions contained in any public construction contract 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 the delay is caused by acts or omissions of the public body, its agents or employees and due to causes within their control shall be void and unenforceable, as against public policy.

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 that is determined through litigation or arbitration to be false or to have no basis in law or in fact.

D. A public body denying a contractor's claim for costs or damages due to the alleged delaying of the contractor in the performance of work under any public construction contract shall be liable to and shall pay such contractor a percent-

age of all costs incurred by the contractor to investigate, analyze, negotiate, litigate and arbitrate the claim. The percentage paid by the public body shall be equal to the percentage of the contractor's total delay claim for which the public body's denial is determined through litigation or arbitration to have been made in bad faith.

§ 2.2-4336. 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 that is authorized to do business in Virginia, as a guarantee that if the contract is awarded to the bidder, he 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.

§ 2.2-4337. Performance and payment bonds.

A. Upon the award of any (i) public construction contract exceeding $100,000 awarded to any prime contractor or (ii) construction contract exceeding $100,000 awarded to any prime contractor requiring the performance of labor or the furnishing of materials for buildings, structures or other improvements to real property owned by a public body, the contractor shall furnish to the public body the following bonds:

a. Except for transportation-related projects, 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. For transportation-related projects, such bond shall be in a form and amount satisfactory to the public body.

b. A payment bond in the sum of the contract amount. The 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 furtherance of the work provided for in the contract, and shall be conditioned upon the prompt payment for all materials furnished or labor supplied or performed in the furtherance 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 the bonds shall be executed by one or more surety companies selected by the contractor that are authorized to do business in Virginia.

C. If the public body is the Commonwealth, or any agency or institution thereof, the 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 that 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 the 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 that are directly with the subcontractor for performing labor and furnishing materials in the prosecution of the work provided for in the subcontract.

§ 2.2-4338. 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 this section shall not apply to the Department of Transportation.

§ 2.2-4340. 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 in all other cases 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 that gave rise to the action.

§ 2.2-4341. Actions on payment bonds; waiver of right to sue.

A. Subject to the provisions of subsection B, any claimant who has performed labor or furnished material in accordance with the contract documents in futherance of the work provided in any contract for which a payment bond has been given, and who has not been paid in full before the expiration of ninety days after the day on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment, may bring an action on the payment bond to recover any amount due him for the labor or material. 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 but who has no contractual relationship, express or implied, with the contractor, may bring an action on the contractor's payment bond only if he has given written notice to the 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. 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 shall be brought within one year after the day on which the person bringing such action last performed labor or last furnished or supplied materials.

D. Any waiver of the right to sue on the payment bond required by this section shall be void unless it is in writing, signed by the person whose right is waived, and executed after such person has performed labor or furnished material in accordance with the contract documents.

§ 2.2-4343.1. Permitted contracts with certain religious organizations; purpose; limitations.

A. It is the intent of the General Assembly, in accordance with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193, to authorize public bodies to enter into contracts with faith-based organizations for the purposes described in this section on the same basis as any other nongovernmental source without impairing the religious character of such organization, and without diminishing the religious freedom of the beneficiaries of assistance provided under this section.

B. For the purposes of this section, "faith-based organization" means a religious organization that is or applies to be a contractor to provide goods or services for programs funded by the block grant provided pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193.

C. Public bodies, in procuring goods or services, or in making disbursements pursuant to this section, shall not (i) discriminate against a faith-based organization on the basis of the organization's religious character or (ii) impose conditions that (a) restrict the religious character of the faith-based organization, except as provided in subsection F, or (b) impair, diminish, or discourage the exercise of religious freedom by the recipients of such goods, services, or disbursements.

D. Public bodies shall ensure that all invitations to bid, requests for proposals, contracts, and purchase orders prominently display a nondiscrimination statement indicating that the public body does not discriminate against faith-based organizations.

