

HARRISONBURG REDEVELOPMENT AND HOUSING AUTHORITY

PURCHASING AND CONTRACTING POLICY

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HARRISONBURG REDEVELOPMENT AND HOUSING AUTHORITY

PURCHASING AND CONTRACTING POLICY

ARTICLE 1 GENERAL PROVISIONS

§ 1.1 Preamble.

These provisions shall collectively be the purchasing and contracting policy for the Harrisonburg Redevelopment and Housing Authority (the “Authority”).

§ 1.2 Purpose.

The purpose of this policy is to increase public confidence in purchasing by the Authority, to encourage competition among vendors and contractors, to administer fair and impartial purchasing procedures, and to obtain high quality goods and services at a reasonable price.

§ 1.3 Application.

(a) This policy applies to the procurement of goods, services, insurance and construction by the Authority from nongovernmental sources.

(b) When a procurement transaction involves the expenditure of federal assistance or contract funds, the receipt of which is conditioned on compliance with mandatory requirements in federal laws or regulations not in conformance with the provisions of the Virginia Public Procurement Act (Va. Code § 2.2-4300, *et seq.*) and this Purchasing and Contracting Policy, the Authority may comply with such federal requirements, notwithstanding contrary provisions of state law or this policy, only upon the written determination by the Authority Purchasing Agent that acceptance of the grant or contract funds under the applicable conditions is in the public interest. Such determination shall state the specific provisions of state law and this policy that conflict with the conditions of the grant or contract.

§ 1.4 Effective Date of Policy.

This policy shall become effective MONTHJuly D1, 20195, and shall replace all purchasing and contracting policies previously adopted. Any contract entered into prior to MONTHDJuly1, 20195, shall be governed by the procurement policies and regulations of the Authority in effect at the time the contract was executed.

§ 1.5 Severability.

If any provision of this policy is declared invalid under any circumstances, all other provisions of this policy shall remain in full effect to the greatest extent possible without the invalid provision.

§ 1.6 Definitions.

As used in this policy, the terms listed below have the following meanings. Any term not defined has the meaning assigned in the Virginia Public Procurement Act (Va. Code § 2.2-4300, *et seq.*).

(1) Affiliate. ~~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.~~

(2) Authority. The Harrisonburg Redevelopment and Housing Authority.

(3) Best Value. The overall combination of quality, price, and various elements of required services that in total ~~is~~ are optimal relative to the Authority's needs.

(4) Brand Name Specification. ~~A specification limited to one or more items by manufacturers' names or catalog numbers.~~

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

(6) Business. Any type of corporation, partnership, limited liability company, association, or sole proprietorship operated for profit.

(7) Change Order (Unilateral). A written order signed and unilaterally issued by the Purchasing Agent directing the contractor to make changes that is issued pursuant to a contract provision that authorizes the Purchasing Agent to order such changes without the consent of the contractor.

(58) Confidential Information. Any information available to an employee only because of the employee's status as an employee of the Authority and that is not a matter of public knowledge or available to the public on request.

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

(740) Construction Management Contract. 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.

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

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

(103) Contractor. Any person having a direct contract with the Authority.

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

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

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

(127) Design-Build Contract. A contract under which a contractor agrees to both design and build the structure or other item specified in the contract.

(138) Direct or Indirect Participation. Involvement in any procurement transaction through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or acting in any other advisory capacity.

(149) Employee. Any person receiving a salary or wages, performing personal services, or serving as an elected official for the Authority or any department, agency, commission, council, board or other entity established by the Authority.

____ (20) Employment Services Organization. An organization that provides employment services to individuals with disabilities that is an approved Commission on the Accreditation of Rehabilitation Facilities (CARF) accredited vendor of the Department for Aging and Rehabilitative Services.

(1524) Executive Director. The chief administrative officer of the Authority.

(1622) Goods. All material, equipment, supplies, printing and automated data processing hardware and software.

(1723) Governing Body. The Commissioners of the Authority who are appointed as provided by law.

(1824) Immediate Family. A spouse, children, parents, brothers and sisters, and any other person living in the same household as the employee.

(1925) Informality. A minor defect or variation of a bid or proposal from the exact requirements of the Invitation to Bid, or the Request for Proposal, which does not affect the price, quality, quantity or delivery schedule for the goods, services or construction being procured.

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

(217) Invitation to Bid or Invitation for Bid. All documents, whether attached or incorporated by reference, utilized for soliciting sealed bids.

(228) Job Order Contracting. A method of procuring construction by establishing a book of unit prices and then obtaining a contractor to perform work as needed using the prices, quantities, and specifications in the book as the basis of its pricing. The contractor may be selected through either competitive sealed bidding or competitive negotiation depending on the needs of the Authority. A minimum amount of work may be specified in the contract. ~~The contract term and the project amount shall not exceed the limitations specified in Article 7 of this policy.~~

(239) Multiphase Professional Services Contract. A contract for the providing of professional services where the total scope of work of the second or subsequent phase of the contract cannot be specified without the results of the first or prior phase of the contract.

____ (30) Nominal Value. A sum which is no more than \$250.

(2431) Nonprofessional Services. Any services not specifically identified as professional services in the definition of professional services.

| (2532) Official Responsibility. Administrative or operating authority, whether intermediate or final, to initiate, approve, disapprove or otherwise affect a procurement ~~transaction,transaction~~ or any claim resulting therefrom.

| (2633) Person. Any business, individual, union, committee, club, other organization, or group of individuals.

| (2734) Personal Interest. A financial benefit or liability that exists by reason of (i) ownership in a business if the ownership interest exceeds three percent of the total equity of the business; (ii) annual income that exceeds, or may reasonably be anticipated to exceed, \$10,000 from ownership in real or personal property or a business; (iii) salary, other compensation, fringe benefits, or benefits from the use of property, or any combination thereof, paid or provided by a business or governmental agency that exceeds, or may reasonably be anticipated to exceed, \$10,000 annually; (iv) ownership of real or personal property if the interest exceeds \$10,000 in value and excluding ownership in a business, income, or salary, other compensation, fringe benefits or benefits from the use of property; (v) personal liability incurred or assumed on behalf of a business if the liability exceeds three percent of the asset value of the business; or (vi) an option for ownership of a business or real or personal property if the ownership interest will consists of (i) or (iv) above.

| (2835) Potential Bidder or Offeror. A person who, at the time the Authority negotiates and awards or proposes to award a contract, is engaged in the sale or lease of goods, or the sale of services, insurance or construction, of the type to be procured under the contract, and who at such time is eligible and qualified in all respects to perform that contract, and who would have been eligible and qualified to submit a bid or proposal had the contract been procured through competitive sealed bidding or competitive negotiation.

| (36) ~~Price Analysis. The evaluation of price data, without analysis of the separate cost components and profit as in cost analysis, which may assist in arriving at prices to be paid and costs to be reimbursed.~~

| (2937) Pricing Data. Factual information concerning prices for items substantially similar to those being procured. Prices in this definition refer to offered or proposed selling prices, historical selling prices and current selling prices. The definition refers to data relevant to both prime and subcontract prices.

| (308) Procurement Act. The Virginia Public Procurement Act, § 2.2-4300; Chapter 43, Title 2.2, 1950 Code of Virginia, as amended.

| (319) Procurement Transaction. 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.

(3420) Professional Services. Work performed by an independent contractor within the scope of the practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law, dentistry, medicine, optometry, pharmacy or professional engineering.

(3434) Public Body. Any legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board or political subdivision created by law to exercise some sovereign power or to perform some governmental duty and empowered by law to undertake the activities described in this policy.

(42) Public Employee. ~~Any person employed by a public body, including elected officials or appointed members of governing bodies.~~

(3443) Purchasing Agent. The ~~E~~xecutive ~~D~~irector or other individuals designated by the ~~E~~xecutive ~~D~~irector as the Purchasing Agent for the Authority.

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

(345) Request for Proposal. A written public notification soliciting proposals for professional, nonprofessional, or contractor services. A Request for Proposal generally describes the services sought, the unique capabilities or qualifications needed to perform the work, factors to be used to evaluate the proposals and the conditions for negotiating the prices and terms with the offerors. A Request for Proposal includes all documents attached or incorporated by reference that are utilized for soliciting proposals.

~~In design-build and construction management procurements, the Request for Proposal is the second step of a two-step, competitive negotiation process in which a written request asking potential contractors that have prequalified to submit technical and cost proposals.~~

(346) Request for Qualifications. A written public notification inviting interested qualified persons to apply for prequalification. ~~In design-build and construction management procurement, a Request for Qualifications is first step of a two-step, competitive negotiation process.~~

(347) Responsible Bidder or Offeror. 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.

(348) Responsive Bidder. A person who has submitted a bid which conforms in all material respects to the Invitation to Bid.

(349) Reverse Auctioning. 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.

(450) Services. Any work performed by an independent contractor wherein the service rendered does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials and supplies.

(51) Small Business. ~~A business, independently owned and controlled by one or more individuals who are U.S. citizens or legal resident aliens, and together with affiliates, has 250 or fewer employees, or annual gross receipts of \$10 million or less averaged over the previous three years. One or more of the individual owners shall control both the management and daily business operations of the small business.~~

(4152) Specification. Any description of the physical or functional characteristics, or of the nature of a good, service or construction item. It may include a description of any requirement for inspecting, testing, or preparing a good, service or construction item for delivery.

ARTICLE 2 OFFICE OF THE PURCHASING AGENT

§ 2.1 Establishment and Appointment.

(a) There is hereby created a purchasing system to operate under the direction and supervision of the Executive Director.

(b) The Executive Director shall be the Authority's Purchasing Agent.

§ 2.2 Purchasing Agent's Authority.

The Purchasing Agent is authorized to procure goods, services, insurance and construction in accordance with this policy.

§ 2.3 Duties.

In accordance with this policy, the Purchasing Agent shall: (a4) purchase or supervise the purchasing of all goods, services, insurance and construction needed by the Authority; (b2) exercise direct supervision over the Authority's central stores and general supervision over all other inventories of goods belonging to the Authority; and (c3) establish and maintain programs for specifications, development, contract administration, and inspection and acceptance, in cooperation with the public bodies using the goods, services, and construction.

§ 2.4 Operational Procedures.

The Purchasing Agent may adopt operational procedures relating to the execution of the duties assigned herein in a manner consistent with this policy.

§ 2.5 Delegation.

The Purchasing Agent may delegate authority to purchase certain supplies, services or construction items to other employees of the Authority if such delegation is deemed necessary by the Purchasing Agent for the effective procurement of those items.

§ 2.6 Unauthorized Purchases.

Except as herein provided, no official, elected or appointed, or any employee shall purchase or contract for any goods, services, insurance or construction within the purview of this policy. Any purchase order or contract made contrary to the provisions of this policy is unauthorized and shall not bind the Authority.

ARTICLE 3

EXCEPTIONS TO REQUIREMENTS **FOR COMPETITIVE PROCUREMENT**

§ 3.1 Purchases From Governmental Sources.

Purchases from governmental agencies are not covered by the Procurement Act or this procurement policy. There are no procedural requirements for such purchases.

§ 3.2 Cooperative Procurement.

The Authority may purchase from another public body's contract 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. This provision does not apply to contracts for architectural services, engineering services, or construction.

§ 3.3 Small Purchases.

(a) The Purchasing Agent may award single or term contracts without requiring sealed bids or competitive negotiation for:

(1) Goods and services other than professional services and non-transportation-related construction, if the aggregate or sum of all phases is not expected to exceed \$100,000;

(2) Transportation-related construction, if the aggregate or sum of all phases is not expected to exceed \$25,000; and

(3) Professional services, if the aggregate or sum of all phases is not expected to exceed \$80,000.

(b) Purchases made by the Purchasing Agent pursuant to Subsection (a) may be based upon any of the following criteria:

(1) Pricelists; Price Quotes. The cost of the items purchased is the lowest of the suppliers' current price lists in the office of the Purchasing Agent. The Purchasing Agent shall attempt to obtain at least three current price lists from suppliers prior to making purchases under this provision. The Purchasing Agent may obtain verbal or written price quotations from two suppliers in lieu of current price lists. Any price list obtained within 12 months of the purchase or any verbal or written quotation obtained within 30 days of the purchase shall be considered current.

(2) Common Pricing. The Purchasing Agent knows that all competitors have substantially the same price for the items to be purchased.

(3) Reorder. The purchase does not exceed \$30,000 and is a reorder of commodities purchased within 12 months prior to the proposed purchase.

(4) Nominal Value. The contract or purchase is for a sum of no more than \$250.

(5) Two Quotes. The Purchasing Agent obtains a written or verbal price quotation for goods or services from at least two providers.

(6) Impracticability. The Purchasing Agent concludes that it is not practicable to obtain bids for the purchases.

§ 3.4 Legal services.

The Authority may contract for legal services, expert witnesses, and services associated with litigation or regulatory proceedings without competitive procurement.

§ 3.5 Sole Source Procurement.

Upon a determination in writing that there is only one source practicably available for that which is to be procured, a contract may be negotiated and awarded to that source without competitive sealed bidding or competitive negotiation. The writing shall document the basis for this determination. The Purchasing Agent shall issue a written notice stating that only one source was determined to be practicably available, and identifying that which is being procured, the

contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted on the Department of General Services' central electronic procurement website or other appropriate websites, and in addition, the Purchasing Agent may publish it in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first. The notice shall be posted in a designated public area of the Authority's offices.

§ 3.6 Emergency Purchases.

(a) In case of emergency, a contract may be awarded without competitive sealed bidding or competitive negotiation; however, such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The Purchasing Agent shall issue a written notice stating that the contract is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted on the Department of General Services' central electronic procurement website or other appropriate websites, and in addition, the Purchasing Agent may publish it in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first.

(b) The Authority may deem an emergency to exist in the following circumstances:

- (1) A breakdown in machinery or equipment;
- (2) A threatened termination of essential services;
- (3) The development of a dangerous condition;
- (4) Any circumstance causing curtailment or diminution of an essential service; or
- (5) Any circumstance in which materials or services are needed to prevent loss of life or property.

