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# The Virginia Public Procurement Act

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*A Guide for Public Officials*

2014 Edition



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Virginia Municipal League

# The Virginia Public Procurement Act: A Guide for Public Officials

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# The Virginia Public Procurement Act

## A Guide for Local Officials

### Preface

The purpose of this publication is to give an overview of the Virginia Public Procurement Act and its application to local public bodies, to identify sources of procurement information, and to provide sample documents that may be of use to local officials when conducting a procurement process. References to the Virginia Code are provided to assist local officials in navigating the VPPA.

The Virginia Municipal League thanks Lisa Robertson, Chief Deputy City Attorney for Charlottesville for writing this guide.

### The Virginia Public Procurement Act

The Virginia Public Procurement Act (VPPA) is set forth within §§2.2-4300 et seq. of the Code of Virginia. VPPA articulates Virginia's public policy relating to the purchase of goods and services by public bodies. The General Assembly specifies the following ends to be served by VPPA:

- That public bodies obtain high quality goods and services at reasonable cost;
- That all procurement procedures be conducted in a fair and impartial manner, with avoidance of any impropriety or appearance of impropriety; and
- That all qualified vendors have access to public business and that no vendor be arbitrarily or capriciously excluded. § 2.2-4300(C).

The Commonwealth of Virginia has established a centralized electronic procurement program, known as eVA. Through revisions to VPPA, the General Assembly has strongly encouraged local participation in this program. The Virginia Department of General Services (DGS) sponsors the program, through its Division of Purchases and Supply. More information about this Division of DGS can be found at: [www.dgs.virginia.gov/DivisionofPurchasesandSupply/tabid/418/Default.aspx](http://www.dgs.virginia.gov/DivisionofPurchasesandSupply/tabid/418/Default.aspx).

The eVA webpage is located at: [www.eva.virginia.gov](http://www.eva.virginia.gov).

These two sites, together, will be referred to simply as "eVA" for the remainder of this publication. eVA provides free access to ITBs, RFPs, and sample speci-

fications and forms used by the state and other public bodies. Every public body and its purchasing agent should utilize this resource.

### What Local Official is Responsible for Compliance with VPPA?

The requirements of VPPA may be implemented by ordinances, resolutions, or regulations enacted by a public body and administered by authorized public officials or employees. § 2.2-4300.

The term "public body" refers to counties, cities, and towns, their departments and officials; and also refers to any other body, agency, office, department, authority, commission, committee, institution, board, or political subdivision. Airport authorities and commissions, jail authorities and commissions, MPOs and planning district commissions that operate exclusively in Virginia, water and sewer authorities, school boards, and constitutional offices/officers are all examples of "public bodies". § 2.2-4301.

Many public bodies designate an employee, known as a "purchasing agent," to exercise day-to-day responsibility for procurement, including preparation of determinations, solicitations, standardized forms, and other record-keeping duties. Regulations and policies developed by the purchasing agent should be approved by the public body itself. A purchasing agent is typically delegated broad authority to make decisions in accordance with the guidelines set forth within the public body's ordinances, resolutions, regulations, and policies. § 15.2-1235.

Each public body's approach to implementing VPPA and to approving contracts will reflect its own financial, political, and administrative structure. For example, the governing board of a public body may reserve itself the right to authorize initiation of certain procurement transactions and/or the final authority to approve large-dollar contracts. Also, prior to approval of a contract, a public body may require its attorney to approve the form of contract document(s) to meet the requirement that all contracts must be approved by a qualified attorney. § 15.2-1237. However, before approving any contract, a public body must require its financial officer to certify that funds are available and appropriated to cover contract costs. § 15.2-1238.

## What Transactions Are Covered?

The requirements of the VPPA apply to public contracts with any non-governmental contractor, for the acquisition (by purchase or lease) of goods and services, including, without limitation: insurance and construction. § 2.2-4303. Notice that neither purchasing land nor hiring employees is subject to VPPA.

“*Goods*” means all material, equipment, supplies, printing and automated data processing hardware and software.

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

“*Construction*” means building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavation, grading or similar work upon real property. § 2.2-4301.

The requirements of VPPA apply regardless of whether the consideration (benefit) supporting the transaction is monetary or non-monetary, and regardless of whether a public body, a contractor, or some third party is providing the consideration. § 2.2-4300(B). For example, if a public body enters into an agreement to allow a vendor to sell hot dogs at a public park, in return for a concession fee paid to the public body, that arrangement should go through a procurement process. If a citizen offers to donate money to pay costs of purchasing new computers for city council, the city must comply with VPPA in purchasing the new computers.

## What Constitutes a Public Contract?

A public contract means any agreement between a public body and a nongovernmental source. VPPA does not apply to contracts between two public bodies, as “public body” is defined within VPPA. A public body may not avoid the requirements of competitive procurement by using a purchase order instead of a formal written agreement, by placing oral orders, or by ordering “on account” with a particular vendor. § 2.2-4301.

## What Types of Contractor Selection Procedures Are Required and Authorized?

Unless otherwise authorized by law, public contracts may be awarded only after completion of a competitive sealed bidding (ITB) or competitive negotiation (RFP) process. § 2.2-4303(A).

### 1. Competitive Sealed Bidding – ITB

Competitive sealed bidding is a method of contractor selection in which price is the primary determinative factor. Bidders review a set of specifications and offer to provide goods and services for a specific price. The price is delivered in a sealed envelope to be opened publicly on a specific date. The contractor who has submitted the lowest price may receive the contract. § 2.2-4302.1. Competitive sealed bidding is the preferred process specified by FPPA for selection of a contractor to provide goods, non-professional services, and insurance. Construction may be procured only by competitive sealed bidding, with limited exceptions. § 2.2-4303(D).