E. A faith-based organization contracting with a public body (i) shall not discriminate against any recipient of goods, services, or disbursements made pursuant to a contract authorized by this section on the basis of the recipient's religion, religious belief, refusal to participate in a religious practice, or on the basis of race, age, color, gender or national origin and (ii) shall be subject to the same rules as other organizations that contract with public bodies to account for the use of the funds provided; however, if the faith-based organization segregates public funds into separate accounts, only the accounts and programs funded with public funds shall be subject to audit by the public body. Nothing in clause (ii) shall be construed to supersede or otherwise override any other applicable state law.

F. Consistent with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193, funds provided for expenditure pursuant to contracts with public bodies shall not be spent for sectarian worship, instruction, or proselytizing; however, this prohibition shall not apply to expenditures pursuant to contracts, if any, for the services of chaplains.

G. Nothing in this section shall be construed as barring or prohibiting a faith-based organization from any opportunity to make a bid or proposal or contract on the grounds that the faith-based organization has exercised the right, as expressed in 42 U.S.C. (§ 2000e-1 et seq.), to employ persons of a particular religion.

H. If an individual, who applies for or receives goods, services, or disbursements provided pursuant to a contract between a public body and a faith-based organization, objects to the religious character of the faith-based organization from which the individual receives or would receive the goods, services, or disbursements, the public body shall offer the individual, within a reasonable period of time after the date of his objection, access to equivalent goods, services, or disbursements from an alternative provider. The public body shall provide to each individual who applies for or receives goods, services, or disbursements provided pursuant to a contract between a public body and a faith-based organization a notice in bold face type that states: "Neither the public body's selection of a charitable or faith-based provider of services nor the expenditure of funds under this contract is an endorsement of the provider's charitable or religious character, practices, or expression. No provider of services

may discriminate against you on the basis of religion, a religious belief, or your refusal to actively participate in a religious practice. If you object to a particular provider because of its religious character, you may request assignment to a different provider. If you believe that your rights have been violated, please discuss the complaint with your provider or notify the appropriate person as indicated in this form."

§ 2.2-4367. Purpose.

The provisions of this article supplement, but shall not supersede, other provisions of law including, but not limited to, the State and Local Government Conflict of Interests Act (§2.2-3100 et seq.), the Virginia Governmental Frauds Act (§ 18.2-498.1 et seq.) and Articles 2 (§ 18.2-438 et seq.) and 3 (§18.2-446 et seq.) of Chapter 10 of Title 18.2.

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

§ 2.2-4368. Definitions. – As used in this article:

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

"Official responsibility" means 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" means a personal interest in a contract as defined in the State and Local Government Conflict of Interests Act (§2-2.3100 et seq.).

"Procurement transaction" means 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" means any person employed by a public body, including elected officials or appointed members of governing bodies.

§ 2.2-4369. Proscribed Participation by employees in procurement transactions.

Except as may be specifically allowed by subdivisions A 2 and A 3 of § 2.2-3112, 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:

A. The employee is contemporaneously employed by a bidder, offeror or contractor involved in the procurement transaction;

B. 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;

C. 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

D. 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.

§ 2.2-4370. 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.

§ 2.2-4371. Prohibition on solicitation or acceptance of gifts; gifts by bidders, offerors, contractor or subcontractors prohibited.

A. 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.

B. 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.

§ 2.2-4372. 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 of 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 shall be recoverable from both the maker and recipient. Recovery from one offending party shall not preclude recovery from other offending parties.

§ 2.2-4373 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 that 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 the person would limit the number of potential qualified bidders or offerors in a manner contrary to the best interests of the public body.

§ 2.2-4374. 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 § 2.2-3101.

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 who has provided or is currently providing design services specifying a sole source for such materials, supplies or equipment to be used in the 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 § 2.2-3101.

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 or the Virginia Port Authority.

§2.2-4375. 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 the certification shall be punished as provided in §2.2-4377.

§2.2-4376. 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 it to contain any false, fictitious or fraudulent statement or entry.

§ 2.2-4377. Penalty for violation.