§ 3.7 Purchases at Auction.

(a) Upon a determination made in advance by the Purchasing Agent and set forth in writing that the purchase of goods, products or commodities from a public auction sale is in the best interests of the public, such items may be purchased at the auction, including online public auctions. The writing shall document the basis for this determination. However, bulk purchases of commodities used in road and highway construction and maintenance, and aggregates shall not be made by online public auctions.

(b) 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.

ARTICLE 4
METHODS OF SOURCE SELECTION
and GENERAL REQUIREMENTS

§ 43.1 Methods of Procurement.

(a) Contracts for the purchase or lease of goods, ~~purchase of~~ services ~~other than professional services, and insurance and construction~~ shall be ~~procured with~~~~awarded after~~ competitive sealed ~~bidding~~~~bidding unless otherwise provided in this section or authorized by law.~~

(b) Professional services shall be procured by competitive negotiation.

(c) Construction ~~must be procured by competitive sealed bidding except that competitive negotiation may be used in the following instances:~~

(1) ~~For a fixed price design-build contract or a construction management contract.~~

(2) ~~For the construction~~ of highways and any draining, dredging, excavation, grading or similar work upon real property ~~may be procured by competitive negotiation~~ upon a determination, made in advance by the Purchasing Agent and set forth in writing, that competitive sealed bidding is either not practicable or not fiscally advantageous to the public. The writing shall document the basis for this determination.

§ 43.2 Prequalification Generally; Prequalification for Construction.

(a) The Purchasing Agent may prequalify prospective contractors for particular types of supplies, services, insurance, or construction, and limit consideration of bids or proposals to prequalified contractors. The opportunity to prequalify shall be given to any prospective contractor who has not been suspended or debarred under this policy.

(b) The application form to prequalify contractors for construction shall set forth the criteria upon which the qualifications of prospective contractors will be evaluated. The application form shall request of prospective construction 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 § 13.2(f) of this policy. 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.

(c) Any contractor that applies for prequalification shall be notified in writing whether they have been prequalified at least 30 days prior to the deadline for submitting bids or proposals under the procurement of the contract for which the prequalification applies. If prospective contractor is denied prequalification, the written notification shall include the reasons for denial and the factual basis of such reasons. Notices of refusal of prequalification shall be kept and made a part of the contract file.

(d) In considering any request for prequalification, the Purchasing Agent shall determine whether the contractor possesses management, financial soundness, and a history of performance that demonstrates the apparent ability to successfully complete all requirements of the contract being procured. The Purchasing Agent may require prospective contractors to submit information that the Purchasing Agent deems pertinent, including samples, financial reports, and references. The Purchasing Agent may employ standard forms designed to elicit necessary information, or may design other forms for that purpose.

(e) Prequalification of a contractor shall not constitute a conclusive determination that the contractor is responsible, and such bidder may be rejected as nonresponsible on the basis of subsequently discovered information.

(f) Failure of a contractor to prequalify with respect to one procurement transaction shall not bar the contractor from seeking prequalification as to other procurement transactions or bidding on procurement transactions that do not require prequalification.

(g) Prequalification may be denied to any contractor only if the Purchasing 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's list of acceptable surety corporations in the amount and type required by the Authority 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 judgments entered against him or her 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 Authority has not contracted with a contractor in any prior construction contracts, the Purchasing Agent 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. This provision shall not be used 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 was 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 154 of this policy; (ii) Article 6 (Virginia Code, § 2.2-4367 *et seq.*) of the Procurement Act, (iii) the Virginia Governmental Frauds Act (Virginia Code, § 18.2-498.1 *et seq.*), (iv) Chapter 4.2 of Title 59.1 of the Code of Virginia, 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 fails to provide information in a timely manner that is requested by the Purchasing Agent and is relevant to subdivisions 1 through 6 of this subsection.

§ 43.3 Discrimination Prohibited.

In the solicitation or awarding of contracts, the Purchasing Agent Authority shall not discriminate against a bidder or offeror on the basis of race, religion, color, sex, national origin, age, disability, status as a service disabled veteran, or any other basis prohibited by state law relating to discrimination in employment. Whenever solicitations are made, the Purchasing Agent shall include businesses selected from a list made available by the Department of Small Business and Supplier Diversity.

§ 43.4 Participation of Small, Women-, Minority-, and Service Disabled Veteran Owned Businesses.

(a) Whenever solicitations are made, the Purchasing Agent shall include businesses selected from a list made available by the Virginia Department of Small Business and Supplier Diversity.

(b) The Purchasing Agent shall place qualified small businesses, women-owned businesses, minority-owned businesses, and service disabled veteran owned businesses, as defined in Virginia Code § 2.2-4310, on solicitation lists used by the Authority. The Purchasing Agent shall use the services and assistance of the Small Business Administration and the Minority Business Development Agency of the United States Department of Commerce, the Virginia Department of Minority Enterprise and other public and private agencies in obtaining the names of qualifying businesses so that their bids may be solicited whenever they are potential sources of goods and services for the Authority.

(c) The Purchasing Agent shall also, when he or she deems it practicable and economically feasible, divide the total bid requirements into smaller tasks or quantities so as to permit maximum participation by qualifying businesses.

| § 43.5 Comments Concerning Specifications.

Comments concerning specifications or other provisions in Invitations to Bid or Requests for Proposals shall be received and considered at conferences with potential contractors prior to the time set for receipt of bids, proposals, or the award of the contract. The Purchasing Agent shall be responsible for scheduling such conferences and providing notice to potential contractors will be called by the Purchasing Agent and, if necessary, attended by the Authority's attorney or other attorney retained by the Authority.

| § 43.6 Rejection of Bids or Proposals.

(a) An Invitation to Bid, a Request for Proposal, any other solicitation, or any and all bids or proposals, may be canceled or rejected. The reasons for cancellation or rejection shall be made part of the contract file. The Purchasing Agent shall not cancel or reject an Invitation to Bid, a Request for Proposal, any other solicitation, bid or proposal pursuant to this section solely to avoid awarding a contract to a particular responsive and responsible bidder or offeror.

(b) The Purchasing Agent may waive informalities in bids.

| § 43.7 Contract Pricing Arrangements.

Except as prohibited herein, public contracts may be awarded on a fixed price or cost reimbursement basis, or on any other basis that is not prohibited. Except in cases of emergency affecting the public health, safety or welfare, no contract shall be awarded on the basis of cost plus a percentage of cost ("cost-plus"). If a cost-plus contract is to be used in an emergency situation, a written determination of the basis of the emergency and the selection of the particular contractor shall be included in the contract file. A policy or contract of insurance or prepaid coverage having a premium computed on the basis of claims paid or incurred, plus the insurance carrier's administrative costs and retention stated in whole or part as a percentage of such claims, shall not be prohibited by this section.

§ 43.8 Multi-Term Contracts.

(a) Unless otherwise provided by law, a contract for goods, services, or insurance may be entered into for any period of time deemed to be in the best interests of the Authority provided the term of the contract and conditions of renewal or extension, if any, are included in the solicitation or request and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor.

(b) When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be canceled.

§ 43.9 Contract Modification.

(a) Any contract award, change order, or contract modification that requires the submission and certification of cost or pricing data shall contain a provision stating that the price ~~to the Authority~~, including any profit or fee, excludes any significant increase that the Purchasing Agent finds to be the result of cost or pricing data furnished by the contractor that was inaccurate, incomplete or not current at the time provided.

(b) Provisions for modification of the contract during performance may be included in the contract, but no fixed-price contract may be increased by more than twenty-five percent of the amount of the contract or \$50,000, whichever is greater, without the advance written approval of the ~~G~~overning ~~B~~body. 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.

(c) The Purchasing Agent may extend the term of an existing contract for services to allow completion of any work undertaken but not completed during the original term of the contract.

(d) Modifications that fail to comply with this section are voidable at the discretion of the ~~G~~overning ~~B~~body, and the unauthorized approval of a modification may not be the basis of a contractual claim brought pursuant to § 12.37 of this policy.

§ 43.10 Retainage on Construction Contracts.

(a) Retainage Limit. In any ~~public contract for~~ construction contract which provides for progress payments in installments based upon an estimated percentage of completion, the contractor shall be paid at least 95 percent of the earned sum when payment is due, with no more than five percent being retained to assure faithful performance of the contract. All amounts withheld may be included in the final payment.

(b) Escrow Option for Retainage. When procuring construction of \$200,000 or more 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, the Invitation to Bid shall include an option for the contractor to use an escrow account procedure for utilization of retainage funds. In the event the contractor elects to use the escrow account procedure, the escrow agreement form included in the Invitation to Bid and Contract shall be executed and submitted to the Purchasing Agent within fifteen calendar days after notification. Otherwise, the contractor shall forfeit his rights to the use of the escrow account procedure. 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 shall be substantially the same as that used by the Virginia Department of Transportation.

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

§ 43.11 Required Contract Provisions.

(a) Every contract shall contain the following Compliance with Immigration Law and Authorization to Transact Business in the Commonwealth clauses set forth in Appendix 2 of this policy provisions.:

(a)

1. Compliance with Immigration Law. 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.

2. Authorized to Transact Business. (i) Any contractor organized as a stock or nonstock 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 of the Virginia Code, or as otherwise required by law. The Authority may void any contract with a business entity that fails to remain in compliance with this section.

(ii) Any contractor described in subsection (i) 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.

(iii) The Authority may void any contract with a contractor that fails to remain in compliance with subsections (i) or (ii).

(b) Every contract that allows subcontracting shall include the Prompt Payment and Interest clause set forth in Appendix 2 of this policy.

(c) Every contract of \$10,000 or more shall ~~include~~ contain the Employment Discrimination and Drug-free Workplace clauses set forth in Appendix 2 of this policy. the following provisions:

1. Employment Discrimination Prohibited. During the performance of this contract, the contractor shall 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. The contractor, in all solicitations or advertisements for employees placed by or on behalf of the contractor, will state that the contractor is an equal opportunity employer.

The contractor will include 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.

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. Drug free workplace. During the performance of this contract, the contractor shall (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 policy, 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.

(d) Additional provisions are required in contracts procured either in part or in whole with federal funds. Please consult Article 14 and Appendices 1 and 2 of this policy prior to issuing a solicitation for any such procurement.

ARTICLE 54 **BOND REQUIREMENTS**

§ 54.1 Bid Bonds.

(a) Except in cases of emergency, all bids or proposals for nontransportation-related construction contracts in excess of \$500,000 or transportation-related projects authorized under Code §§ 33.1-1233.1-1233.1-12 that are in excess of \$250,000 and partially or wholly funded by the Commonwealth 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 or she 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) For nontransportation-related construction contracts in excess of \$100,000 but less than \$500,000, where the bid bond requirements are waived, prospective contractors shall be prequalified for each individual project in accordance with § 43.2 of this policy and Virginia Code § 2.2-4317. However, the Purchasing Agent may waive the requirement for prequalification of a bidder with a current Class A contractor license for contracts in excess of \$100,000 but less than \$300,000 upon an advance written determination by the Governing Body that waiving the requirement is in the best interests of the Authority. The Authority may not enter into more than 10 of such contracts per year.

(c) 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.

(d) Nothing in this section shall preclude the Purchasing Agent from requiring bid bonds to accompany bids or proposals for construction contracts anticipated to be less than \$500,000 for nontransportation-related projects or \$250,000 for transportation-related projects authorized under Virginia Code §§ 33.1-1233.1-1233.1-12 and partially or wholly funded by the Commonwealth.

§ 54.2 Performance and Payment Bonds.

(a) Upon the award of any (1i) ~~public~~ construction contract exceeding \$500,000 to any prime contractor; (2ii) construction contract exceeding \$500,000 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 or leased by a public body; (3iii) construction contract exceeding \$500,000 in which the performance of labor or the furnishing of materials will be paid with public funds, or (4iv) any transportation-related projects exceeding \$350,000 that are partially or wholly funded by the Commonwealth, such contractor shall furnish to the Authority the following bonds:

—(i)1. A performance bond in the sum of the contract amount conditioned upon the faithful performance of the contract in strict conformity with the plans, specifications and conditions of the contract. For transportation-related projects authorized under Virginia Code, § 33.1-12, such bond shall be in a form and amount satisfactory to the Purchasing Agent.

—(ii)2. A payment bond in the sum of the contract amount. The payment bond shall be for the protection of claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded, or to any subcontractors, in the prosecution of the work provided for in the contract, and shall be conditioned upon the prompt payment for all material furnished or labor supplied or performed in the prosecution of the work. For transportation-related projects authorized under Virginia Code, § 33.1-12 and partially or wholly funded by the Commonwealth, such bond shall be in a form and amount satisfactory to the Purchasing Agent. “Labor or materials” ~~shall~~ includes public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site.

(b) Each bond shall be (1i) executed by one or more surety companies selected by the contractor that are authorized to do business in Virginia; (2ii) made payable to the Authority; and (3iii) filed with the Authority or a designated office or official thereof.

(c) Nothing in this section shall preclude the Purchasing Agent from requiring payment or performance bonds for construction contracts below \$500,000 for nontransportation-related projects or \$350,000 for transportation-related projects authorized under Virginia Code, § 33.1-12 and partially or wholly funded by the Commonwealth.

(d) 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.

(e) The performance and payment bond requirements of ~~S~~ubsection (a) for transportation-related projects that are valued in excess of \$250,000 but less than \$350,000 may only be waived by the Purchasing Agent if the bidder provides evidence, satisfactory to the Purchasing Agent, that a surety company has declined an application from the contractor for a performance or payment bond.

(f) For nontransportation-related construction contracts in excess of \$100,000 but less than \$500,000, where the performance and payment bond requirements are waived, prospective contractors shall be prequalified for each individual project in accordance with § 4.2 of this policy and Virginia Code § 2.2-4317. However, the Purchasing Agent may waive the

requirement for prequalification of a bidder with a current Class A contractor license for contracts in excess of \$100,000 but less than \$300,000 upon an advance written determination by the Governing Body that waiving the requirement is in the best interests of the Authority. The Authority may not enter into more than 10 of such contracts per year.