To commence a competitive sealed bidding process, the public body must issue a written Invitation to Bid (also commonly referred to as “Invitation for Bids”, this invitation will hereafter be referred to as the “ITB”) containing specifications sufficiently detailed to support award of a contract based on prices. Terms and conditions applicable to the procurement, along with any mandatory qualifications required of potential contractors, must be set forth within an ITB. An ITB should reference any mandatory requirements (e.g., bonds; required licenses and certifications; insurance, etc.) which may affect a vendor’s pricing. An ITB may also include criteria for life-cycle costing; value analysis; and other specifications (such as inspection, testing, quality, workmanship, delivery and suitability for a particular purpose). Standards should be given as to what level of information or evidence must be included within a bid in order for it the bid to be deemed responsive to the requirements and specifications. § 2.2-4302.1(1) & (4).

Samples of written specifications for various goods and services can be found on the DGS website, [www.dgs.virginia.gov](http://www.dgs.virginia.gov) and within ITB documents posted on eVA.

Public notice of the ITB must be given at least 10 days prior to the date set for receipt of bids. In the “old days” public bodies were required to physically post this notice in a public area. Now the notice is required to be posted electronically—either on eVA or other appropriate websites, which may include the public body’s

own website. The public notice may also be published by newspaper, but this is not mandatory for an ITB. Bids may be solicited directly from potential contractors, and should include businesses selected from a list published by the Va. Dept. of Minority Business Enterprise. § 2.2-4302.1(2). Each ITB must specify the manner in which public notice will be given of an award, or decision to award, any contract resulting from the ITB. § 2.2-4360(A).

Bidders responding to an ITB must submit the bids in sealed envelopes, and the ITB must specify a date, time, and location at which all bids received will be publicly opened and announced. At the public bid opening, a public body is not required to immediately award a contract, but it must identify the apparent low bidder. The public body may then take time to evaluate the bids based on the ITB's requirements, and may conduct inquiries to determine whether the apparent low bidder is both "responsive" and "responsible." § 2.2-4302.1(3) & (5).

The term "responsive" refers to whether a bidder has submitted a bid that conforms in all material respects to the requirements and specifications set forth in the ITB. An informality is a minor defect or variation of a bid from the exact requirements of the ITB, but which does not affect the price, quality, quantity, or delivery schedule. A public body may waive any informality. § 2.2-4301.

The term "responsible" refers to a bidder who has the ability, in all respects, to perform the contract requirements, and the moral and business integrity and reliability that will assure good faith performance of the contract requirements. § 2.2-4301.

A public body must give an apparent low bidder advance written notice before making a determination of *non-responsibility* and must allow an opportunity for the bidder to respond with rebuttal information before moving to the next low bidder. § 2.2-4359(A)(1). The public body's determination cannot be arbitrary—it must be an honest exercise of discretion, based on the requirements of the ITB, and consistent with state law. § 2.2-4359(B).

After bid-opening, a public body may not change the terms or specifications of the ITB, however, it may waive a minor defect or variation of a bid from the requirements of the ITB (known as an "informality") if the defect/variation does not affect the price, quality, quantity, or delivery schedule for the goods or services being procured. §§ 2.2-4302.1 & 2.2-4301.

A public body may not negotiate with individual bidders. A responsive bid from the lowest responsible bidder must be accepted as submitted, unless the entire ITB is cancelled. One exception to this rule: if the bid from the lowest responsive and responsible bidder exceeds available funds, a public body may negotiate with that bidder to obtain a contract price within available funds—but only if the ITB, when issued, identified the conditions and procedures under which the negotiation would be conducted. § 2.2-4318.

The public body may award a contract to the lowest bidder who is both responsive and responsible. If an award will be made, public notice must be given in the manner prescribed in the ITB. § 2.2-4360(A).

Alternatively, the public body may cancel or reject the entire ITB, or any and all bids received. The reasons for cancellation or rejection must be set forth in writing, and shall be made a part of the contract file. A public body may not cancel or reject any ITB or bid, simply to avoid contracting with a particular bidder. § 2.2-4319(A).

## **2. Competitive Negotiation – RFP**

Competitive negotiation is a method of contractor selection in which a public body issues a written Request for Proposals ("RFP"), describing the goods or services proposed to be procured, and identifying the factors that the locality will use to evaluate the relative merits of proposals received from persons or firms ("offerors"). § 2.2-4302.2(A)(1). The RFP must specify a deadline for submission of proposals; however, sealed envelopes are not required, and the public body is not required to publicly open or announce the proposals.

Contracts for "professional services," (e.g., accounting, actuarial, architect and engineering services) must be procured by competitive negotiation. § 2.2-4303(B).

Other types of contracts may be procured by RFP, but only after a determination made in writing by a public body that an ITB is not either practicable or fiscally advantageous. §§ 2.2-4303(C) & (D).

Public notice of an RFP must be given at least 10 days prior to the deadline for receipt of proposals. The notice must be posted electronically—either on eVA or other appropriate websites, which may include the public body's own website. A public body must also publish the notice by newspaper. Proposals may also be solicited directly from potential contractors. Additional solicitations must include businesses selected from a list published by the state Department of Small Business and Supplier Diversity. § 2.2-4302.2(A)(2). The RFP must also specify the manner in which public notice

will be given of a contract award, or decision to award. § 2.2-4360(A).