Any person convicted of a willful violation of any provision of this article shall be guilty of a Class 1 misdemeanor. Upon conviction, any public employee, in addition to any other fine or penalty provided by law, shall forfeit his employment.

APPENDIX 2

POLICIES AND PROCEDURES FOR PROCUREMENT OF GOODS AND SERVICES WITH FUNDING FROM FEDERAL GRANTS

1001. Purpose

This policy communicates the County of York's methods for the procurement of goods and services obtained with federal grants and sets forth the requirements provided by the Office of Management and Budget (OMB) Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Final Rule Title 2 of the Code of Federal Regulations; 2 CFR 200.

OMB Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Final Rule Title 2 of the Code of Federal Regulations; 2 CFR 200 supersedes and streamlines requirements from OMB Circulars A-21, A-87, A-110, A-122, A-89, A-102, A-133 and the guidance in Circular A-50 on Single Audit Act follow-up. 2 CFR 200, also referred to as the "Super Circular", consolidates the guidance previously contained in the aforementioned citations into a streamlined format that aims to improve both the clarity and accessibility of the guidance.

The effective date of 2 CFR 200 is December 26, 2014. Fiscal policies and OMB Circulars A-87, A-110, A-122, and A-133 requirement are still in effect for funding distributed *prior* to December 26, 2014. Funding awarded after December 26, 2014 must be in compliance with 2 CFR 200.

1002. Cash Management

The County will comply with applicable methods and procedures for payment that minimize the time elapsing between the transfer of funds and disbursement by the County. However, if the County receives an advance in federal grant funds, the County will remit interested earned on the advanced payment quarterly to the federal agency consistent with 2 C.F.R. 200.305(b)(9).

Payment Methods

Reimbursements:
The County will request reimbursement for actual expenditures incurred under the federal grants as necessary.

Consistent with state and federal requirements, the County will maintain source documentations supporting the federal expenditures (invoices, time sheets, payroll stubs, etc.) and will make sure documentation is available for review upon request.

Reimbursements of actual expenditures do not require interest calculations.

Advances:

To the extent the County receives advance payments of federal grant funds, the County will strive to expend the federal funds on allowable expenditures as expeditiously as possible.

The County will hold federal advance payments in interest-bearing accounts, unless an allowable exception applies. The County will begin to calculate interest earned on cash balances once fund are deposited into the County's account.

The County will remit interest earned on grant funds annually to the U.S. Department of Health and Human Services Payment Management System (regardless of the federal awarding agency for the grant) through an electronic medium using either Automated Clearing House (ACH) network or a Fedwire Funds Service payment. 2 C.F.R. 200.305(b)(9). The County may retain up to $500 of interest per year.

1003. Conflict of Interest

In accordance with 2 C.F.R 200.18(c)(1), no employee, officer, or agent may participate in the selection, award, or administration of a contract supported by a federal award if he or she has real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract.

The officers, employees, and agents of the County may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts, unless the gift is an unsolicited item of nominal value.

1004. General Procurement Standards

1004.1 Procurement procedures will avoid acquisition of unnecessary or duplicative items and promote cost-effective use of shared services by entering into state and local intergovernmental agreements for procurement or use of common or shared goods and services where appropriate. Departments are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs. In addition, departments are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions.

1004.2 The County of York will award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as:

- Contractor integrity,
- Compliance with public policy,
- Record of past performance, and

- Financial and technical resources.

The County of York will maintain records sufficient to detail the history of procurement. These records will include, but are not limited to:

- Rationale for the method of procurement,
- Selection of contract type,
- Basis for contractor selection or rejection, and
- The basis for the contract price.

1004.3 Time and material contracts [For major construction only; 2 CFR 200.318(j)]: the County of York may use time and material type contracts only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk.

1004.4 All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards provided in section 200.319 of 2 CFR 200. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work or invitations for bids or requests for proposals must be excluded from competing from such procurements.

The County of York procurement transactions will contain no requirements that unduly restrict competition as specified in 200.319(a) and (b).