§ 54.3 Action on Performance Bond.

No action against the surety on a performance bond shall be brought unless within one year after (aⁱ) completion of the contract, including the expiration of all warranties and guarantees, or (bⁱⁱ) discovery of the defect or breach of warranty that gave rise to the action.

§ 54.4 Action on Payment Bonds.

(a) Any claimant who has a direct contractual relationship with the contractor and who has performed labor or furnished material in accordance with the contract documents in furtherance 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 90 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 for the labor and material. The obligee named in the bond need not be named a party to the 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 or she has given written notice to the contractor within 90 days from the day on which the claimant performed the last of the labor or furnished the last of the materials for which he or she 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 the contractor at any place where his or her office is regularly maintained for the transaction of business. Claims for sums withheld as retainages with respect to labor performance or materials furnished shall not be subject to the time limitations stated in this subsection.

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

(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.

§ 54.5 Bonds on Other Than Construction Contracts.

The Purchasing Agent may require bid, payment, or performance bonds for contracts for goods or services if provided in the Invitation to Bid or Request for Proposal.

§ 54.6 Alternative Forms of Security.

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

(b) If approved by the Authority's attorney, a bidder may furnish a personal bond, property bond, or bank or savings institution's letter of credit on certain designated funds in the face amount required for 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 Authority equivalent to a corporate surety's bond.

ARTICLE 65
COMPETITIVE SEALED BIDDING

§ 65.1 Definition.

Competitive sealed bidding is a method of contractor selection, other than for professional services, which includes (a) issuance of a written Invitation to Bid, (b) public notice of the Invitation to Bid, (c) public opening and announcement of all bids received, (d) evaluation of bids based upon the requirements set forth in the Invitation, and (e) award to the lowest responsive and responsible bidder.

§ 65.2 Invitation to Bid.

(a) An Invitation to Bid shall contain or incorporate by reference the specifications and contractual terms and conditions applicable to the procurement, state where bid documents and specifications may be obtained and identify the time and place for opening bids. Unless the Purchasing Agent has provided for prequalification of bidders pursuant to § 43.2 of this policy, the Invitation to Bid shall include a statement of any requisite qualifications of potential contractors. No confidential or proprietary data shall be solicited in any Invitation to Bid.

(b) An Invitation to Bid shall include a provision that requires a bidder organized or authorized to transact business in the Commonwealth pursuant to Title 13.1 or Title 50 to include in its bid the identification number issued to it by the State Corporation Commission. Any bidder 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 a statement describing why the bidder is not required to be so authorized.

(c) Any bidder 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 the ~~Director of the Department of General Services or his designee or by the chief executive of the Authority Purchasing Agent~~.

§ 65.3 Multistep Sealed Bidding.

When it is impractical to initially prepare a purchase description to support an award based on prices, an Invitation to Bid may be issued requesting the submission of unpriced offers followed by an Invitation to Bid limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.

§ 65.4 Notice of Invitation to Bid.

(a) Notice of the Invitation to bid shall be posted on ~~the Department of General Services' central electronic procurement website and other~~ appropriate websites at least 10 days prior to the date set for receipt of bids. In addition, notice may also be published in a newspaper of general circulation ~~in the City of Harrisonburg, Virginia~~. Bids may be solicited directly from potential contractors, subject to the requirements of § 43.4 of this policy.

(b) The notice of Invitation to Bid shall include a general description of the goods or services to be purchased, the location where bid documents and specifications may be obtained, and the time and place for opening bids.

§ 65.5 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 convey the general style, type, character, and quality of the article desired. Any article that the Purchasing Agent, in his or her 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.

§ 65.6 Bid Openings.

Sealed bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the Invitation to Bid. The name of each bidder and the amount of each bid shall be recorded along with any other relevant information deemed appropriate by the Purchasing Agent. The contract record and each bid shall be open to public inspection as provided in § 13.2 of this policy.

§ 65.7 Evaluation of Bids.

(a) Evaluation of bids shall be based upon the requirements set forth in the invitation, which may include special qualifications of potential contractors, lifecycle 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.

(b) If the Purchasing Agent determines that the apparent low bidder is not responsible, he or she shall proceed as follows:

- (1) Prior to the issuance of a written determination of nonresponsibility, the Purchasing Agent shall (i) notify the apparent low bidder in writing of the results of the evaluation, (ii) disclose the factual support for the determination, and (iii) allow the apparent low bidder an opportunity to inspect any documents that relate to the determination, if so requested by the bidder within five business days after receipt of the notice.
- (2) Within 10 business days after receipt of the notice, the bidder may submit rebuttal information challenging the evaluation. The Purchasing Agent shall issue a written determination of responsibility based on all information in its possession, including any rebuttal information, within five business days of the date the Purchasing Agent received the rebuttal information. At the same time, the Purchasing Agent shall notify, with return receipt requested, the bidder in writing of the determination.
- (3) Such notice shall state the basis for the determination which shall be final unless the bidder appeals the decision within 10 days after receipt of the notice by filing a letter of appeal pursuant to the administrative appeals procedure described in § 12.4 or by instituting legal action pursuant to § 12.6 of this policy.
- (4) If, upon appeal, it is determined that the decision of the Purchasing Agent was (i) not an honest exercise of discretion, but rather was arbitrary or capricious or (ii) not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid, and the award of the contract in question has not been made, the sole relief shall be a finding that the bidder is a responsible bidder for the contract in question. If it is determined that the decision of the Purchasing Agent was (i) not an honest exercise of discretion, but rather was arbitrary or capricious or (ii) not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid and the contract has been awarded, the relief shall be as set forth in § 12.2(b) of this policy.
- (5) A bidder contesting a determination that he or she is not a responsible bidder for a particular contract shall proceed under this section, and may not protest the award or proposed award under § 12.2 of this policy.

(6) Nothing herein shall require the Authority to furnish a statement of the reasons why a particular proposal was not deemed to be the most advantageous when procuring by competitive negotiation.

§ 56.8 Award of Contract.

(a) A contract shall be awarded to the lowest responsive and responsible bidder. When the terms and conditions of multiple bids are so provided in the Invitation to Bid, awards may be made to more than one bidder.

(b) Unless cancelled or rejected, a responsible bid from the lowest responsible bidder shall be accepted as submitted, except that if the bid from the lowest responsible bidder exceeds available budgeted funds, the Purchasing Agent may negotiate with the apparent low bidder to obtain a contract price within budgeted available funds. ~~T—However, the negotiation may be undertaken only under conditions and procedures described in writing and approved by the Purchasing Agent prior to issuance of the Invitation to Bid and summarized therein. The negotiations should be conducted in accordance with the following procedures:~~

- (1) The Purchasing Agent shall advise the lowest responsible bidder, in writing, that the low bid exceeds the Authority's funds budgeted for the procurement. He or she may suggest a reduction in scope for the proposed purchase, and invite the lowest responsible bidder to amend its bid proposal.
- (2) Repetitive informal discussions may be conducted with the lowest responsible bidder for purposes of obtaining a contract within the Authority's budgeted funds.
- (3) The lowest responsible bidder may submit an addendum to its bid that includes the change in scope for the proposed purchase, the reduction in price, and the new contract value.
- (4) If the proposed addendum is acceptable to the Authority, the Purchasing Agent should award a contract within its budgeted funds to the lowest responsible bidder based upon the amended bid.
- (5) If the Purchasing Agent and the lowest responsible bidder cannot negotiate a contract within the Authority's budgeted funds, all bids should be rejected.

(c) When the award is not given to the lowest bidder, a full and complete statement of the reasons for placing the order elsewhere shall be prepared by the Purchasing Agent and made a part of the contract record.

| § 65.9 Tie Bids; Preference Matching.

(a) In the case of a tie bid, preference shall be given to goods produced in Virginia, goods or services or construction provided by Virginia persons, firms or corporations; otherwise the tie shall be decided by lot.

(b) Whenever the lowest responsive and responsible bidder is a resident of any other state and such state under its laws allows a resident contractor of that state a percentage preference, a like preference shall be allowed to the lowest responsive and responsible bidder who is a resident of Virginia and is the next lowest bidder. If the lowest responsive and responsible bidder is a resident of any other state and such state under its laws allows a resident contractor of that state a price-matching preference, a like preference shall be allowed to responsive and responsible bidders who are residents of Virginia. If the lowest bidder is a resident contractor of a state with an absolute preference, the bid shall not be considered. The Purchasing Agent may rely upon information posted on the website for the Department of General Services for the purposes of compliance with this subsection.

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

(d) For the purposes of this section, a Virginia person, firm or corporation shall be deemed to be a resident of Virginia if such person, firm or corporation has been organized pursuant to Virginia law or maintains a principal place of business within Virginia.

| § 65.10 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 or her bid from consideration 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 or her 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.

~~(b) One of the following procedures for withdrawal of a bid shall be selected by the Purchasing Agent and stated in the notice of Invitation to Bid:~~

~~1. Where the Authority opens the bids one day following the time fixed for the submission of bids, the bidder shall submit to the Purchasing Agent his or her original work papers, documents and materials used in the preparation of the bid at or prior to the time fixed for the opening of bids. The work papers shall be delivered by the bidder in person or by registered mail. 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 or her bid. The contract shall not be awarded by the Purchasing Agent until the two hour period has elapsed.~~

~~2. The bidder shall give notice in writing of any claim of right to withdraw his or her bid within two business days after the conclusion of the bid opening procedure and shall submit original work papers with such notice. T~~

~~Under these procedures, the mistake shall be proved only from the original work papers, documents and materials delivered as required herein. The work papers, documents and materials submitted by the bidder shall, at the bidders request, be considered trade secrets or proprietary information subject to the conditions of § 13.2(f) of this policy and Virginia Code § 2.2-4342(F).~~

~~(d) The Purchasing Agent may establish procedures for the withdrawal of bids for other than construction contracts.~~

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

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

~~(eg) 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.~~

~~(fh) The Purchasing Agent shall notify the bidder in writing within five business days of the decision regarding the bidder's request to withdraw its bid. If the Purchasing Agent denies the withdrawal of a bid under the provisions of this section, it shall state in the notice the reason 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 Purchasing Agent shall return all work papers and copies thereof that have been submitted by the bidder.~~

(g) A decision denying withdrawal of bid shall be final and conclusive unless the bidder appeals the decision within 10 days after receipt of the decision by invoking the administrative appeals procedure provided in § 12.4 or instituting legal action as provided in § 12.6 of this policy.

(h) If no bid bond was posted, a bidder shall, prior to appealing, deliver to the Purchasing Agent a certified check or cash bond in the amount of the difference between the bid sought to be withdrawn and the next lowest bid. Such security shall be released only upon a final determination that the bidder was entitled to withdraw the bid.

(i) If, upon appeal, it is determined that the decision refusing withdrawal of the bid was (i) not an honest exercise of discretion, but rather was arbitrary or capricious or (ii) not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid, the sole relief shall be withdrawal of the bid.

ARTICLE 76 COMPETITIVE NEGOTIATION

§ 76.1 Definition.

Competitive negotiation is a method of procurement which includes (a) issuance of a written Request for Proposal, (b) public notice of the Request for Proposal, and (c) individual discussions-negotiations between the Authority and individual offerors.

§ 76.2 Request for Proposals.

(a) A Request for Proposal shall be in writing and indicate in general terms that which is sought to be procured, specifying the factors which will be used in evaluating the proposal, indicating whether a numerical scoring system will be used in evaluation of the proposal, and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities or qualifications which will be required of the contractor. In the event that a numerical scoring system will be used in the evaluation of proposals, the point values assigned to each of the evaluation criteria shall be included in the Request for Proposal or posted at the location designated for public posting of procurement notices prior to the due date and time for receiving proposals.

(b) A Request for Proposal shall include a provision that requires an offeror organized or authorized to transact business in the Commonwealth pursuant to Title 13.1 or Title 50 to include in its proposal the identification number issued to it by the State Corporation Commission. Any 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 proposal a statement describing why the offeror is not required to be so authorized.

(c) Any offeror described in ~~Subsection (b)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 the ~~Director of the Department of General Services or his designee or by the chief executive of a local governing body~~Purchasing Agent.

§ 76.3 Public Notice.

Notice of the Request for Proposal shall be posted on the Department of General Services' central electronic procurement website and other appropriate websites at least 10 days prior to the date set for receipt of proposals. In addition, the notice may be published in one or more newspapers of general circulation in the area in which the contract is to be performed ~~so as to provide reasonable notice to the maximum number of offerors that can be reasonably anticipated to submit proposals in response to the particular request~~. Proposals may be solicited directly from potential contractors, subject to the requirements of § 43.4 of this policy.

§ 76.4 Procurement Negotiations for Professional Services.

(a) The Purchasing Agent 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 Purchasing Agent 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. As the discussion stage, the Purchasing Agent may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of price for services. Proprietary information from competing offerors shall not be disclosed to the public or to competitors. For architectural or engineering services, offerors shall not be required to list exceptions to proposed contractual terms and conditions, unless required by applicable law, until after the qualified offerors are ranked for negotiations.

At the conclusion of discussion, outlined herein, on the basis of evaluation factors published in the Request for Proposal and all information developed in the selection process to this point, the Purchasing Agent 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 Authority can be negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable price. If

the terms and conditions for multiple awards are included in the Request for Proposal, the Purchasing Agent may award contracts to more than one offeror. Should the Purchasing Agent determine in writing and in his or her 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) A contract for architectural or professional engineering services relating to construction projects may be negotiated ~~by the Authority~~ for multiple projects provided (1) the projects require similar experience and expertise, (2) the nature of the projects is clearly identified in the Request for Proposal, and (3) the contract term is limited to one year or when the cumulative total project fees reach the maximum cost authorized in this ~~paragraph~~subsection, whichever occurs first.

Such contracts may be renewable for four additional one-year terms at the option of the Authority. The fair and reasonable prices as negotiated shall be used in determining the cost of each project performed. ~~and the~~ The sum of all projects performed in one contract term shall not exceed ~~\$750,000~~.