An RFP must specify the evaluation factors that the public body will use to compare proposals received. § 2.2-4302.2(A)(1). With RFPs for non-professional services, an offeror may be required to include pricing information in its initial proposal. § 2.2-4302.2(A)(3).

RFPs for professional services may not ask for estimates of man-hours or price/cost of services as part of an offeror's initial proposal. § 2.2-4302.2(A)(4).

Proposals received must then be evaluated based on factors specified in the RFP, including price, if stated in the RFP, and then a public body must implement a process of negotiations with potential contractors. The required negotiations process differs, according to the item being procured:

### **Goods, non-professional services, and insurance**

Following a public body's determination that an ITB is not practical or fiscally advantageous, an RFP may be used. A public body must select at least two (2) offerors who are deemed fully qualified and best suited, and then must negotiate with each of those selected. Price must be considered, but is not required to be the sole determining factor. After completion of those negotiations, the public body may select the offeror who, in its opinion, has made the best proposal and award a contract. § 2.2-4302.2(A)(3).

### **Professional services**

At the discussion stage, a public body must engage in individual discussions with two (2) or more offerors deemed fully qualified, responsible, and suitable on the basis of the initial responses, with emphasis on professional competence. Repetitive interviews are allowed, and offerors should be encouraged to elaborate on qualifications, performance data, and staff expertise relevant to the advertised contract. The public body may, as part of these discussions, seek non-binding estimates of total project costs. During the discussion stage, a public body may not disclose proprietary information about one offeror with any other offerors, or disclose such information publicly. § 2.2-4302.2(A)(4).

Upon the conclusion of initial discussions, the public body must select two (2) or more offerors whose qualifications and proposed services are deemed most meritorious, and the public body must rank them in order of preference. Negotiations shall then be conducted beginning with the first-ranked offeror. If a contract satisfactory and advantageous to the public body can be negotiated at a fair and reasonable price, a contract

may be awarded to that offeror. Otherwise, negotiations with the first-ranked offeror shall be terminated, and negotiations with the second-ranked offeror shall commence, and so on, until a contract is successfully achieved. § 2.2-4302.2(A)(4).

### **3. Job Order Contracting**

The General Assembly recently enacted legislation authorizing a method for procuring construction services, known as "job order contracting." Under this process, a locality must first establish a book of unit prices, quantities and specifications. The locality may then select a contractor to perform work as needed, using the book as the basis of its pricing. The contractor may be selected using either an ITB or RFP process. § 2.2-4301. All projects performed under a job order contract must require similar experience and expertise. A job order contract is limited to a term of one year, or when the cumulative total project fees reach specified amounts, whichever occurs first. The contract may be renewable for four (4) additional one-year terms, at the option of the public body. § 2.2-4302.2(B).

### **4. Design-build and Construction Management Procurements**

In the VPPA, competitive sealed bidding remains the standard method of contractor selection for construction services. However, VPPA authorizes a public body to enter into a contract for construction through use of the competitive negotiations process, for construction services to be performed on a design-build or construction management basis, under certain conditions. First, the public body must have a licensed architect or engineer on staff, capable of advising the public body on the use of such methods, and must document in writing for a specific project why design-build or construction management is more advantageous than competitive sealed bidding. §§ 2.2-4308(A) & (A)(2). Under the current law, for a transportation project, the determination must be rendered by a locality's chief executive officer and must detail why design-build will best serve the public interest. § 33.1-223.2:16. This provision has been repealed effective October 1, 2014.

Second, prior to issuing an RFP for a design-build or construction management contract for a specific project, the public body must have adopted, by ordinance or resolution, procedures governing the contractor selection, consistent with competitive negotiation procedures for nonprofessional services (i.e., a two-step selection/ discussion process). At the end of the selection process, a contract may be awarded to the fully-qualified offeror who submits an acceptable proposal determined to be the best value. The contract price

must be established as a fixed fee, or a not-to-exceed fee. §§ 2.2-4308(A)(1) & 2.2-4303(D)(4).

## **5. Cooperative Procurement**

Cooperative Procurement is a variation of competitive procurement in which vendors are requested to make the terms and conditions of their responsive bids/proposals (including price) available to multiple public bodies. Cooperative procurement, well-planned and properly executed, promotes administrative efficiency. § 2.2-4304(A).

Any public body in Virginia may participate in, sponsor, conduct or administer a cooperative procurement on behalf of, or in conjunction with, one or more other public bodies, including, without limitation, agencies of the Commonwealth of Virginia, other states, and the United States Government and its General Services Administration. § 2.2-4304(A).

### **Joint procurements**

Often, two or more public bodies will enter into a written cooperative procurement agreement, in which they all agree in advance to a combined set of requirements, specifications, or administrative procedures, and they all participate directly in the ITB/RFP. The ITB/RFP will identify each of the individual public bodies on whose collective behalf the procurement is being conducted, and each is thereby identified as a direct participant in the transaction. Following selection of a vendor, each public body that participated in the procurement may enter into its own contract directly with the successful vendor, or the public bodies may have specified a joint, centralized contract administration process. § 2.2-4304(B).

### **Purchasing from another public contract, without participation in procurement**

Even if one public body did not participate directly in a procurement transaction, it may purchase from another public body's contract provided that the RFP or ITB by which the contract was procured specified that the procurement was being conducted on behalf of other public bodies. This process is sometimes referred to as "piggybacking". "Piggybacking" cooperative procurement cannot be used for professional services contracts and certain construction contracts. § 2.2-4304(B). The eVA system contains numerous examples of state or locally-issued RFPs and ITBs requesting vendors, if awarded a contract, to extend their pricing to other public bodies seeking the same goods or services. This procedure does not work well for purchases that deviate substantially from the terms on which the pricing of the underlying contract was based.