The County of York procurement procedures will ensure that all solicitations:

-Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured in a manner that does not unduly restrict competition; and,

-Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

The County of York will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free completion. The County of York will not preclude potential bidders from qualifying during the solicitation period.

1005. Methods of Procurement

The procurement of goods and services with funding from federal grants must use one of the following methods:

1. Micro-purchases (purchases of $1-$3,000): Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which

does not exceed $3,000 (or $2,000 in the case of acquisitions for construction subject to the Davis-Bacon Act). To the extent practicable, the County of York will distribute micro-purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the County considers the price to be reasonable.

Small purchases (purchases of $3,001 - $10,000): Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than $10,000. If small purchase procedures are used, price or rate written quotations must be obtained from an adequate number of qualified sources.

2. All purchases $10,000 or greater must follow the County's Purchasing Policy.

3. Noncompetitive Proposals (Sole Source): Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply:

   a. The item is available only from a single source; or

   b. The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation; or

   c. The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; or

   d. After solicitation of a number of sources, competition is determined inadequate.

1006. Contracting with Small and Minority Businesses, Women's Business Enterprises, and Labor Surplus Area Firms

The County of York will take necessary affirmative steps in accordance with 2 CFR 200.321(b) in ensure that minority businesses, women's business enterprises, and labor surplus firms are used when possible.

1007. Contract Cost and Price

1. The County of York will perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold ($150,000) including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the County will make independent estimates before receiving bids or proposals.

2. Where applicable, the County will negotiate profit as a separate element of the

price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

3. Costs or prices based on estimated costs for contacts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the County under Subpart E – Cost Principles of the Uniform Administrative Guidance 2 CFR Part 200.

4. The cost plus a percentage of cost and percentage of construction cost methods of contracting are not allowable.

1008. Procurement Review (2 CFR 200.324)

1. The County of York will make available, upon request by the Federal awarding agency or passing-through entity, technical specifications on proposed procurements where the Federal awarding agency or pass-through entity believes such review is needed to ensure that the item or service specified is the one being proposed for acquisition.

2. The County of York will make available upon request, for the Federal awarding agency or passing-through entity pre-procurement review, procurement documents, such as requests for proposals or invitations for bids, or independent cost estimates when the circumstances detailed in 200.323(b) apply.

1009. Geographical Preferences

The County must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable federal statues expressly mandate or encourage geographic preference. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

1010. Allowability of Costs

When determining how the County will spend its grant funds, departments will review the proposed cost to determine whether it is an allowable use of federal grant funds *before* obligating and spending those funds on the proposed good or service. All costs supported by federal grant funds must meet the standards outlined in 2 C.F.R. Part 200, Subpart E, which are provided in the bulleted list below. Departments must consider these factors when making an allowability determination.

- **Be Necessary and Reasonable for the performance of the federal award.** Department must consider these elements when determining the reasonableness of a cost. A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision to incur the cost was made. For example, reasonable means that sound business practices were followed, and purchases were comparable to market prices.

  When determining reasonableness of a cost, considerations must be given to:

  - Whether the cost is a type generally recognized as ordinary and necessary for the operation of the County or the proper and efficient performance of the federal award.

  - The restrains or requirements imposed by factors, such as: sound business practices; arm's length bargaining; federal, state, and other laws and regulations; and terms and conditions of the federal award.

  - Market prices for comparable goods or services for the geographic area

  - Whether the individuals concerned acted with prudence in the circumstances considering their responsibilities to the County, its employees, the public at large, and the federal government.

  - Whether the County significantly deviates from its established practices and policies regarding the incurrence of costs, which may unjustifiably increase the federal award's cost. 2 C.F.R. 200.404.

  When determining whether a cost is necessary, consideration may be given to:

  - Whether the cost is needed for the proper and efficient performance of the grant program.

  - Whether the cost is identified in the approved budget or application.

  - Whether the cost aligns with identified needs based on results and findings from a needs assessment.