The project fee for any single project for architectural or professional engineering services relating to construction projects shall not exceed ~~\$150,000~~. Any unused amounts from a contract term may not be carried forward to subsequent terms.

~~Competitive~~ negotiations for such contracts may result in awards to more than one offeror provided (1) the Request for Proposal so states and (2) the Authority has established procedures for distributing multiple projects among the selected contractors during the contract term. Such procedures shall prohibit requiring the selected contractors to compete for individual projects based on price.

(c) Multiphase professional services contracts satisfactory and advantageous to the Authority for completion of large, phased, or long-term projects may be negotiated and awarded based upon qualifications at a fair and reasonable price for the first phase only, when completion of the earlier phases is necessary to provide information critical to the negotiation of a fair and reasonable price for succeeding phases. Prior to the procurement of any such contract, the Authority Purchasing Agent shall state the anticipated intended total scope of the project and determine in writing that the nature of the work is such that the best interests of the Authority require awarding the contract.

§ 76.5 Procurement of Negotiations For Other than Professional Services.

Selection shall be made of two or more offerors deemed to be fully qualified and best suited among those submitting proposals, on the basis of the factors involved in the Request for Proposal, including price if so stated in the Request for Proposal. Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but need not be the sole or primary determining factor. After negotiations have been conducted with each offeror so selected, the Purchasing Agent shall select the offeror which, in his or her opinion, has made the

best proposal, and shall award the contract to that offeror. When the terms and conditions of multiple awards are so provided in the Request for Proposal, awards may be made to more than one offeror. Should the Purchasing Agent determine in writing and in his or her sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified than the others under consideration, a contract may be negotiated and awarded to that offeror.

ARTICLE 87 JOB ORDER CONTRACTS

§ 87.1 Approval of Use.

The Authority Purchasing Agent may award a job order contract for multiple jobs, provided (a) the jobs require similar experience and expertise; (b) the nature of the jobs is clearly identified in the solicitation; and (c) the contract is limited to a term of one year or when the cumulative total project fees reach the maximum authorized by § 87.2 of this policy, whichever occurs first. Contractors may be selected through either competitive sealed bidding or competitive negotiation.

§ 87.2 General Requirements.

At the Authority's option, jJob order contracts may be renewed by the Purchasing Agent for up to two additional one-year terms. The fair and reasonable prices as negotiated shall be used in determining the cost of each job performed, and the sum of all jobs performed in a one-year contract term shall not exceed \$65 million. Individual job orders shall not exceed \$500,000. Any unused amounts from one contract term shall not be carried forward to any additional term.

§ 87.3 Restrictions.

(a) Order splitting with the intent of keeping a job order under the maximum dollar amounts prescribed in § 87.2 of this policy is prohibited.

(b) Job order contracting may not be used solely for the purpose of purchasing professional architectural or engineering services that constitute the practice of architecture or the practice of engineering as those terms are defined in Code of Virginia § 54.1-400. However, professional architectural or engineering services may be included on a job order where such professional services are (i) incidental and directly related to the job; (ii) do not exceed \$25,000 per job order; and (iii) do not exceed \$75,000 per contract term.

(c) Job order contracting may not be used for construction, maintenance, or asset management services for a highway, bridge, tunnel, or overpass. However, job order contracting may be used for safety improvements or traffic calming measures for individual job orders up to \$250,000, subject to the maximum annual threshold established above.

ARTICLE 98

DESIGN-BUILD and CONSTRUCTION MANAGEMENT CONTRACTS

§ 98.1 Approval of Use; Exceptions.

The Authority may ~~enter into~~ procure contracts for construction on a fixed price or not-to-exceed price design-build or construction management basis in accordance with the provisions of this Article.

~~provided the Authority complies with the requirements of this Article and has implemented procedures consistent with the procedures adopted by the Secretary of Administration for utilizing design-build or construction management contracts.~~

§ 98.2 General Requirements.

(a) Professional Advisor. Prior to electing to use a design-build or construction management contract for a specific construction project, the Purchasing Agent shall ~~procure~~ hire a licensed architect or professional engineer (the “Professional Advisor”) with professional competence appropriate to the project who shall advise the Purchasing Agent regarding the use of design-build or construction management for the project and who shall assist the Purchasing Agent with the preparation of the Request for Qualifications, ~~and~~ Request for Proposal, and the evaluation thereof.

(b) Eligibility Requirements. Prior to ~~procuring issuing a Request for Proposal for any~~ design-build or construction management contract, the Purchasing Agent shall issue a written determination that competitive sealed bidding is not practical or fiscally advantageous and document the basis for the determination to utilize design-build or construction management. document in writing that as to the particular project:

- ~~1. a design-build or construction management contract is more advantageous than a competitive sealed bid construction contract;~~
- ~~2. there is a benefit to the Authority by using a design-build or construction management contract; and~~
- ~~3. competitive sealed bidding is not practical or fiscally advantageous.~~

(c) Evaluation Committee. An Evaluation Committee of not less than three members shall be appointed by the Purchasing Agent to review and evaluate submittals. To the extent possible, the Evaluation Committee shall include one licensed professional architect or professional engineer. The Professional Advisor may be a member of the Evaluation Committee. Members of the Evaluation Committee may be employees of the Authority or City of Harrisonburg, but may not be officers, directors, owners or employees of or otherwise affiliated with any offeror or potential offeror.

(d) Reporting Requirements. The Purchasing Agent shall report no later than November 1 of each year to the Director of the Department of General Services on all completed design build or construction management projects in excess of \$2 million, including (1) the procurement method utilized, (2) the project budget, (3) the actual project cost, (4) the expected timeline, (5) the actual completion time, and (6) any post-project issues.

§ 98.3 Design-Build Procurement Procedure.

Design-build contracts shall be procured using the following two-step competitive negotiation process:

(a) Selection of Qualified Offerors.

—(1)- Request for Qualifications. The Purchasing Agent shall issue a Request for Qualifications inviting potential offerors to submit their qualifications as both “designer” and “builder” of the construction. The Professional Advisor shall assist the Purchasing Agent in preparing the Request for Qualifications. The Request for Qualifications shall describe in general terms the particular construction and specify all factors that will be used in evaluating potential offerors’ qualifications. The Request for Qualifications shall also contain or incorporate by reference other applicable contractual terms and conditions, including any unique capabilities or qualifications required for the project. The Request for Qualifications shall request only such information as is appropriate for an objective evaluation of all potential offerors pursuant to the criteria in the Request for Qualifications.

—Notice of the Request for Qualifications shall be published at least 10 days prior to the deadline for qualification submittals by posting in a public area normally used for posting of public notices and by posting on the On-Line Bids page eVa, Virginia’s electronic procurement website, at <http://eva.virginia.gov>. In addition, the notice shall be published in a newspaper of general circulation in the area in which the contract is to be performed. The intent of publication is to provide reasonable notice to the maximum number of potential offerors that can be reasonably anticipated to submit qualifications in response to the Request for Qualifications.

—(2)- Review. The Evaluation Committee shall evaluate the qualification submittals based on the criteria set forth in the Request for Qualifications. Additional information submitted by potential offerors can be considered by the Evaluation Committee. The Evaluation Committee shall select and prequalify two to five offerors that it deems most qualified and suitable for the project.

Within a reasonable time after review of all qualification submittals, but no less than 30 days prior to the deadline for submission of proposals, all potential offerors shall be notified in writing whether they have been prequalified. If an offeror is denied prequalification, the notice shall include the reasons for denial and the factual basis of those reasons. Potential offerors may be denied prequalification only upon those grounds specified in § 43.2(g) of this policy.

(b) Selection of Contractor.

(1)- Request for Proposals. The Purchasing Agent shall issue a Request for Proposals to the offerors prequalified by the Evaluation Committee. The Professional Advisor shall assist the Purchasing Agent in preparing the Request for Proposals. The Request for Proposals shall request that offerors submit separate sealed Technical Proposals and Cost Proposals. Cost Proposals shall be secured and kept sealed until evaluation of all Technical Proposals is completed.

The Request for Proposals shall define the criteria to be used by the Evaluation Committee to evaluate each proposal. In addition, the Request for Proposals shall include and define the criteria of the specific construction project in areas such as site plans; floor plans; exterior elevations; basic building envelope materials; fire protection information plans; structural, mechanical (HVAC), and electrical systems; and special telecommunications. The Request for Proposals may also define such other requirements as the Purchasing Agent deems appropriate for that particular construction project.

Qualified offerors may comment on the specifications or other provisions of the Request for Proposals prior to the deadline for submission. Any comments made prior to the deadline for proposal submission will be considered by the Evaluation Committee when reviewing the Technical Proposals.

(2)- Review of Technical Proposals. The Evaluation Committee shall evaluate each of the Technical Proposals based on the criteria set forth in the Request for Proposals. As a part of the evaluation process, the Evaluation Committee shall grant each of the offerors an equal opportunity for direct and private communication with the Evaluation Committee. Each offeror shall be allotted the same fixed amount of time. The Evaluation Committee shall exercise care to discuss the same information with all offerors. The Evaluation Committee shall inform each offeror of any adjustments necessary to make its Technical Proposal fully comply with the requirements of the Request for Proposals. The Evaluation Committee shall not disclose any trade secret or proprietary information

for which the offeror has invoked protection pursuant to § 13.2(f) of this policy and § 2.2-4342(F) of the Procurement Act.

— Based upon its review of the Technical Proposals, the Evaluation Committee shall determine whether any changes to the Request for Proposals should be made to clarify errors, omissions or ambiguities or to incorporate project improvements or additional details, or both, identified by the Evaluation Committee during its review. If such changes are required, an addendum shall be provided to each offeror.

— Based on any revisions to the Technical Proposals, the offeror may amend its Cost Proposal. In addition, an offeror may submit cost modifications to its sealed Cost Proposal which are not based upon revisions to the Technical Proposals.

— (3): Review of Cost Proposal. At the conclusion of this process, the Evaluation Committee shall publicly open, read aloud, and tabulate the Cost Proposals. The Evaluation Committee shall add to or deduct from the appropriate Cost Proposal any cost adjustments contained in amendments submitted by an offeror.

— (4): Selection of Contractor. The Evaluation Committee shall make its recommendation on the selection of the design-builder to the Purchasing Agent based on its evaluation and negotiations. Unless otherwise specified in the Request for Proposals, the design-build contract shall be awarded to the fully qualified offeror who submits an acceptable proposal determined to be the best value in response to the Request for Proposal. When the terms and conditions of multiple awards are so provided in the Request for Proposals, awards may be made to more than one offeror.

— The Purchasing Agent shall notify all offerors who submitted proposals which offeror was selected for the project. Upon request, documentation of the process used for the final selection shall be made available to the unsuccessful offerors.

§ 98.4 Construction Management Procurement Procedure.

(a) Prerequisites for Use. Construction management contracts may be procured (1) for any project whose cost is expected to exceed \$10 million; and (2) any complex project whose cost is less than \$10 million and construction management has been approved by the Governing Body. A “complex project” is a construction project that includes 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 impractical. The written approval of the Governing Body shall be maintained in the procurement file.

(b) Procurement Procedure. Construction management contracts shall be procured using the following two-step competitive negotiation process:

(1a) Selection of Qualified Offerors.

(i)1. Request for Qualifications. The Purchasing Agent shall issue a Request for Qualifications inviting potential offerors to submit their qualifications for coordinating and administering contracts for construction services as both “designer” and “builder” of the construction. The Professional Advisor shall assist the Purchasing Agent in preparing the Request for Qualifications. The Request for Qualifications shall describe in general terms the particular construction projects, and specify all factors that will be used in evaluating potential offerors’ qualifications. The Request for Qualifications shall also contain or incorporate by reference other applicable contractual terms and conditions, including any unique capabilities or qualifications required for the project. The Request for Qualifications shall request only such information as is appropriate for an objective evaluation of all potential offerors pursuant to the criteria in the Request for Qualifications.

Notice of the Request for Qualifications shall be posted on the Department of General Services’ central electronic procurement website published at least 340 days prior to the deadline for qualification submittals by posting in a public area normally used for posting of public notices and by posting on the On Line Bids page eVa, Virginia’s electronic procurement website, at <http://eva.virginia.gov>. In addition, the notice may also shall be published in a newspaper of general circulation in the area in which the contract is to be performed. The intent of publication is to provide reasonable notice to the maximum number of potential offerors that can be reasonably anticipated to submit qualifications in response to the Request for Qualifications.

(ii)2. Review. The Evaluation Committee shall evaluate the qualification submittals based on the criteria set forth in the Request for Qualifications. Additional information submitted by potential offerors can be considered by the Evaluation Committee. The Evaluation Committee shall select and prequalify two to five offerors that it deems most qualified and suitable for the project.

Within a reasonable time after review of all qualification submittals, but no less than 30 days prior to the deadline for submission of proposals, all potential offerors shall be notified in

writing whether they been prequalified. If an offeror is denied prequalification, the notice shall include the reasons for denial and the factual basis of those reasons. Potential offerors may be denied prequalification only upon those grounds specified in § 43.2(g) of this policy.

_____ (2b) Selection of Contractor.

_____ (i) Request for Proposals. The Purchasing Agent shall issue a Request for Proposals to the offerors prequalified by the Evaluation Committee. The Professional Advisor shall assist the Purchasing Agent in preparing the Request for Proposals.

_____ The Request for Proposals shall define the criteria to be used by the Evaluation Committee to evaluate each proposal. In addition, the Request for Proposals shall include and define the criteria of the specific construction project in areas such as site plans; floor plans; exterior elevations; basic building envelope materials; fire protection information plans; structural, mechanical (HVAC), and electrical systems; and special telecommunications. The Request for Proposals may also define such other requirements as the Purchasing Agent deems appropriate for that particular construction project.

_____ Qualified offerors may comment on the specifications or other provisions of the Request for Proposals prior to the deadline for submission. Any comments made prior to the deadline for proposal submission will be considered by the Evaluation Committee when reviewing the proposals.