## **Purchasing from federal schedules**

If authorized by federal law or regulations, any county, city, town or school board may purchase goods or nonprofessional services from a U.S. General Services Administration (GSA) contract or a contract awarded by another U.S. government agency. § 2.2-4304(C)(3).

## **6. Small Purchase Procedures**

The General Assembly intends that public bodies should enjoy flexibility in fashioning the details of competition, and that purchasing procedures should be efficient. "Small Purchase Procedures" are authorized, under certain conditions, as an acceptable alternative to the more formal ITB and RFP procedures. A public body may establish written small purchase procedures, if competition is included wherever practicable and if the monetary consideration meets the following requirements:

*Goods and services (other than professional services):* Small purchase procedures may be used if the aggregate or the sum of all phases is not expected to exceed \$100,000.

*Professional services:* Small purchase procedures may be used if the aggregate or sum of all phases is not expected to exceed \$60,000.

The state strongly encourages local public bodies to utilize eVA to post a public notice of purchases expected to exceed \$30,000 in order to provide the public with centralized visibility and access to procurement opportunities. § 2.2-4303(G).

Public bodies have broad leeway to create small purchase procedures suited to their individual needs. Typically, small purchase procedures require a purchasing agent to solicit price quotes from vendors, with the number of required solicitations varying with the nature and cost of the goods or services being procured. Some simply refer to this process as "getting quotes." § 2.2-4303(G).

A price quote solicitation is not required to take any particular form—although it is often advisable to prepare a written description identifying the key attributes of the item for which a quote is sought. Responsive quotes may be tendered and accepted verbally, on paper, via fax, or by e-mail. Pricing obtained from eVA vendors may be counted as quotes, and pricing obtained from catalogs, or electronic websites may be counted as quotes.

There is no requirement that a contract be awarded to the contractor who submitted the lowest price quote. However, if price will not be the exclusive selection

factor, the small purchase procedure, or the written solicitation, should identify the criteria on which selection of a contractor will be based. §§ 2.2-4303(G) & (H).

The person who solicits the quotes should document verbal quotes obtained in-person or by telephone, quotes solicited or received electronically, and quotes obtained from catalogue price-checks. This documentation should be placed in a file containing information sufficient to demonstrate compliance with the public body's approved small purchase procedures.

## 7. Reverse auctioning

Reverse auctioning is a process in which bidders are invited to bid on specified goods or services, through real-time electronic bidding, with the award made to the lowest responsive and responsible bidder. During the process, bidders' prices are revealed and bidders have an opportunity to modify their bid prices for the duration of the time period established for bid opening. § 2.2-4301. Bulk purchases of commodities used in road and highway construction and maintenance, and aggregates, cannot be made via reverse auctioning. § 2.2-4303(J).

## In What Circumstances May Contracts be Awarded, or Purchases Made, with Little or No Competition?

### 1. Emergency and Sole-Source Contracts

In emergency circumstances, or when there exists only one source practicably available for goods or services ("sole source") a contract may be awarded without a competitive contractor selection process, or with limited competition. §§ 2.2-4303(E) & (F).

To comply with VPPA requirements, the following documentation must be created and preserved within a contract file for an emergency or sole-source procurement: (i) a written determination identifying the basis for the emergency or sole source determination and the basis for selection of a particular contractor; and (ii) a public notice, stating that an emergency or sole-source procurement is being conducted, identifying the specific goods or services being procured, identifying the contractor selected, and identifying the date on which the contract was or will be awarded. The notice must be posted on the eVA website or the public body's website, or another appropriate website, and the notice may also be published by newspaper. The notice must be published on the same day that the public body awards or announces its decision to award the contract,

whichever occurs first. §§ 2.2-4303(E) & (F).

Emergency procurement will be justified under circumstances that form the basis for declaration of a local emergency. § 44-146.21(c1). Other circumstances may qualify as "emergency", for instance: a ruptured water pipe in the restroom of a public office building, which requires an immediate response by a plumber. Emergency procurement must be made with such competition as is practicable under the circumstances. § 2.2-4303(F).

If the basis of a sole source determination is that a federal grant providing funds for a project requires a specific vendor, the governing body of a locality must provide a written determination that acceptance of the grant is in the public interest and the determination must reference the specific terms and conditions of the grant that conflict with requirements of VPPA and thereby require the sole source determination. § 2.2-4343(B).

### 2. Public Auction Sale

Goods may be purchased from a public auction sale, including online public auctions, following an advance, written determination that purchase at public auction sale is in the best interests of the public. Bulk purchases of commodities used in road and highway construction and maintenance, and aggregates, cannot be made via online public auctions. § 2.2-4303(I).

## What Public Contracts Are Exempt from VPPA Requirements?

VPPA lists various entities and transactions that may be exempt from some or all aspects of competitive procurement. §§ 2.2-4343, 2.2-4344, 2.2-4345, & 2.2-4346. The list of such exemptions is too lengthy to repeat; however, the following may be of particular interest to local officials:

- **Towns with a population of less than 3,500** are exempt from VPPA. This exemption has a few exceptions that can be found in § 2.2-4343(A)(9).
- **Contracts for legal services** are exempt from competitive procurement, provided that the relevant portions of § 2.2-500 et seq. are applicable. Likewise, contracts for expert witnesses or other litigation services are exempt. § 2.2-4344(A)(2).
- **Contracts for insurance, or utility services, if purchased through an association** of which the public body is a member, and

the purpose of the association is to promote the interests of public bodies, provided that these contracts were procured by the association through competitive procurement. Examples of this type of association include the VML Insurance Program. § 2.2-4345(A)(13).