  - Whether the cost addresses program goals and objectives and is based on program data.

- **Allocable to the federal award.** A cost is allocable to the federal award if the goods or services involved are chargeable or assignable to the federal award in accordance with the relative benefit received. This means that the federal grant program derived a benefit in proportion to the funds charged by the program. 2 C.F.R. 220.405

- **Consistent with policies and procedures that apply uniformly to both federally-**

financed and other activities of the County.

- **Conform to any limitations or exclusions set forth as cost principles in Part 200 or in the terms and conditions of the federal award.**
- **Consistent treatment.** A cost cannot be assigned to a federal award as a direct cost if any other cost incurred for the same purpose in like circumstances has been assigned as an indirect cost under another award.
- **Adequately documented.** All expenditures must be properly documented.
- **Be determined in accordance with general accepted accounting principles (GAAP), unless provided otherwise in Part 200.**
- **Not included as a match or cost-share, unless the specific federal program authorizes federal costs to be treated as such.**
- **Be the net of all applicable credits.**

1011. Selected Items of Cost

Part 200 examines the allowability of 55 specific cost items (commonly referred to as Selected Items of Cost) at 2 C.F.R. 200.420-200.475. Do not assume that an item is allowable because it is specifically listed in the regulation as it may be unallowable despite its inclusion in the selected items of cost section. The expenditure may be unallowable for a number of reasons, including: the express language of the regulation states the item is unallowable; the terms and conditions of the grant deem the item unallowable; or state/local restrictions dictate that the item is unallowable. The item may also be unallowable because it does not meet one of the cost principles, such as being reasonable because it is considered too expensive. If an item is unallowable for any of these reasons, federal funds cannot be used to purchase it.

Likewise, it is possible for the state and/or County of put additional requirements on a specific item of cost. Under such circumstances, the stricter requirements must be met for a cost to be allowable. Departments must consult federal, State, and County requirements when spending federal funds.

1012. Contract Specifications

All contracts made by the non-Federal entity under the Federal award must contain provisions covering the following, as applicable:

a) Contracts for more than the simplified acquisition threshold currently set at $150,000 must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.

b) All contracts in excess of $10,000 must address termination for cause and for convenience by the non-Federal entity including the manner by which it will be affected and the basis for settlement.

c) Except as otherwise provided under 41 CFR Part 60, all contracts that meet the definition of "federally assisted construction contract" must include the equal opportunity clause provided under 41 CFR 60-1.4(b), in accordance with Executive Order 11246, "Equal Employment Opportunity" (30 FR 12319, 12935, 3 CFR Part 1964-1965 Comp., p.339), as amended by Executive Order 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and implementing regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

d) When required by Federal program legislation, all prime construction contracts in excess of $2,000 awarded by non-Federal entities must include a provision for compliance with the Davis-Bacon Act as supplemented by Department of Labor regulations.

e) Where applicable, all contracts awarded by the non-Federal entity in excess of $100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations.

f) If the Federal award meets the definition of "funding agreement" under 37 CFR 401.2 (a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that "funding agreement", the recipient or subrecipient must comply with the requirements of 37 CFR Part 401 , "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," and by any implementing regulations issued by the awarding agency.

g) Contracts and subgrants of amounts in excess of $150,000 must contain a provision that requires the non-Federal award to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act and the Federal Water Pollution Control Act as amended.

h) Mandatory standards issued in compliance with the Energy Policy and Conservation Act

i) Debarment and Suspension—A contract award must not be made to parties listed on the government-wide Excluded Parties List System in the System for Award Management (SAM), in accordance with the OMB guidelines.

j) Byrd Anti-Lobbying Amendment (31.US.C.1352) Contractors that apply or bid for an award of $100,000 or more must file the required certification.

APPENDIX 3

Chapter 43.1. Construction Management and Design-Build Contracting.

Article 1. General Provisions.

§ 2.2-4378. Purpose; applicability.