(ii) 2. Evaluation of Proposals. The Evaluation Committee shall evaluate each of the proposals based on the criteria set forth in the Request for Proposals. After evaluating the proposals, the Evaluation Committee shall div

_____ (a) cConduct negotiations with two or more offerors submitting the highest ranked proposals, or

_____ (b) Sif should the Purchasing Agent determines, in writing and at his or her sole discretion, that only one offeror is fully qualified or that one offeror is clearly more highly qualified than the others under consideration, a contract may be negotiated and awarded to that offeror.

_____ (iii)3. Award of Contract~~Selection of Contractor~~. The Evaluation Committee shall make its recommendation on the selection of the construction manager to the Purchasing Agent based on its evaluation and negotiations. The construction management contract shall be awarded to the fully qualified offeror who submits an acceptable proposal determined to be the best value in response to the Request for Proposal. Price shall be a critical basis for awarding the contract. Prior construction management experience may be considered but is not required as a prerequisite for award of a contract. When the terms and conditions of multiple awards are so provided in the Request for Proposals, awards may be made to more than one offeror. The contract must be entered into no later than the completion of the schematic phase of design, unless prohibited by authorization of funding restrictions.

_____ The Purchasing Agent shall notify all offerors who submitted proposals which offeror was selected for the project. Upon request, documentation of the process used for the final selection shall be made available to the unsuccessful offerors.

(c) Required Terms for ~~Guaranteed Maximum Price~~ Construction Management Contracts.

Any ~~guaranteed maximum price~~ construction management contract entered into by the Authority shall contain provisions requiring that (1) not more than 10 percent of the construction work (measured by cost of the work) will be performed by the construction manager with its own forces; and (2) that the remaining 90 percent of the construction work will be performed by subcontractors of the construction manager which the construction manager must procure by publicly advertised, competitive sealed bidding, to the maximum extent practicable. ~~The Purchasing Agent may modify these contractual requirements in whole or in part for projects where it would be fiscally advantageous to the public to increase the amount of work performed by the construction manager. In addition, the guaranteed maximum price shall be established at the completion of working drawings unless this requirement is waived by the Purchasing Agent.~~

ARTICLE 109 COOPERATIVE PROCUREMENT

§ 109.1 Conditions for Use.

The Authority may participate in, sponsor, conduct or administer a joint procurement agreement 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.

~~The Authority may also purchase from another public body's contract 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:~~

~~Contracts for architectural or engineering services; or~~

~~Construction.~~

Any public body that enters into a cooperative procurement agreement with the Authority shall comply with the policies and procedures herein, except that if the Authority enters into a cooperative procurement agreement with a county, city or town that has alternative policies and procedures adopted pursuant to subsections (A)(9) or (A)(10) of § 2.2-4343 of the Procurement Act, the Authority shall comply with those policies and procedures.

ARTICLE 10
EXCEPTIONS TO REQUIREMENTS
FOR COMPETITIVE PROCUREMENT

§ 10.1 Sole Source Procurement.

~~Upon a determination in writing that there is only one source practicably available for that which is to be procured, a contract may be negotiated and awarded to that source without competitive sealed bidding or competitive negotiation. The writing shall document the basis for this determination. The Purchasing Agent shall issue a written notice stating that only one source was determined to be practicably available, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted on the Department of General Services' central electronic procurement website or other appropriate websites, and in addition, the Purchasing Agent may publish it in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first. The notice shall be posted in a designated public area of the Authority's offices.~~

§ 10.2 Emergency Purchases.

~~(a) In case of emergency, a contract may be awarded without competitive sealed bidding or competitive negotiation; however, such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The Purchasing Agent shall issue a written notice stating that the contract is being awarded~~

~~on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted on the Department of General Services' central electronic procurement website or other appropriate websites, and in addition, the Purchasing Agent may publish it in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first.~~

~~(b) The Authority shall deem an emergency to exist in the following circumstances:~~

- ~~(1) a breakdown in machinery or equipment;~~
- ~~(2) a threatened termination of essential services;~~
- ~~(3) the development of a dangerous condition;~~
- ~~(4) any circumstance causing curtailment or diminution of an essential service; or~~
- ~~(5) any circumstance in which materials or services are needed to prevent loss of life or property.~~

~~§ 10.3 Small Purchases.~~

~~(a) Goods, Services Other than Professional Services, and Non-Transportation Related Construction. The Purchasing Agent may, in his or her discretion, make single or term contacts for goods, services other than professional services, and non-transportation related construction without requiring sealed bids or competitive negotiation if the aggregate or sum of all phases is not expected to exceed \$100,000. Compliance with the Uniform State Building Code may not be waived for construction purchased pursuant to this section.~~

~~Purchases made by the Purchasing Agent pursuant to this section may be based upon any one of the following criteria:~~

- ~~(1) Pricelists; Price Quotes. The cost of the items purchased is the lowest of the suppliers' current price lists in the office of the Purchasing Agent. The Purchasing Agent shall attempt to obtain at least three current price lists from suppliers prior to making purchases under this provision. The Purchasing Agent may obtain verbal or written price quotations from two suppliers in lieu of current price lists. Any price list obtained within 12 months of the purchase or any verbal or written quotation obtained within 30 days of the purchase shall be considered current.~~
- ~~(2) Common Pricing. The Purchasing Agent knows that all competitors have substantially the same price for the items to be purchased.~~
- ~~(3) Reorder. The purchase does not exceed \$30,000 and is a reorder of commodities purchased within 12 months prior to the proposed purchase.~~

- (4) Nominal Value. The contract or purchase is of nominal value.
- (5) Two Quotes. The Purchasing Agent obtains a written or verbal price quotation for goods or services from at least two providers.
- (6) Impracticability. The Purchasing Agent concludes that it is not practicable to obtain bids for the purchases.

_____ (b) Professional Services. The Purchasing Agent may also in his or her discretion make single or term contracts for professional services if the aggregate amount or the sum of all phases is not expected to exceed \$60,000, provided that such purchases are made on the basis of one of the requirements listed in paragraphs (a)(1) through (a)(6) above.

§ 10.4 Purchases at Auction.

- (a) Upon a determination made in advance by the Purchasing Agent and set forth in writing that the purchase of goods, products or commodities from a public auction sale is in the best interests of the public, such items may be purchased at the auction, including online public auctions. The writing shall document the basis for this determination. However, bulk purchases of commodities used in road and highway construction and maintenance, and aggregates shall not be made by online public auctions.
- (b) 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.

ARTICLE 11 DEBARMENT

§ 11.1 Authority to Debar or Suspend.

_____ The Purchasing Agent may, in the public interest, debar a prospective contractor from participating in the Authority's competitive procurement. The seriousness of the grounds and any mitigating factors should be considered in making any debarment decision.

§ 11.2 Grounds for Debarment.

The Purchasing Agent may debar a prospective contractor for any of the following grounds:

- (a) Conviction of or entry of a civil judgment for
 - (1) Fraud or any criminal offense in connection with obtaining, attempting to obtain, or performing a public contract or subcontract.
 - (2) Violating federal or state antitrust statutes relating to the submission of offers.
 - (3) Embezzlement, theft, forgery, bribery, falsification, destruction of records, making false statements, or receiving stolen property.
 - (4) Any other offense that reflects a lack of business integrity or business honesty and directly affects the responsibility of a contractor or subcontractor.
- (b) Breach of the terms of a government contract or subcontract so serious as to justify debarment, including:
 - (1) Willfully failing to perform in accordance with the terms of a contract.
 - (2) A history of failing to perform or of performing unsatisfactorily under a contract.
 - (3) Any other cause of so serious or compelling that it affects the present responsibility of a contractor or subcontractor.

§ 11.3 Debarment Procedure.

- (a) Notice of consideration. The prospective contractor shall be advised that debarment is being considered. The notice should be by certified mail, return receipt requested. The notice shall include the reasons for the proposed debarment.
- (b) Challenge. Within 10 days of the date of the notice, the prospective contractor may submit information challenging the proposed debarment.
- (c) Decision. The Purchasing Agent shall render a written decision within 5 days of receiving the prospective contractor's rebuttal information. Any debarment should be for a time period that reflects the seriousness of the cause.
- (d) Appeal. The Purchasing Agent's decision is final unless the prospective contractor appeals the decision within 10 days after receipt by invoking the administrative appeals procedure provided in § 12.4 or instituting legal action pursuant to § 12.6 of this policy.

~~Agent after consulting with the Authority's attorney, the governing body or Purchasing Agent is authorized to debar a person for cause from consideration for award of contracts. Prior~~

~~to exercising such authority, the person involved shall be given reasonable notice and a reasonable opportunity to be heard. The debarment shall not be for a period of more than three years. After consultation with the Authority's attorney, the governing body or Purchasing Agent is authorized to suspend a person from consideration for award of contracts if there is probable cause to believe that the person has engaged in any activity that might lead to debarment. The suspension shall not be for a period exceeding three months. Causes for debarment shall include:~~

- ~~1. Conviction for 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,~~
- ~~2. Conviction under state or federal statutes for embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly impacts responsibility as a potential Authority contractor.~~
- ~~3. Conviction under state or federal antitrust statutes arising out of the submission of bids or proposals.~~
- ~~4. Violation of contract provisions, as set forth below, of a character which is regarded by the governing body or Purchasing Agent to be so serious as to justify debarment:
 - ~~a. deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or~~
 - ~~b. a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment.~~~~
- ~~5. Any other cause the governing body or Purchasing Agent determines to be so serious and compelling as to affect responsibility as a Authority contractor including debarment by another governmental entity for any cause in this policy; and for violation of the ethical standards set forth in this policy.~~

§ 11.2 Decision to Debar or Suspend.

~~The governing body or Purchasing Agent shall issue a written decision to debar or suspend. The decision shall state the reasons for the action taken and inform the debarred or suspended person involved of their rights concerning administrative and judicial review.~~

§ 11.3 Notice of Decision.

~~A copy of the decision required by § 11.2 of this policy shall be mailed or otherwise furnished immediately to the debarred or suspended person.~~

§ 11.4 Finality of Decision.

~~A decision under § 11.2 of this policy shall be final and conclusive unless the debarred or suspended person commences an action in court in accordance with applicable law within 10 days after receipt of the decision.~~

ARTICLE 12 APPEALS and REMEDIES

§ 12.1 Ineligibility of Bidder, Offeror or Contractor.

(a) Any bidder, offeror or contractor refused permission to participate, or disqualified from participation, in public contracts shall be notified in writing. Prior to the issuance of a written determination of disqualification or ineligibility, the Purchasing Agent shall (1) notify the bidder in writing of the results of the evaluation, (2) disclose the factual support for the determination, and (3) allow the bidder an opportunity to inspect any documents that relate to the determination, if so requested by the bidder within five business days after receipt of the notice.

Within 10 business days after receipt of the notice, the bidder may submit rebuttal information challenging the evaluation. The Purchasing Agent shall issue its written determination of disqualification or ineligibility based on all information its possession, including any rebuttal information, within five business days of the date the Purchasing Agent received such rebuttal information.

If the evaluation reveals that the bidder, offeror or contractor should be allowed permission to participate in the public contract, the Purchasing Agent shall cancel the proposed disqualification action. If the evaluation reveals that the bidder should be refused permission to participate, or disqualified from participation, in the public contract, the Purchasing Agent shall so notify the bidder, offeror or contractor. The notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within 10 days after receipt of the notice by invoking the administrative appeal procedure provided in § 12.4 or instituting legal action as provided in § 12.6 of this policy.

(b) If, upon appeal, it is determined that the action taken was arbitrary or capricious, or not in accordance with the Constitution of Virginia, applicable state law or regulations, the sole relief shall be restoration of eligibility.

§ 12.2 Protest of Award or Decision to Award.

(a) Any bidder or offeror may protest the award or decision to award a contract by submitting the protest in writing to the Purchasing Agent no later than 10 days after the award or the announcement of the decision to award, whichever occurs first. Public notice of the award or

the announcement of the decision to award shall be given in the manner prescribed in the terms or conditions of the Invitation to Bid or Request for Proposal. Any potential bidder or offeror on a contract negotiated on a sole source or emergency basis who desires to protest the award or decision to award such contract shall submit the protest in the same manner no later than 10 days after posting or publication of the notice of such contract. However, if the protest of any actual or potential bidder or offeror depends in whole or in part upon information contained in public records pertaining to the procurement transaction that are subject to inspection, then the time within which the protest shall be submitted shall expire 10 days after those records are available for inspection by such bidder or offeror, or at such later time as provided in this section. The written protest shall include the basis for the protest and the relief sought. No protest shall lie for a claim that the selected bidder or offeror is not a responsible bidder or offeror. The Purchasing Agent shall issue a decision in writing within 10 days stating the reasons for the action taken. This decision shall be final unless the bidder or offeror appeals within 10 days of the written decision by invoking the administrative procedures described § 12.4 or instituting legal action as provided in § 12.6 of this policy. Nothing in this subsection shall be construed to permit a bidder to challenge the validity of the terms or conditions of the Invitation to Bid or Request for Proposal.

(b) If prior to an award it is determined that the decision to award is arbitrary or capricious, then the sole relief shall be a finding to that effect. The Purchasing Agent shall cancel the proposed award or revise it to comply with the law. If, after an award, it is determined that an award of a contract was arbitrary or capricious, then the sole relief shall be as hereinafter provided. Where the award has been made but performance has not begun, the performance of the contract may be enjoined. Where the award has been made and performance has begun, the Purchasing Agent may declare the contract void upon a finding that this action is in the best interest of the public. Where a contract is declared void, the performing contractor shall be compensated for the cost of performance up to the time of such declaration. In no event shall the performing contractor be entitled to lost profits.

(c) Where the Purchasing Agent determines, after a hearing held following reasonable notice to all bidders, that there is probable cause to believe that a decision to award was based on fraud or corruption or on an act in violation of Article 15, the Purchasing Agent may enjoin the award of the contract to a particular bidder.