- **Purchases of goods or services for direct use by individual clients** of a community service board or a public body that is administering social services programs or purchasing services under the Comprehensive Services Act for At-Risk Youth and Families or the Virginia Juvenile Community Crime Control Act. § 2.2-4345(A)(14). For example, the purchase of one blood glucose monitor for an individual foster care child would be exempt; however, the bulk purchase of monitors, so as to have a supply available for any clients who might need them, would be subject to procurement.
- **Contracts for certain essential election materials and services** are exempt from certain provisions of VPPA. §§ 2.2-4346(A) & 24.2-602.
- **The Public-Private Education Facilities and Infrastructure Act (PPEA)** allows a public body to consider solicited or unsolicited proposals for construction of public facilities or acquisition of technology, without public procurement, **BUT ONLY IF** the public body has adopted guidelines encouraging competition and standards to guide the selection of its PPEA projects. §§ 56-575.3 & 56-575.3:1. A locality must post any proposals received on its website, or on the eVA website, and make at least one copy available for public inspection. § 56-576.17(A)(2). Upon a decision to award a contract, the procurement records must be made available for inspection. Exemptions to this requirement include trade secrets, financial records, cost estimates, and other reasonable restrictions. §§ 56-576.17(D), (E), & (F).

## What Vendors Must be Included? May Vendors be Excluded?

In the solicitation or awarding of contracts, the VPPA prohibits every public body from discriminating against any bidder or offeror because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by Virginia law relating to discrimination in employment. § 2.2-4310(A). Further, VPPA requires every public body to ensure that all ITBs,

RFPs, contracts, and purchase orders prominently display a statement affirming that the public body does not discriminate against faith-based organizations. § 2.2-4343.1(D).

Under certain limited circumstances, VPPA authorizes public bodies to exclude certain vendors, or requires certain vendors to be included, in the competition for public contracts. Those circumstances are as follows:

### 1. Debarment

Prospective contractors may be entirely disqualified (“debarred”) from competing for a public body’s contracts, for specified periods of time. Any decision to debar a contractor must be made pursuant to a pre-established, written debarment procedure. Debarment procedures must be adopted by a public body’s governing board; however, the decision to debar a particular contractor may be made administratively, so long as the official making the decision is authorized to do so and the decision is guided by standards and criteria specified in the written procedure. Debarment procedures may provide for debarment on the basis of a contractor’s prior unsatisfactory performance for a public body, even if the unsatisfactory performance was for another public body. § 2.2-4321.

### 2. Prequalification

A public body may find it desirable to determine, in advance of accepting bids/proposals, whether potential contractors or their products meet specific requirements of a particular contract. For example, when it is impractical to prepare initially a description or set of specifications sufficient to support an award based on price, an ITB may be issued requesting the submission of un-priced offers. This will be followed by a second ITB limited to those bidders whose offers were qualified under criteria set forth in the first ITB. § 2.2-4317. State law requires prequalification of bidders for non-transportation construction projects between \$100,000 and \$500,000, in situations where a no bid bond will be required. § 2.2-4336(B).

The most common type of prequalification involves situations in which the vendor’s own qualifications and experience are of importance. In these situations, an ITB or RFP may specify that a public body’s consideration of bids or proposals will be limited to those submitted by prequalified contractors. The criteria and requirements that will be applied, and the process for obtaining prequalification, must be referenced in the ITB or RFP. § 2.2-4317(B).

A valid prequalification procedure must be set forth

in writing, sufficiently in advance to allow potential contractors a fair opportunity to complete the process. Notice must be given of the deadline for submission of prequalification applications, and a public body must structure the procurement process so that, at least 30 days prior to the deadline for submission of bids/proposals, the public body can provide written notification to each contractor as to whether that contractor was prequalified. § 2.2-4317(B).

Under VPPA, there exist only 7 grounds upon which a public body may deny prequalification to a contractor: (1) lack of financial ability to perform contract requirements; (2) lack of appropriate experience; (3) court judgments against contractor for breach of contract, within the past 10 years; (4) documented history of prior non-compliance with conditions of prior public contracts without good cause; (5) officers' conviction of crimes relating to public contracts, within the past 10 years; (6) current debarment by any public body; or (7) failure to timely provide information requested by the public body relative to prequalification. § 2.2-4317(C).

Each applicant who is to be denied prequalification must be advised of which specific grounds serve as the basis of the denial, and of the factual basis of the public body's conclusions. § 2.2-4317(B). The applicant has the right to, (i) within 5 days after receipt of the notice, inspect any documents that relate to the determination, and (ii) within 10 days after receipt of the notice, submit rebuttal information. The public body must submit a final written prequalification determination within 5 days after receipt of rebuttal information. Following the final determination, the applicant may initiate legal action as provided in §2.2-4364, or an administrative procedure as provided in §2.2-4365. § 2.2-4357(A).

### **3. Small Businesses and Minority-Owned Businesses**

Public bodies are required to establish, in writing, programs to facilitate the participation of small businesses and businesses owned by women, minorities, and service disabled veterans in procurement transactions. The programs must include cooperation with the Virginia Department of Small Business and Supplier Diversity and may include other public or private agencies having similar purposes. § 2.2-4310(B). This requirement does not apply to towns with a population under 3,500. § 2.2-4343(A)(9).