A. The purpose of this chapter is to enunciate the public policies pertaining to governmental procurement of construction utilizing the construction management and design-build procurement methods. Notwithstanding any other provision 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 chapter and § 2.2-1502.

B. Except as provided in subsection C, this chapter shall apply regardless of the source of financing, whether it is general fund, non-general fund, federal trust fund, state debt, or institutional debt.

C. The following shall be exempt from the provisions of this chapter:

1. Projects of a covered institution that are to be funded exclusively by a foundation that (i) exists for the primary purpose of supporting the covered institution and (ii) is exempt from taxation under § 501(c)(3) of the Internal Revenue Code; and

2. Transportation construction projects procured and awarded by the Commonwealth Transportation Board pursuant to subsection B of § 33.2-209.

D. The provisions of this chapter shall supplement the provisions of the Virginia Public Procurement Act (§ 2.2-4300 et seq.), which provisions shall remain applicable. In the event of any conflict between this chapter and the Virginia Public Procurement Act (§ 2.2-4300 et seq.), the Restructured Higher Education Financial and Administrative Operations Act of 2005 (§ 23.1-1000 et seq.), or any other provision of law, this chapter shall control.

2017, cc. 699, 704.

§ 2.2-4379. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Complex project" means a construction project that includes one or more of the following significant components: difficult site location, unique equipment, specialized building systems, multifaceted program, accelerated schedule, historic designation, or intricate phasing or some other aspect that makes competitive sealed bidding not practical.

"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.

"Covered institution" means a public institution of higher education operating (i) subject to a management agreement set forth in Article 4 (§ 23.1-1004 et seq.) of Chapter 10 of Title 23.1, (ii) under a memorandum of understanding pursuant to § 23.1-1003, or (iii) under the pilot program authorized in the appropriation act.

"Department" means the Department of General Services.

"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, or other item specified in the contract.

"Public body" means the same as that term is defined in § 2.2-4301.

"State public body" means any authority, board, department, instrumentality, agency, or other unit of state government. "State public body" does not include any covered institution; any county, city, or town; or any local or regional governmental authority. 2017, cc. 699, 704.

Article 2. Procedures for State Public Bodies.

§ 2.2-4380. Construction management or design-build contracts for state public bodies authorized.

A. Any state public body may enter into a contract for construction on a fixed price or not-to-exceed price construction management or design-build basis, provided that such public body complies with the requirements of this article and the procedures adopted by the Secretary of Administration for using construction management or design-build contracts.

B. Procedures adopted by a state public body pursuant to this article shall include the following requirements:

1. A written determination is made in advance by the state public body that competitive sealed bidding is not practicable or fiscally advantageous, and such writing shall document the basis for the determination to use construction management or design-build. The determination shall be included in the Request for Qualifications and maintained in the procurement file;

2. Prior to making a determination as to the use of construction management or design-build for a specific construction project, a state public body shall have in its employ or under contract a licensed architect or engineer with professional competence appropriate to the project who shall (i) advise the public body regarding the use of construction management or de-

sign-build for that project and (ii) assist the public body with the preparation of the Request for Proposal and the evaluation of such proposals;

3. Public notice of the Request for Qualifications is posted on the Department's central electronic procurement website, known as eVA, at least 30 days prior to the date set for receipt of qualification proposals;

4. For construction management contracts, the contract is entered into no later than the completion of the schematic phase of design, unless prohibited by authorization of funding restrictions;

5. Prior construction management or design-build experience or previous experience with the Department's Bureau of Capital Outlay Management shall not be required as a prerequisite for award of a contract. However, in the selection of a contractor, a state public body may consider the experience of each contractor on comparable projects;

6. Construction management contracts shall require that (i) no more than 10 percent of the construction work, as measured by the cost of the work, be performed by the construction manager with its own forces and (ii) the remaining 90 percent of the construction work, as measured by the cost of the work, be performed by subcontractors of the construction manager, which the construction manager shall procure by publicly advertised, competitive sealed bidding to the maximum extent practicable; and