(d) An award need not be delayed for the period allowed a bidder or offeror to protest, but in the event of a timely protest, no further action to award the contract will be taken unless there is a written determination that proceeding without delay is necessary to protect the public interest or unless the bid or offer would expire.

§ 12.1 Ineligibility of Bidder, Offeror or Contractor

(a) Any bidder, offeror or contractor refused permission to participate, or disqualified from participation, in public contracts shall be notified in writing. Prior to the issuance of a written determination of disqualification or ineligibility, the Purchasing Agent shall (i) notify the

~~bidder in writing of the results of the evaluation, (ii) disclose the factual support for the determination, and (iii) allow the bidder an opportunity to inspect any documents that relate to the determination, if so requested by the bidder within five business days after receipt of the notice.~~

~~Within 10 business days after receipt of the notice, the bidder may submit rebuttal information challenging the evaluation. The Purchasing Agent shall issue its written determination of disqualification or ineligibility based on all information its possession, including any rebuttal information, within five business days of the date the Purchasing Agent received such rebuttal information.~~

~~If the evaluation reveals that the bidder, offeror or contractor should be allowed permission to participate in the public contract, the Purchasing Agent shall cancel the proposed disqualification action. If the evaluation reveals that the bidder should be refused permission to participate, or disqualified from participation, in the public contract, the Purchasing Agent shall so notify the bidder, offeror or contractor. The notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within 10 days after receipt of the notice by instituting legal action as provided in § 12.9 of this policy.~~

~~(b) If, upon appeal, it is determined that the action taken was arbitrary or capricious, or not in accordance with the Constitution of Virginia, applicable state law or regulations, the sole relief shall be restoration of eligibility.~~

§ 12.2 Appeal of Denial of Withdrawal of Bid.

~~(a) A decision denying withdrawal of bid under the provisions of § 5.10 shall be final and conclusive unless the bidder appeals the decision within 10 days after receipt of the decision by instituting legal action as provided in § 12.9 of this policy.~~

~~(b) If no bid bond was posted, a bidder refused withdrawal of a bid under the provisions of § 5.10 of this policy shall, prior to appealing, deliver to the Purchasing Agent a certified check or cash bond in the amount of the difference between the bid sought to be withdrawn and the next lowest bid. Such security shall be released only upon a final determination that the bidder was entitled to withdraw the bid.~~

~~(c) If, upon appeal, it is determined that the decision refusing withdrawal of the bid was (i) not an honest exercise of discretion, but rather was arbitrary or capricious or (ii) not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid, the sole relief shall be withdrawal of the bid.~~

§ 12.3 Determination of Nonresponsibility.

~~(a) If the Purchasing Agent determines that the apparent low bidder is not responsible, it shall proceed as follows:~~

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

~~2. Within 10 business days after receipt of the notice, the bidder may submit rebuttal information challenging the evaluation. The Purchasing Agent shall issue a written determination of responsibility based on all information in its possession, including any rebuttal information, within five business days of the date the Purchasing Agent received the rebuttal information. At the same time, the Purchasing Agent shall notify, with return receipt requested, the bidder in writing of the determination.~~

~~3. Such notice shall state the basis for the determination which shall be final unless the bidder appeals the decision within 10 days after receipt of the notice by instituting legal action as provided in § 12.9 of this policy.~~

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

~~(b) If, upon appeal, it is determined that the decision of the Purchasing Agent was (i) not an honest exercise of discretion, but rather was arbitrary or capricious or (ii) not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid, and the award of the contract in question has not been made, the sole relief shall be a finding that the bidder is a responsible bidder for the contract in question. If it is determined that the decision of the Purchasing Agent was (i) not an honest exercise of discretion, but rather was arbitrary or capricious or (ii) not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid and the contract has been awarded, the relief shall be as set forth in § 12.4 of this policy.~~

~~(c) A bidder contesting a determination that he or she is not a responsible bidder for a particular contract shall proceed under this section, and may not protest the award or proposed award under § 12.4 of this policy.~~

~~(d) Nothing contained in this section shall be construed to require the Authority to furnish a statement of the reasons why a particular proposal was not deemed to be the most advantageous when procuring by competitive negotiation.~~

§ 12.4 Protest of Award or Decision to Award.

~~(a) Any bidder or offeror may protest the award or decision to award a contract by submitting the protest in writing to the Purchasing Agent no later than 10 days after the award or~~

~~the announcement of the decision to award, whichever occurs first. Public notice of the award or the announcement of the decision to award shall be given in the manner prescribed in the terms or conditions of the Invitation to Bid or Request for Proposal. Any potential bidder or offeror on a contract negotiated on a sole source or emergency basis who desires to protest the award or decision to award such contract shall submit the protest in the same manner no later than 10 days after posting or publication of the notice of such contract. However, if the protest of any actual or potential bidder or offeror depends in whole or in part upon information contained in public records pertaining to the procurement transaction that are subject to inspection, then the time within which the protest shall be submitted shall expire 10 days after those records are available for inspection by such bidder or offeror, or at such later time as provided in this section. The written protest shall include the basis for the protest and the relief sought. No protest shall lie for a claim that the selected bidder or offeror is not a responsible bidder or offeror. The Purchasing Agent shall issue a decision in writing within 10 days stating the reasons for the action taken. This decision shall be final unless the bidder or offeror appeals within 10 days of the written decision by instituting legal action as provided in § 12.9 of this policy. Nothing in this subsection shall be construed to permit a bidder to challenge the validity of the terms or conditions of the Invitation to Bid or Request for Proposal.~~

~~(b) If prior to an award it is determined that the decision to award is arbitrary or capricious, then the sole relief shall be a finding to that effect. The Purchasing Agent shall cancel the proposed award or revise it to comply with the law. If, after an award, it is determined that an award of a contract was arbitrary or capricious, then the sole relief shall be as hereinafter provided. Where the award has been made but performance has not begun, the performance of the contract may be enjoined. Where the award has been made and performance has begun, the Purchasing Agent may declare the contract void upon a finding that this action is in the best interest of the public. Where a contract is declared void, the performing contractor shall be compensated for the cost of performance up to the time of such declaration. In no event shall the performing contractor be entitled to lost profits.~~

~~(c) Where the Purchasing Agent determines, after a hearing held following reasonable notice to all bidders, that there is probable cause to believe that a decision to award was based on fraud or corruption or on an act in violation of Article 14, the Purchasing Agent may enjoin the award of the contract to a particular bidder.~~

§ 12.5 Effect of Appeal Upon Contract.

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

§ 12.6 Stay of Award During Protest.

~~An award need not be delayed for the period allowed a bidder or offeror to protest, but in the event of a timely protest, no further action to award the contract will be taken unless~~

~~there is a written determination that proceeding without delay is necessary to protect the public interest or unless the bid or offer would expire.~~

§ 12.37 Contractual Disputes.

All contractual claims for money or other relief shall be adjudicated using the following procedure, which shall be included or incorporated by reference in every contract:

(a) Notice. The contractor shall give written notice of his or her intention to file a contractual claim to the Executive Director at the time of the event or the beginning of the work upon which the claim is based.

(b) Claim. Contractual claims must be submitted in writing to the Executive Director no later than 60 days after final payment.

(c) Decision. The Executive Director or an authorized designee shall make a written decision addressing the claim within 90 days of submission.

(d) Appeal. The decision of the Executive Director shall be final and conclusive unless the contractor appeals within six months of the date of the final decision on the claim by invoking administrative procedures or instituting legal action.~~(a) Contractual claims, whether for money or other relief, shall be submitted to the Executive Director in writing no later than 60 days after final payment. However, written notice of the contractor's intention to file such claim shall have been given at the time of the occurrence or beginning of the work upon which the claim is based. Nothing herein shall preclude a contract from requiring submission of an invoice for final payment within a certain time after completion and acceptance of the work or acceptance of the goods. Pendency of claims shall not delay payment of amounts agreed due in the final payment.~~

(b) A procedure for consideration of contractual claims shall be included in each contract. The procedure may be incorporated into the contract by reference and made available to the contractor and shall establish a time limit for a final decision in writing by the Authority. If, however, the Authority fails to include such procedure in a contract or by reference the following procedures shall apply:

~~Contractual claims, whether for money or other relief, shall be submitted 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.~~

~~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 Executive Director. The contractor may not institute legal action prior to receipt of the final written decision on the claim unless the Authority fails to render a decision within 90 days of submission of the claim. Failure of the Authority 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 Authority's failure to render a decision within 90 days shall be the contractor's right to institute immediate legal action.~~

~~— (c) A contractor may not invoke administrative procedures or institute appeal as provided in § 12.8 or institute legal action as provided in § 12.9 prior to receipt of the Authority's decision on the claim, unless the Authority fails to render such decision within the time specified in the contract or, if no time is specified, then within the time provided by subsection (b) the time period specified in Subsection (c).~~

~~— (d)~~

§ 12.4 Administrative Appeals Procedure.

(a) Appealable Decisions. Any contractor may appeal a decision on a contract claim. In addition, any bidder or offeror, or person debarred or denied prequalification, may appeal:

- (1) An award or a decision to award a contract.
- (2) A decision refusing to allow the withdrawal of the appellant's bid.
- (3) A denial of the appellant's prequalification.
- (4) The appellant's debarment.
- (5) A determination of the appellant's nonresponsibility.

(b) Appeals Process. Any protest or appeal pursuant to this section shall be in accordance with the following administrative procedures:

- (1) The appellant shall submit a written letter of appeal to the Executive Director within 10 days of the date of the decision being appealed. The letter of appeal must include the basis for the appeal and the relief sought, and whether the contractor wishes to have a hearing.

(2) If no hearing is requested, the Executive Director or a designee, shall render a written decision within 10 days of receiving the letter of appeal.

(3) If a hearing is requested, it shall be held within 10 days of receipt of the letter of appeal, and a final decision shall be rendered within 10 days of the hearing. During the hearing, the appellant shall have the opportunity to present pertinent information and to cross-exam adverse witnesses. The hearing shall be an informal administrative proceeding rather than a judicial-type trial, and it will be conducted by a disinterested person appointed by the Executive Director and who is not an employee of the Authority.

(c) Judicial Review. Any party to the administrative procedure may institute judicial review within 30 days of receipt of the written decision. Findings of fact shall be final and conclusive and shall not be set aside unless the same are fraudulent or arbitrary or capricious, or so grossly erroneous as to imply bad faith. No determination of an issue of law shall be final if legal action is instituted in a timely manner.

§ 12.5 Effect of Appeal Upon Contract.

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

§ 12.6 Legal Actions.

(a) A bidder or offeror, actual or prospective, who is refused permission to participate or is disqualified from participating in bidding or competitive negotiation, or who is determined not to be a responsible bidder or offeror for a particular contract, may bring an action in the appropriate circuit court challenging that decision, which shall be reversed only if the petitioner establishes that the decision was (i) not an honest exercise of discretion, but rather was arbitrary or capricious; (ii) not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid; or (iii) in the case of denial of prequalification, based upon the criteria for denial of prequalification set forth in § 4.2(g) of this policy.

(b) A bidder denied withdrawal of a bid under this policy may bring an action in the appropriate circuit court challenging that decision, which shall be reversed only if the bidder establishes that the decision of the public body was (i) not an honest exercise of discretion, but rather was arbitrary or capricious, or (ii) not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid.

(c) A bidder, offeror or contractor, or a potential bidder or offeror on a contract negotiated on a sole source or emergency basis whose protest of an award or decision to award

under § 12.2 of this policy is denied, may bring an action in the appropriate circuit court challenging a proposed award or the award of a contract, which shall be reversed only if the petitioner establishes that the proposed award or the award is (i) not an honest exercise of discretion, but rather is arbitrary or capricious or (ii) not in accordance with the applicable law, regulations or the terms and conditions of the Invitation to Bid or Request for Proposal.

(d) If injunctive relief is granted, the court, upon request of the Authority, shall require the posting of reasonable security to protect the Authority.

(e) A contractor may bring an action involving a contract dispute with the Authority in the appropriate circuit court.

(f) A bidder, offeror or contractor need not utilize administrative procedures provided in § 12.4 of this policy, but if those procedures are invoked by the bidder, offeror or contractor, the procedures shall be exhausted prior to instituting legal action concerning the same procurement transaction unless the Authority agrees otherwise.

(g) Nothing herein shall be construed to prevent the Authority from instituting legal action against a contractor.

~~The decision of the Authority shall be final and conclusive unless the contractor appeals within six months of the date of the final decision on the claim by invoking administrative procedures as provided in § 12.8, or in the alternative by instituting legal action as provided in § 12.9 of this policy.~~

§ 12.8 Administrative Appeals Procedure.

(a) Any contractor may protest or appeal a decision on disputes arising during the performance of a contract.

(b) Any protest or appeal pursuant to this section shall be in accordance with the following administrative procedures:

1. Any contractor shall submit a written protest or letter of appeal to the Executive Director of the Authority within the time constraints as set forth in this policy. The written protest or appeal shall include the basis for the protest or appeal and the relief sought, and whether the contractor wishes to have a hearing with respect to the protest or appeal.

2. If no hearing is requested, the Executive Director or his designee, shall render a written decision to the contractor within 10 days of receipt of the written protest or letter of appeal.

3. If a hearing is requested, it shall be held within 10 days of receipt of the written protest or letter of appeal, and a final decision shall be rendered within 10 days of the hearing. During the hearing, the protesting party shall have the opportunity to present pertinent information and to cross-examine adverse witnesses. The hearing shall be an informal administrative proceeding rather than a judicial type trial, and it will be conducted by a disinterested person appointed by the Executive Director and who is not be an employee of the Authority.

4. Findings of fact shall be final and conclusive and shall not be set aside unless the same are fraudulent or arbitrary or capricious, or so grossly erroneous as to imply bad faith. No determination of an issue of law shall be final if appropriate legal action is instituted in a timely manner.

5. Any party to the administrative procedure shall be entitled to institute judicial review if such action is brought within 30 days of receipt of the written decision.

§ 12.9 Legal Actions.