In an ITB or RFP process, if a public body solicits bids directly from any potential contractors, it must solicit bids directly from at least some businesses selected from a list made available by the Department of Small

Business and Supplier Diversity. §§ 2.2-4302.1(2) & 2.2-4302.2(2).

## **4. Preferences**

### **Low bid from out-of-state bidder**

If the lowest responsive and responsible bidder is a resident of another state, and if that state allows a preference to its own contractors, then a public body must apply a like preference to the next lowest responsive and responsible bidder who is a resident of Virginia. The Virginia Department of General Services, on its website, publishes a current list of all states that provide preferences for their own contractors. § 2.2-4324(B).

### **Community reinvestment activities**

This preference is permitted in localities that have established affordable housing programs. If authorized in advance by the local governing body, in making a decision to award a contract to a financial institution for time deposits or investment of public funds, a public body's treasurer/director of finance may consider, as one applicable criteria for selection, a vendor's local investment activities that enhance the supply of, or accessibility to, affordable housing in the public body. § 2.2-4327.

### **“Made in Virginia”**

In the case of a tie bid, a public body must give preference to the following, if applicable: (i) goods produced in Virginia; (ii) goods and services, including construction, provided by Virginia persons, firms or corporations. § 2.2-4324(A).

### **Recycled content**

In the case of a tie bid, where goods are being procured and existing price preferences have already been taken into account, a public body must give preference to the bidder whose goods contain the greatest amount of recycled content. § 2.2-4324(C).

### **Local contractors**

A county, city, or town may, in case of a tie bid, give preference to goods, services, and construction produced in its locality or provided by persons, firms, or corporations having principal places of business in its locality. § 2.2-4328(A). This authority is expressly limited to bids received in a competitive sealed bidding (ITB) process. § 2.2-4328(B).

If no preferences apply in a given situation, a tie bid must be decided by lot.

## **5. Licensing Requirements, Construction Contracts**

It is a criminal misdemeanor offense for any person

to receive or consider a bid on a construction project, if that person knows that the bidder does not hold a Virginia contractor's license (or certification) required for such work. An awarding authority must require a contractor to submit his state license or certificate number, prior to considering the bid. § 54.1-1115(A)(6). It is recommended that a public body should expressly state, within the instructions to bidders in the ITB, that a construction contractor's license or certificate number must be printed clearly on the outside of the sealed bid envelope. Any bid without this information should not be accepted or considered.

## What Dispute Resolution Procedures Are Specified by VPPA?

VPPA sets forth procedures for resolving several types of disputes that may arise between public bodies and contractors/prospective contractors. The procedures vary, depending on the nature of the dispute and the stage of contract award or performance.

### 1. Protests of Contract Awards

A disappointed contractor may protest a contract awarded to another bidder/offeror. A written protest must be submitted to the public body within 10 days of the award or announcement of the decision to award, whichever occurs first. The written protest must describe the basis for the protest and a statement of the relief sought. § 2.2-4360(A).

An unsuccessful bidder/offeror may not file a protest based on a claim that the successful bidder/offeror is non-responsible. § 2.2-4360(A). Likewise, a bidder determined to be "non-responsible" may not protest a contract award to another contractor, but must timely challenge the "non-responsibility" determination through a separate process. § 2.2-4359(A).

Within 10 days of the receipt of a protest, a public body must render its written decision. Thereafter, a protester has 10 days to initiate an appeal. § 2.2-4360.

The validity of a contract that has been awarded and accepted in good faith will not be affected by the filing of a protest or appeal. § 2.2-4361. VPPA does not require a public body to delay a contract award for the period allowed to a bidder to protest. However, in the event that a timely protest is received, or if legal action is timely filed, no further action to award the contract may be taken unless there is a written determination that proceeding without delay is necessary to protect the public interest, or the bid or offer would expire. § 2.2-4362.

## 2. Appeals of "Non-Responsibility" Determinations; appeals of protest decisions and disputed claims

Following public opening and announcement of bids received in response to an ITB, if a public body determines that the apparent low bidder is not responsible, then the public body must follow procedures specified in Va. Code §2.2-4359. The bidder must be notified in writing and given an opportunity to present rebuttal information. Within 10 days of the receipt of the public body's final non-responsibility determination, the bidder may initiate legal action or an administrative appeal. § 2.2-4359(A).

If any protest or appeal is ultimately successful, there are three possible results, depending on the status of the contracting process:

*Prior to award:* The public body must cancel the proposed award or revise it to comply with applicable law. If a bidder wins an appeal of a "non-responsible" determination, the court may simply find the bidder responsible, or the court may direct an award to that bidder.

*Post-award, if performance has not begun:* The performance of the contract may be enjoined by a court.

*Post-award, if performance has begun:* The public body may declare the contract void, upon a finding that such action would be in the best interests of the public. In that event, the performing contractor must be compensated for the cost of performance up to the date his contract is voided, but he is not entitled to lost profits. § 2.2-4360(B).

### 3. Legal Action

Under certain circumstances, articulated in Va. Code § 2.2-4364, if a contractor's protest has been denied, or a contractor's appeal of a disqualification/exclusion determination is rejected, the contractor may file a lawsuit. Legal actions must be filed within 10 days after the aggrieved contractor receives the determination that is the basis of the legal challenge. §§ 2.2-4357(A), 2.2-4359(A)(3), 2.2-4360(A), & 2.2-4364.