7. The procedures allow for a two-step competitive negotiation process.

C. The Department shall evaluate the proposed procurement method selected by the state public body and make its recommendation as to whether the use of the construction management or design-build procurement method is appropriate for the specific project. In its review, the Department shall also consider:

1. The written determination of the state public body;

2. The compliance by the state public body with subdivisions B 1, 2, and 7;

3. The project cost, expected timeline, and use;

4. Whether the project is a complex project; and

5. Any other criteria established by the Department to evaluate the proposed procurement method for the project.

D. The Department shall conduct its review within five working days after receipt of the written determination and render its written recommendation within such five-working-day period. The written recommendation of the Department shall be maintained in the procurement file.

E. If a state public body elects to proceed with the project using a construction

management or design-build procurement method despite the recommendation of the Department to the contrary, such state public body shall state in writing its reasons therefor and any justification for not following the recommendation of the Department and submit same to the Department. The written statement of a state public body's decision to not follow the recommendation of the Department shall be maintained in the procurement file.

2017, cc. 699, 704.

Article 3. Procedures for Covered Institutions.

§ 2.2-4381. Construction management or design-build contracts for covered institutions authorized.

A. Any covered institution may enter into a contract for construction on a fixed price or not-to-exceed price construction management or design-build basis, provided that such institution complies with the requirements of this article and with the procedures adopted by the Secretary of Administration for using construction management or design-build contracts.

B. Covered institutions shall:

1. Develop procedures for determining the selected procurement method which, at a minimum, shall consider cost, schedule, complexity, and building use;

2. Submit such procedures, and any subsequent changes to adopted procedures, to the Department for review and comment; and

3. Submit Department-reviewed procedures to its board of visitors for adoption.

C. Procedures adopted by a board of visitors pursuant to this article shall include the following requirements:

1. A written determination is made in advance by the covered institution that competitive sealed bidding is not practicable or fiscally advantageous, and such writing shall document the basis for the determination to use construction management or design-build. The determination shall be included in the Request for Qualifications and maintained in the procurement file;

2. Prior to making a determination as to the use of construction management or design-build for a specific construction project, a covered institution shall have in its employ or under contract a licensed architect or engineer with professional competence appropriate to the project who shall (i) advise the covered institution regarding the use of construction management or design-build for that project and (ii) assist the covered institution with the preparation of the Request for Proposal and the evaluation of such

proposals;

3. Public notice of the Request for Qualifications is posted on the Department's central electronic procurement website, known as eVA, at least 30 days prior to the date set for receipt of qualification proposals;

4. For construction management contracts, the contract is entered into no later than the completion of the schematic phase of design, unless prohibited by authorization of funding restrictions;

5. Prior construction management or design-build experience or previous experience with the Department's Bureau of Capital Outlay Management shall not be required as a prerequisite for award of a contract. However, in the selection of a contractor, a covered institution may consider the experience of each contractor on comparable projects;

6. Construction management contracts shall require that (i) no more than 10 percent of the construction work, as measured by the cost of the work, be performed by the construction manager with its own forces and (ii) the remaining 90 percent of the construction work, as measured by the cost of the work, be performed by subcontractors of the construction manager, which the construction manager shall procure by publicly advertised, competitive sealed bidding to the maximum extent practicable; and

7. The procedures allow for a two-step competitive negotiation process.

D. The Department shall evaluate the proposed procurement method selected by a covered institution and make its recommendation as to whether the use of the construction management or design-build procurement method is appropriate for the specific project. In its review, the Department shall also consider:

1. The written determination of the covered institution;

2. The compliance by the covered institution with subdivisions C 1, 2, and 7;

3. The project cost, expected timeline, and use;

4. Whether the project is a complex project; and

5. Any other criteria established by the Department to evaluate the proposed procurement method for the project.

E. The Department shall conduct its review within five working days after receipt of the written determination and render its written recommendation within such five-working-day period. The written recommendation of the Department shall be maintained in the procurement file.