(a) A bidder or offeror, actual or prospective, who is refused permission to participate or is disqualified from participating in bidding or competitive negotiation, or who is determined not to be a responsible bidder or offeror for a particular contract, may bring an action in the appropriate circuit court challenging that decision, which shall be reversed only if the petitioner establishes that the decision was (i) not an honest exercise of discretion, but rather was arbitrary or capricious; (ii) not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid; or (iii) in the case of denial of prequalification, based upon the criteria for denial of prequalification set forth in § 3.2(g) of this policy.

(b) A bidder denied withdrawal of a bid under this policy may bring an action in the appropriate circuit court challenging that decision, which shall be reversed only if the bidder establishes that the decision of the public body was (i) not an honest exercise of discretion, but rather was arbitrary or capricious, or (ii) not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid.

(c) A bidder, offeror or contractor, or a potential bidder or offeror on a contract negotiated on a sole source or emergency basis whose protest of an award or decision to award under § 12.4 of this policy is denied, may bring an action in the appropriate circuit court challenging a proposed award or the award of a contract, which shall be reversed only if the petitioner establishes that the proposed award or the award is (i) not an honest exercise of discretion, but rather is arbitrary or capricious or (ii) not in accordance with the applicable law, regulations or the terms and conditions of the Invitation to Bid or Request for Proposal.

(d) If injunctive relief is granted, the court, upon request of the Authority, shall require the posting of reasonable security to protect the Authority.

(e) A contractor may bring an action involving a contract dispute with the Authority in the appropriate circuit court.

(f) A bidder, offeror or contractor need not utilize administrative procedures provided in § 12.8 of this policy, but if those procedures are invoked by the bidder, offeror or contractor, the procedures shall be exhausted prior to instituting legal action concerning the same procurement transaction unless the Authority agrees otherwise.

(g) Nothing herein shall be construed to prevent the Authority from instituting legal action against a contractor.

ARTICLE 13 RECORD RETENTION and PUBLIC ACCESS

§ 13.1 Record Retention.

The Authority shall maintain such written records as required by this policy and applicable law. All records and contract documents shall be maintained for at least three years after the Authority makes final payment and all other pending matters have concluded with respect to any given procurement transaction.

§ 13.2 Public Access to Procurement Information.

(a) Except as provided herein, all proceedings, records, contracts, and other public records relating to procurement transactions shall be open to the inspection of any citizen, or any interested person, firm or corporation, in accordance with the Virginia Freedom of Information Act (Virginia Code, § 2.2-3700, *et seq.*).

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

(c) Any competitive sealed bidder, upon request, shall be afforded the opportunity to inspect bid records within a reasonable time after the opening of all bids but prior to award, except in the event that the Authority rejects all bids and reopens the contract. Otherwise, bid and proposal records shall be open to public inspection only after award of the contract.

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

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

(f) Trade secrets or proprietary information submitted by a bidder, offeror or contractor in connection with a procurement transaction or prequalification application shall not be subject to public disclosure under the Virginia Freedom of Information Act; however, the bidder, offeror or contractor must invoke the protections of this section prior to or upon submission of the data or other materials, identify the data or other materials to be protected, and state the reasons why protection is necessary. A bidder, offeror, or contractor shall not designate as trade secrets or proprietary information (1) an entire bid, proposal, or prequalification application; (2) any portion of a bid, proposal, or prequalification application that does not contain trade secrets or proprietary information; or (3) line item prices or total bid, proposal, or prequalification application prices.

ARTICLE 14

ETHICS IN PUBLIC CONTRACTING

§ 14.1 Purpose.

~~The provisions of this Article supplement, but do not supersede, other provisions of law including, but not limited to, the State and Local Government Conflict of Interests Act (§ 2.2-3100, *et seq.*), the Virginia Governmental Frauds Act (§ 18.2-498.1, *et seq.*) and Article 2 (§ 18.2-438, *et seq.*) and Article 3 (§ 18.2-446, *et seq.*) of Chapter 10 of Title 18.2. The provisions of this Article apply notwithstanding the fact that the conduct described may not constitute a violation of the State and Local Government Conflict of Interests Act.~~

§ 14.2 Proscribed Participation by Public Employees in Procurement Transactions.

No public employee having official responsibility for a procurement transaction shall participate in that transaction on behalf of the governing body when the employee knows that:

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

§ 14.3 Prohibition on Solicitation or Acceptance of Gifts.

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

§ 14.4 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 Authority unless the employee, or former employee, provides written notification to the Authority prior to commencement of employment by that bidder, offeror or contractor.

§ 14.5 Prohibition of Gifts by Bidders, Offerors, Contractors or Subcontractors.

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

§ 14.6 Kickbacks.

_____ (a) _____ No contractor or subcontractor shall demand or receive from any supplier or subcontractor, as an inducement for the award of a subcontract or order, any payment, loan, subscription, advance, deposit of money, services or anything, present or promised, unless consideration of substantially equal or greater value is exchanged.

_____ (b) _____ No subcontractor or supplier shall make, or offer to make, kickbacks as described in this section.

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

_____ (d) _____ If a subcontractor or supplier makes a kickback or other prohibited payment as described in this section, the amount thereof shall be conclusively presumed to have been included in the price of the subcontract or order and ultimately borne by the Authority and will be recoverable from both the maker and recipient. Recovery from one offending party shall not preclude recovery from other offending parties.

§ 14.7 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 the Authority 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, the Purchasing Agent may permit such person to submit a bid or proposal for that procurement or any portion thereof if he or she 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 Authority.

§ 14.8 Purchase of Building Materials, etc., from Architect or Engineer Prohibited.

_____ (a) _____ Except in cases of emergency, no building materials, supplies or equipment for any building or structure constructed by or for the Authority shall be sold by or purchased from any person employed as an independent contractor by the Authority 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 by this policy and Virginia Code § 2.2-3101.

_____ (b) _____ Except in cases of emergency, no building materials, supplies or equipment for any building or structure constructed by or for the Authority 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 Authority to furnish architectural or engineering services in which such person has a personal interest as defined by this policy and Virginia Code § 2.2-3101.~~

§ 14.9 Misrepresentations Prohibited.

~~No Authority 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.~~

§ 14.10 Penalty for Violation.

~~A willful violation of any provision of this policy shall constitute a Class 1 misdemeanor under § 2.2-4377 of the Code of Virginia. Upon conviction, any public employee, in addition to any other fine or penalty provided by law, shall forfeit his or her employment.~~

ARTICLE 14
ADDITIONAL PROVISIONS APPLICABLE TO
PROCUREMENTS INVOLVING FEDERAL FUNDS

§ 14.1 Applicability.

The Authority is required to comply with federal regulations when a procurement is conducted in whole or in part with federal funds. The United States Office of Management and Budget's Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards apply to all federal grants.

§ 14.2 Full and Open Competition.

All procurement transactions must be conducted in a manner providing full and open competition. 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 for such procurements. The following are considered to be restrictions upon full and open competition:

- (a) Imposing unreasonable business requirements for bidders or offerors to qualify to do business.
- (b) Requiring unnecessary experience or bonding.
- (c) Specifying only a brand name product without listing salient characteristics and allowing an equivalent product to be offered. Brand names are among the most restrictive types of specification.
- (d) Non-competitive practices between firms or affiliated companies.

(e) Noncompetitive contracts with consultants that are on retainer contracts.

(f) Organizational conflicts of interest.

(g) Any arbitrary action in the procurement process.

§ 14.3 Geographic Preferences Prohibited.

The Authority 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 statutes expressly mandate or encourage geographic preference. Nothing in this section preempts any Virginia law requiring that a contractor within a particular profession be licensed within the Commonwealth. When contracting for architectural and engineering 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.

§ 14.4 Affirmative Steps Pertaining to Minority and Other Businesses.

The Authority is required to take certain steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible. Affirmative steps must include:

(a) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(b) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(c) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;

(d) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;

(e) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and

(f) Requiring the contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (a) through (e) of this section.

§ 14.5 Recovered Materials.

The Authority must comply with certain laws that require a preference for items that protect the environment, including Section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (“EPA”) at 40 CFR Part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

§ 14.6 Equal Opportunity.

All contracts greater than \$3,500 must contain a clause in which the Contractor agrees that it will not discriminate against any employee or applicant for employment because of race, color, religion, national origin, sex, disability, or age. In addition, the Contractor agrees to comply with all applicable Federal laws and regulations pertaining to nondiscrimination.

§ 14.7 Federal Awarding Agency Review.

The Authority must make procurement documents and technical specifications available to the federal awarding agency upon request. The Authority may affirmatively seek review by the federal awarding agency when the Authority believes that such review is needed to comply with federal regulations.

§ 14.8 Debarment and Suspension.

A contract award must not be made to parties listed on the government-wide exclusions in the System for Award Management (SAM). The SAM Exclusions contain the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority.

§ 14.9 Davis-Bacon Act.

All procurements for federally-assisted construction contracts in excess of \$2,000 must require the contractor to comply with the Davis-Bacon Act, as supplemented by United States Department of Labor regulations, which require that the contractor and its subcontractors pay prevailing wages to certain categories of employees.

§ 14.10 Byrd Anti-Lobbying Amendment.

All federally-funded procurements in excess of \$100,000 must require that bidders and offerors provide a certification that the funds will not be used to pay any person or organization to lobby agencies, members of Congress, or other federal officials. In addition, any lobbying in connection with obtaining any federally-funded project must be disclosed.

§ 14.11 Other Required Federal Contract Clauses.

Certain contract clauses are required in federally-funded contracts, such clauses being dependent on the nature of the goods or services being procured and the dollar amount of the contract. Please consult Appendix 1 for a list of many required state and federal contract clauses. On larger contracts or with atypical funding sources, the Authority should consult with counsel prior to the issuance of a procurement solicitation.

ARTICLE 15 **CONFLICTS OF INTEREST and** **ETHICS IN PUBLIC CONTRACTING**

§ 15.1 Purpose.

Public employment is a public trust, particularly when public funds are being expended. This Article is intended to set organizational and behavioral guidelines for the manner in which employees should act in order to preserve and in furtherance of public trust and comply with all applicable laws and regulations. Employees should also maintain a standard of conduct that will inspire public confidence in the integrity of the Authority. The Authority is committed to the responsible exercise of authority and expressly prohibits all forms of impropriety, threats, favoritism, and undue influence. To that end, the Executive Director shall distribute and explain this policy to all existing employees and all new hires. Employees are required to sign a statement affirming that they have received the policy, understand and will comply with its provisions. Employees who are involved in purchasing or in the administration of contracts should, from time to time, receive training from the Executive Director, Authority's employee, or other appropriate official.

The provisions of this Article supplement, but do not supersede, other provisions of law including, but not limited to, the State and Local Government Conflict of Interests Act (§ 2.2-3100, *et seq.*), the Virginia Governmental Frauds Act (§ 18.2-498.1, *et seq.*) and Article 2 (§ 18.2-438, *et seq.*) and Article 3 (§ 18.2-446, *et seq.*) of Chapter 10 of Title 18.2. The provisions of this Article apply notwithstanding the fact that the conduct described may not constitute a violation of the State and Local Government Conflict of Interests Act.

§ 15.2 General Principles.

Authority employees¹ must follow the following principles when doing their work:

(a) Act in Best Interest of the Public. Employees shall perform their official duties in such a manner as to promote the best interest of the members and general public at all times.

(b) No Additional Value for Service. Employees shall not solicit or accept money or other thing of value for services performed within the scope of their official duties, except the compensation, expenses or other remuneration paid by the agency of which they are an officer or

¹ For the purpose of this Article, the word "employee" includes both officers (Commissioners) and employees of the Authority.

employee. This prohibition shall not apply to the acceptance of special benefits that may be authorized by law. Furthermore, no employee shall offer or accept any money or other thing of value for or in consideration of obtaining employment, appointment, or promotion of any person with any governmental or advisory agency.

(c) No Use of Confidential Information for Own Benefit. Employees shall not use for their own economic benefit or that of another party confidential information that they have acquired by reason of his public position and which is not available to the public.

(d) No Accepting of Gifts That Tend to Influence. Employees shall not accept any money, loan, gift, favor, service, or business or professional opportunity that reasonably tends to influence him or her in the performance of official duties. This subdivision shall not apply to any political contribution actually used for political campaign or constituent service purposes and reported as required by Chapter 9.3 of Title 24.2 of the Code of Virginia.

(e) No Accepting of Business Opportunities Intended to Influence. Employees shall not accept any business or professional opportunity when they know that there is a reasonable likelihood that the opportunity is being afforded to influence the performance of official duties.

(f) No Accepting Money for Expertise or Opinions within Scope of Duties. Employees shall not accept any honoraria for any appearance, speech, or article in which the officer or employee provides expertise or opinions related to the performance of official duties. The term "honoraria" shall not include any payment for or reimbursement to such person for actual travel, lodging, or subsistence expenses incurred in connection with such appearance, speech, or article or in the alternative a payment of money or anything of value not in excess of the per diem deduction allowable under § 162 of the Internal Revenue Code, as amended from time to time.

(g) No Accepting Gifts for Influence. Employees shall not accept a gift from a person who has interests that may be substantially affected by the performance of the employee's official duties under circumstances where the timing and nature of the gift would cause a reasonable person to question the officer's or employee's impartiality in the matter affecting the donor. Any gift that is received by an employee as a result of the performance of their official duties that is sharable (fruit baskets, desert trays, product samples) should be shared among other Authority employees.

(h) No Accepting of Frequent Gifts. Employees shall not accept gifts from sources on a basis so frequent as to raise an appearance of the use of public office for private gain.

Explanatory note for Subsections (g) and (h): Certain small gifts are de minimis under Virginia's Conflict of Interest Act and are allowed. The Conflict of Interest Act imposes a \$100 per year limitation on the receipt of gifts from any person, organizations, or businesses who contracts with or is seeking to contract with the Authority. See Va. Code § 2.2-3103.1. Gifts that are greater than \$20 are aggregated toward the \$100 annual limit. Therefore, it does not violate this policy to have one lunch or dinner with a contractor who pays for the check. However,

multiple lunches or dinners that exceed \$100 in the aggregate would violate this policy. Any gift that exceeds \$100 must be returned.