### 4. Administrative Appeals

Any public body may establish an administrative procedure as an intermediate step, prior to legal (court) proceedings. Administrative procedures are authorized for hearings of: (i) protests of awards and decisions to award, (ii) appeals from refusals to allow withdrawals of bids, (iii) appeals from disqualifications and determinations of non-responsibility, (iv) appeals from decisions made as to disputes arising during performance of a contract, or (v) any of these. If a

public body offers an administrative appeal process, the process must include, at a minimum, opportunity for a hearing before a disinterested person or panel, opportunity for presentation of pertinent information, and issuance of a final written decision containing findings of fact. The disinterested person or panel may not be, or include, any person who is an employee of the public body against whom the appeal is taken. § 2.2-4365(A).

Such disinterested persons or panels are sometimes referred to as “administrative hearing officers,” or “contract appeals boards.” In localities with substantial contracting activity, a specialized appeals person or panel may work well, if they will be called upon frequently enough to develop knowledge and expertise of procurement issues.

Many localities forego the specialized appeals board/ panel authorized by § 2.2-4365, in favor of the more simple “in-house” claims resolution procedure referenced in §§ 2.2-4363(B) & (C)

## **5. Disputes Arising During Performance of a Contract**

### **Contract claims**

Every public body is required to include in each of its contracts a procedure for presentation and consideration of contractual claims. § 2.2-4363(B). If a public body fails to do so, the statutory procedure set forth in Va. Code § 2.2-4363(C) will apply (“Statutory Claims Procedure”).

Under the Statutory Claims Procedure, any contract claim, whether for money or other relief, such as additional time for performance, must be submitted in writing to the public body. Written notice of the contractor’s intention to file a claim must be given at the time of the occurrence, or at the beginning of the work upon which the claim is based. Thereafter, a claim must be presented to the public body no later than 60 days after receipt of final payment. The notice of claim does not need to be separate and distinct from the claim itself. § 2.2-4363(C)(1).

A public body must render a written decision, signed by its chief administrative officer or designee, within 90 days of receiving a claim. § 2.2-4363(C)(2). After the final decision has been issued, a contractor has six (6) months to initiate legal action or an administrative appeal. § 2.2-4363(E). If the public body does not render a decision within 90 days, the contractor has the right to institute immediate legal action. § 2.2-4363(C)(2).

When a claim is asserted against a County, a contractor must also comply with the notice of appeal and

bond requirement set forth within § 15.2-1246.

### **Alternative dispute resolution**

Public bodies may enter into agreements to submit contractual disputes to arbitration, and to utilize mediation and other alternative dispute resolution procedures. Alternative dispute resolution procedures entered into by school boards must be non-binding. § 2.2-4366.

An agreement arising out of a dispute resolution proceeding does not become binding unless it is affirmed by action of the public body. § 2.2-4116(C).

Records of alternative dispute resolution proceedings involving a public body will be treated as “confidential” and are exempt from the requirements of the Virginia Freedom of Information Act. § 2.2-4119(B). However, records concerning expenses incurred in connection with a dispute resolution proceeding, or the amount of money paid by a public body to settle a dispute, are not exempt from FOIA. § 2.2-4116(A).

## **What Public Records Requirements Apply to Procurements?**

All proceedings, records, contracts and other public records relating to procurement transactions must be open to the inspection of any citizen, or any interested person, firm or corporation, in accordance with the Virginia Freedom of Information Act. § 2.2-4342(A). VPPA provides limited exceptions:

1. Cost estimates relating to a proposed procurement transaction, prepared by or for a public body, shall not be open to public inspection. § 2.2-4342(B).
2. Bid and proposal records are open to public inspection after award of a contract, except that, during the time period between bid opening/ competitive negotiations and contract award, any actual bidder or offeror has a right to inspect bid/proposal records. §§ 2.2-4342(C) & (D). If a bid protest of an actual or potential bidder/offeror is dependent on information contained in the records of the procurement transaction, the deadline for submission of a protest will expire 10 days after the date on which the records are available for inspection. § 2.2-4360(A).
3. Trade secrets or proprietary information submitted in connection with a procurement transaction or prequalification application shall not be open to public inspection. However, the

person submitting any such information has a responsibility to label it as such, identifying the data to be protected and stating why the protection is necessary. A general “confidential” label applied generally to the entire contents of a bid or proposal will not suffice. § 2.2-4342(F).

According to the records retention schedules established by the Library of Virginia, contracts and agreements entered into by a local public body, and purchasing records (e.g., ITBs, RFPs, bids, proposals, purchase orders, etc.) must be retained in a file for a period of 5 years after the end of the fiscal year in which they were created. The retention requirements apply regardless of whether the records are in paper, electronic, or some other format. The schedule effective as of June 26, 2104 can be found on the Library of Virginia website, at: [http://www.lva.virginia.gov/agencies/records/sched\\_local/gs-02.pdf](http://www.lva.virginia.gov/agencies/records/sched_local/gs-02.pdf).