F. If a covered institution elects to proceed with the project using a construction

management or design-build procurement method despite the recommendation of the Department to the contrary, such covered institution shall state in writing its reasons therefor and any justification for not following the recommendation of the Department and submit same to the Department. The written statement of a covered institution's decision to not follow the recommendation of the Department shall be maintained in the procurement file.

2017, cc. 699, 704.

Article 4. Procedures for Local Public Bodies.

§ 2.2-4382. Design-build or construction management contracts for local public bodies authorized.

A. Any local public body may enter into a contract for construction on a fixed price or not-to-exceed price construction management or design-build basis, provided that the local public body (i) complies with the requirements of this article and (ii) has by ordinance or resolution implemented procedures consistent with the procedures adopted by the Secretary of Administration for utilizing construction management or design-build contracts.

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

C. A written determination shall be made in advance by the local public body that competitive sealed bidding is not practicable or fiscally advantageous, and such writing shall document the basis for the determination to utilize construction management or design-build. The determination shall be included in the Request for Qualifications and be maintained in the procurement file.

D. Procedures adopted by a local public body for construction management pursuant to this article shall include the following requirements:

1. Construction management contracts may be utilized for projects where the project cost is expected to be more than $10 million;

2. Construction management may be utilized on projects where the project cost is expected to be less than $10 million, provided that (i) the project is a complex project and (ii) the project procurement method is approved by the local governing body. The written approval of the governing body shall be maintained in the procurement file;

3. Public notice of the Request for Qualifications is posted on the Department's central electronic procurement website, known as eVA, at least 30

days prior to the date set for receipt of qualification proposals;

4. The construction management contract is entered into no later than the completion of the schematic phase of design, unless prohibited by authorization of funding restrictions;

5. Prior construction management or design-build experience or previous experience with the Department's Bureau of Capital Outlay Management shall not be required as a prerequisite for award of a contract. However, in the selection of a contractor, the local public body may consider the experience of each contractor on comparable projects;

6. Construction management contracts shall require that (i) no more than 10 percent of the construction work, as measured by the cost of the work, be performed by the construction manager with its own forces and (ii) the remaining 90 percent of the construction work, as measured by the cost of the work, be performed by subcontractors of the construction manager, which the construction manager shall procure by publicly advertised, competitive sealed bidding to the maximum extent practicable;

7. The procedures allow for a two-step competitive negotiation process; and

8. Price is a critical basis for award of the contract.

E. Procedures adopted by a local public body for design-build construction projects shall include a two-step competitive negotiation process consistent with the standards established by the Division of Engineering and Buildings of the Department for state public bodies.

2017, cc. 699, 704.

Article 5. Reporting Requirements for All Public Bodies.

§ 2.2-4383. Reporting requirements.

A. The Department shall report by December 1 of each year to the Governor and the Chairmen of the House Committee on Appropriations, the House Committee on General Laws, the Senate Committee on Finance, and the Senate Committee on General Laws and Technology the following information: (i) the number of projects reviewed pursuant to Articles 2 (§ 2.2-4380) and 3 (§ 2.2-4381) and (ii) for each project (a) the identity of the state public body or covered institution and a description of each such project, (b) the estimated cost of the project at the time of the Department's review, (c) the recommendation made by the Department concerning the proposed procurement method, and (d) the final procurement method used by the state public body or covered institution.

B. All public bodies subject to the provisions of this chapter shall report no later than November 1 of each year to the Director of the Department on all completed capital projects in excess of $2 million, which report shall include at a mini-

mum (i) the procurement method utilized, (ii) the project budget, (iii) the actual project cost, (iv) the expected timeline, (v) the actual completion time, and (vi) any post-project issues.

The Department shall consolidate received report data and submit the consolidated data to the Governor and Chairmen of the House Committee on Appropriations and the Senate Committee on Finance by December 1 of each year.

A Copy Teste:

Mary E. Simmons
Deputy Clerk