(i) No Retaliating. Employees shall not use their public position to retaliate or threaten to retaliate against any person for expressing views on matters of public concern or for exercising any right that is otherwise protected by law.

(j) No Misrepresentations. No Authority 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.

(k) Conserve Authority Property. Employees shall protect and conserve Authority property and shall not use it for other than authorized activities.

(l) No Use of Authority Property for Personal Benefit. The use of Authority equipment, machines, property or services for purposes other than Authority business is strictly prohibited, except; however, for a *de minimis* use. No employee shall authorize any work to be performed on any property owned by such employee, the employee's relatives, or an individual with whom or business to which the employee has a financial interest.

(m) Comply with Laws and Policies. Employees are expected to comply with all federal and state laws, grants and regulations and all Authority policies.

(n) Additional Considerations During Pending or Active Procurements. During any pending or active procurement, employees should (i) avoid and limit individual discussions with bidders and offerors, and (ii) direct bidders and offerors to submit any questions about the procurement in writing to the Purchasing Agent.

§ 15.3 Prohibited Conduct by Employees in Procurement Transactions.

(a) Each employee with more than a *de minimis* personal interest in any contract or any prospective contract shall disqualify himself or herself from participating in the award or administration of that contract and shall file a disclosure of such personal interest with the Executive Director. In addition, if the Executive Director has a personal interest in a contract or prospective contract, he or she shall disclose such interest to the Governing Body.

(b) No employee having official responsibility for a procurement transaction shall participate in that transaction on behalf of the Authority when the employee knows that:

(1) The employee is contemporaneously employed by a bidder, offeror or contractor involved in the procurement transaction;

(2) The employee, the employee's partner, or any member of the employee's immediate family holds a position with a bidder, offeror or contractor such as an officer, director, trustee, partner or the like, or is employed in a capacity involving personal and substantial participation in the procurement transaction, or owns or controls an interest of more than five percent;

- (3) The employee, the employee's partner, or any member of the employee's immediate family has a pecuniary interest arising from the procurement transaction; or
- (4) The employee, the employee's partner, or any member of the employee's immediate family is negotiating, or has an arrangement concerning, prospective employment with a bidder, offeror or contractor.

§ 15.4 Subsequent Employment.

No employee or former employee of the Authority 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 Authority unless the employee or former employee provides written notification to the Executive Director prior to commencement of employment by that bidder, offeror or contractor.

§ 15.5 Kickbacks.

- (a) No contractor or subcontractor shall demand or receive from any supplier or subcontractor, as an inducement for the award of a subcontract or order, any payment, loan, subscription, advance, deposit of money, services or anything, present or promised, unless consideration of substantially equal or greater value is exchanged.
- (b) No subcontractor or supplier shall make, or offer to make, kickbacks as described in this section.
- (c) No person shall demand or receive any payment, loan, subscription, advance, deposit of money, services or anything of value in return for an agreement not to compete on a public contract.
- (d) If a subcontractor or supplier makes a kickback or other prohibited payment as described in this section, the amount thereof shall be conclusively presumed to have been included in the price of the subcontract or order and ultimately borne by the Authority and will be recoverable from both the maker and recipient. Recovery from one offending party shall not preclude recovery from other offending parties.

§ 15.6 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 the Authority 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, the Purchasing Agent may permit such person to submit a bid or proposal for that procurement or any portion thereof if he or she 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 Authority.

§ 15.7 Purchase of Building Materials, etc., from Architect or Engineer Prohibited.

(a) Except in cases of emergency, no building materials, supplies or equipment for any building or structure constructed by or for the Authority shall be sold by or purchased from any person employed as an independent contractor by the Authority 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 by this policy and Virginia Code § 2.2-3101.

(b) Except in cases of emergency, no building materials, supplies or equipment for any building or structure constructed by or for the Authority 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 Authority to furnish architectural or engineering services in which such person has a personal interest as defined by this policy and Virginia Code § 2.2-3101.

§ 15.8 Principles of Ethical Decision-Making.

To assist in fostering a climate of ethical awareness, conduct and decision-making, employees may find it useful to refer, either by themselves or in consultation with their peers or supervisor, the following five considerations:

- (a) Is the decision or conduct lawful?
- (b) Is the decision or conduct consistent with the Authority's policy and objectives?
- (c) What will the outcome be for the employee, work colleagues, the Authority, citizens, and other parties?
- (d) Do these outcomes raise a conflict of interest or lead to private gain at public expense?
- (e) Can the decision or conduct be justified in terms of the public interest and would it withstand public scrutiny?

§ 15.9 Reporting Conflicts of Interest.

(a) Employees may consult with the Executive Director with any questions as to the existence of a potential conflict of interest.

(b) Any employee with a serious, well founded reason to believe that another Authority employee has violated this policy may speak in confidence with the Executive Director about such concerns. The Executive Director shall promptly investigate such

allegations and take appropriate actions if a problem is found to exist.

(c) Any employee with a serious, well founded reason to believe that the Executive Director has violated this policy may speak in confidence to the Chairman of the Governing Body about such concerns. The Chairman of the Governing Body shall promptly investigate such allegations and take appropriate actions if found to exist.

(d) Employees presenting serious, well founded concerns to either the Executive Director or the Chairman of the Governing Body are protected from retaliation by their superiors and co-workers. Any supervisor or co-worker attempting to retaliate will face discipline up to and including dismissal.

§ 15.10 Penalty for Violation.

A willful violation of any provision of this Article shall constitute a Class 1 misdemeanor under Virginia Code § 2.2-4377. Upon conviction, any Authority employee, in addition to any other fine or penalty provided by law, shall forfeit his or her employment.

Appendix 1. Guide to Required Contract Clauses

<u>Contract Amount</u>	<u>State Contract Clauses</u> (VPPA, 2.2-4300 <i>et seq.</i>)	<u>Federally-Funded Contract Clauses</u> (Appendix II to 2 C.F.R. Part 200)
<u>Exceeding \$3,500</u>	<p><u>Compliance with federal Immigration Reform and Control Act (Virginia Code § 2.2-4311.1; Applies if there is a written contract)</u></p> <p><u>Authorized to transact business in Commonwealth (Virginia Code § 2.2-4311.2; Applies if there is a written contract)</u></p> <p><u>Prompt payment (Virginia Code § 2.2-4354 – Applies if the contract allows the goods or services to be subcontracted)</u></p>	<p><u>No Federal Government Obligations to Third Parties</u></p> <p><u>False or Fraudulent Statements or Claims – Civil and Criminal Fraud</u></p> <p><u>Access to Third Party Contract Records</u></p> <p><u>Changes to Federal Requirements</u></p> <p><u>Civil Rights (Title VI, ADA, EEO (except special DOL construction clause))</u></p> <p><u>Disadvantaged Business Enterprises (DBEs)</u></p>
<u>Exceeding \$10,000</u>	<p><u>Employment discrimination by contractor prohibited (Virginia Code § 2.2-4311)</u></p> <p><u>Drug-free workplace (Virginia Code § 2.2-4312)</u></p>	<p><u>Termination for cause and/or for convenience (Appendix II to 2 C.F.R. Part 200)</u></p>
<u>Exceeding \$25,000</u>		<u>Debarment and Suspension</u>
<u>Exceeding \$100,000</u>		<p><u>Resolution of Disputes, Breaches, or Other Litigation</u></p> <p><u>Byrd Anti-Lobbying Amendment</u></p> <p><u>Contract Work Hours and Safety Standards Act (for Contracts involving mechanics or laborers)</u></p>

Appendix 2. State and Federal Contract Clauses

Authorized to Transact Business in the Commonwealth (all written contracts).

The contractor is authorized to transact business in the Commonwealth of Virginia as a domestic Limited Liability Company and its State Corporation Commission Identification Number is _____.

Compliance with Federal Immigration and Reform and Control Act (all written contracts).

The Contractor shall not knowingly employ an unauthorized alien as defined in the federal Immigration Reform and Control Act of 1986.

Prompt Payment and Interest (all contracts that allow subcontracting).

(a) The contractor shall take one of the two following actions within seven (7) days after the receipt of amounts paid to him by HRHA for work performed by his subcontractor(s) under the contract:

(1) Pay the subcontractor(s) for the proportionate share of the total payment received from HRHA attributable to the work performed by the subcontractor(s) under the contract; or

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

(b) The contractor shall pay interest to the subcontractor(s) on all amounts owed by the contractor that remain unpaid after seven (7) days following receipt by the contractor of payment from HRHA for work performed by the subcontractor(s) under the contract, except for amounts withheld as allowed by paragraph (a)(2) above. Unless otherwise provided under the terms of this contract, interest shall accrue at the rate of one percent (1%) per month.

(c) The contractor shall include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor(s).

(d) The contractor's obligation to pay an interest charge to a subcontractor(s) pursuant to the payment clause in this section shall not be construed to be an obligation of HRHA. A contract modification shall not be made for the purpose of providing reimbursement for such interest charge and a cost reimbursement claim shall not include any amount for reimbursement for such interest charge.

No Federal Obligations to Third Parties (contracts of \$3,500 or more).

The contractor acknowledges and agrees that the Federal Government is not a party to this contract and shall have no obligations hereunder.

Examination and Retention of Contractor's Records.

The HRHA, HUD, or Comptroller General of the United States, or any of their duly authorized representatives shall, until three years after final payment under this contract, have access to and the right to examine any of the contractor's directly pertinent books, documents, papers, or other records involving transactions related to this contract for the purpose of making audit, examination, excerpts, and transcriptions.

False or Fraudulent Statements or Claims (contracts of \$3,500 or more).

The contractor acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. § 3801, *et seq.*, applies to its actions pertaining to the contract. The Contractor certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, it may make, or causes to be made, pertaining to the contract.

Civil Rights – Federal Law (contracts of \$3,500 or more).

The contractor agrees that it will not discriminate against any employee or applicant for employment because of race, color, religion, national origin, sex, disability, or age. In addition, the Contractor agrees to comply with all applicable Federal laws and regulations pertaining to nondiscrimination.

Employment Discrimination Prohibited – State Law (contracts of \$10,000 or more).

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 the 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.

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

Drug-Free Workplace (contracts of \$10,000 or more).

During the performance of this contract, the contractor agrees to (a) provide a drug-free workplace for the contractor's employees; (b) 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; (c) 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 (d) 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.

Termination for Cause and for Convenience (contracts of \$10,000 or more).

(a) The HRHA may terminate this contract in whole, or from time to time in part, for the HRHA's convenience or the failure of the contractor to fulfill the contract obligations (cause/default). The HRHA shall terminate by delivering to the contractor a written notice of termination specifying the nature, extent, and effective date of the termination. Upon receipt of the notice, the contractor shall: (1) immediately discontinue all services affected (unless the notice directs otherwise), and (2) deliver to the HRHA all information, reports, papers, and other materials accumulated or generated in performing the contract, whether completed or in process.

(b) If the termination is for the convenience of the HRHA, the HRHA shall be liable only for payment for services rendered before the effective date of the termination.

(c) If the termination is due to the failure of the contractor to fulfill its obligations under the contract (cause/default), the HRHA may (1) require the contractor to deliver to it, in the manner and to the extent directed by the HRHA, any work described in the notice of termination; (2) take over the work and prosecute the same to completion by contract of otherwise, and the contractor shall be liable for any additional cost incurred by the HRHA; and (3) withhold any payments to the contractor, for the purpose of set-off or partial payment, as the case may be, of amounts owned by the HRHA by the contractor. In the event of termination for cause/default, the HRHA shall be liable to the contractor for reasonable costs incurred by the contractor before the effective date of the termination. Any dispute shall be decided by the contracting officer.

Debarment and Suspension (contracts of \$25,000 or more).

This contract is a covered transaction for purposes of 2 CFR 180. As such, the contractor is required to verify that none of the contractor, its principals, are excluded or disqualified as defined under Executive Orders Nos. 12549 and 12689. The contractor is required to comply

with 2 CFR 1200, and must include the requirement to comply with 2 CFR 1200, Subpart C, in any lower tier covered transaction. This certification is a material representation of fact relied upon by the HRHA.

If it is later determined that the bidder or offeror knowingly rendered an erroneous certification, in addition to remedies available to the HRHA, the Federal Government may pursue available remedies, including but not limited to suspension and/or debarment. The bidder or offeror agrees to comply with the requirements of 2 CFR Part 180 while this offer is valid and throughout the period of any contract that may arise from this offer. The bidder or offeror further agrees to include a provision requiring such compliance in its lower tier covered transactions.

Right in Data and Patent Rights (Ownership and Proprietary Interest).

The HRHA shall have exclusive ownership of, all proprietary interest in, and the right to full and exclusive possession of all information, materials, and documents discovered or produced by contractor pursuant to the terms of this contract, including, but not limited to, reports, memoranda or letters concerning the research and reporting tasks of the contract.

Energy Efficiency.

The contractor shall comply with all mandatory standards and policies relating to energy efficiency which are contained in the energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub.L. 94-163) for the state in which the work under this contract is performed.

Procurement of Recovered Materials.

(a) In accordance with Section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, the contractor shall procure items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR Part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition. The contractor shall procure items designated in the EPA guidelines that contain the highest percentage of recovered materials practicable unless the contractor determines that such items: (1) are not reasonably available in a reasonable period of time; (2) fail to meet reasonable performance standards, which shall be determined on the basis of the guidelines of the National Institute of Standards and Technology, if applicable to the item; or (3) are only available at an unreasonable price.

(b) Paragraph (a) of this clause shall apply to items purchased under this contract where: (1) the contractor purchases in excess of \$10,000 of the item under this contract; or (2) during the preceding Federal fiscal year, the contractor: (i) purchased any amount of the items for use under a contract that was funded with Federal appropriations and was with a Federal agency or a State agency or agency of a political subdivision of a State; and (ii) purchased a total of in excess of \$10,000 of the item both under and outside that contract.

~~AMENDED: JUNE 17, 2015~~