## Ethics in Public Contracting

In addition to the provisions of the State and Local Government Conflicts of Interest Act (COIA) and the Virginia Governmental Frauds Act, the VPPA establishes standards of ethical conduct for public officials involved in procurement transactions. § 2.2-4367 et seq. The Ethics portion of the VPPA addresses multiple topics, including:

### Financial interest in the outcome of contracting decisions

Persons having official responsibility for a procurement transaction are subject to restrictions, and are prohibited from participating in the transaction if they, or a member of their immediate family, would realize a financial benefit or detriment from the transaction. § 2.2-4369(3). The term “official responsibility” refers to any authority, whether intermediate or final, to initiate, approve, disapprove or otherwise affect a procurement transaction, or any resulting claim. The term “immediate family” refers to an individual’s spouse, children, parents, siblings, and “any other person living in the same household.” § 2.2-4368. Keep in mind that VPPA’s definition of “immediate family” is broader than that set forth in the COIA. For example:

- If the Director of Procurement responsible for evaluating proposals is married to the President and sole owner of a company who submits a proposal in response to the RFP, then the Director of Purchasing must not participate in the process.
- If a final contract resulting from the RFP must

be approved by the governing board of the public body, and if a member of the governing board is a partner within the firm that has submitted the best proposal, that member of the governing board may not participate in the process.

### Gifts

No person having official responsibility for a procurement transaction may accept from any bidder, offeror, contractor or subcontractor any payment, loan, subscription, services or anything of more than nominal value. § 2.2-4371(A). Examples of things having nominal value would be plastic cups; key-chains; plastic pens; calendars; etc.

### Document preparation

No person who, for compensation, prepares an ITB or RFP on behalf of a public body may (i) submit a bid or proposal in response to that ITB or RFP, or (ii) disclose to any bidder or offeror information regarding the procurement that is not available to the public (for example, cost estimates prepared for the public body). § 2.2-4373. For example, if a public body engages an architectural firm to write the requirements and specifications for an RFP for construction management services, that same firm may not submit a proposal in response to that RFP.

### Subsequent employment by contractor

A person having official responsibility for public procurement transactions may not accept employment with a contractor with whom he dealt in an official capacity, within one (1) year after leaving his public position, unless the person provided written notice to the public body prior to commencement of his employment with that contractor. § 2.2-4370.

### Penalty

Any public employee or official who violates VPPA’s Ethics in Public Contracting requirements may be prosecuted for a Class 1 criminal misdemeanor offense. Upon conviction, that employee or official shall forfeit his employment, in addition to any other fine or penalty imposed. § 2.2-4377.

## Conclusion

The scope and requirements of VPPA can be daunting; however, with the advent of state and local e-procurement web sites, resources are more accessible than ever before. We hope this Procurement Guide, and the resources referenced, will prove useful to elected and appointed officials throughout the Commonwealth.

In 2013 the General Assembly established a Special Joint Subcommittee on Procurement. The purpose of this Subcommittee is to identify and resolve problem areas relating to VPPA. Public bodies and their administrators should watch for legislation in 2014 and beyond, arising out of this Subcommittee's findings and recommendations, in order to keep local policies and procedures up-to-date.

## SUMMARY OF PURCHASING PROCEDURES

Anticipated Cost	Process
<b>Informal Procurement Procedures Authorized (“Small Purchase Procedures”)</b>	
<b>\$100,000 OR LESS</b> <b>(Goods and non-professional services)</b>  <b>\$60,000 or less</b> <b>(Professional services)</b>	Local public bodies are free to specify their own dollar limits and process for obtaining quotes and making purchases.
	<b>SAMPLE SMALL PURCHASE GUIDELINES:</b>
	<b>\$1,000 or less:</b> no quotes or competition is required; purchase exempt from all purchasing procedures (Note: local public bodies are free to select a higher or lower minimum purchase amount)
	<b>\$1,000.01 to \$10,000:</b> solicit at least 2 telephone, catalog, electronic or written quotes; post notice on appropriate website
	<b>\$10,000.01 to \$30,000:</b> solicit at least 3 electronic or written quotes; written solicitation encouraged; posting of notice on an appropriate website is encouraged.
	<b>\$30,000.01 to \$100,000:</b> post notice on appropriate website; solicit, in writing, 4 written quotes (Note: <i>state</i> public bodies are <i>required</i> to solicit at least <b>four (4) written quotes</b> by informal written solicitation, e.g., “Request for Quotes”. Prior to 2012 this was also required for public bodies, and it remains a standard practice.
<b>Alternative Procurement Procedures Authorized</b>	
Cooperative Procurement	Purchase off existing State Contract; Purchase off another public body’s existing contract. RFP or ITB for the “source” contract must expressly specify that pricing/terms will be extended to other public bodies. Not authorized for architect, engineering, or other professional services, or for certain construction services.  Purchase off existing U.S. General Services Administration (GSA) contract, if authorized
Sole Source/Emergency	Requires advance written determination of the basis for finding that a particular vendor is the “sole source practicably available,” or of an emergency
<b>Formal Competition Required (ITB or RFP)</b>	
<b>\$60,000.01 or more</b> <b>(Professional services)</b>  <b>\$100,000.01 or more</b> <b>(Goods and non-professional services)</b>	Formal competitive sealed bidding (ITB) is REQUIRED, per Va. Code §15.2-4303(C). RFP may be used for certain other contracts, following a written determination that an ITB is not practicable or fiscally advantageous
	Formal competitive negotiation (RFP) process is REQUIRED for professional services, per Va. Code §15.2-4303(B)
	<b>COMPONENTS OF FORMAL SOLICITATION DOCUMENTS</b>
	Written determination that ITB is not practicable or not fiscally advantageous ( <i>except RFPS for professional services</i> )
	Public Notice
	List of Vendors Contacted Directly (including state MBE businesses, if required)
	Written ITB or RFP
	Detailed specifications and requirements for goods and services
	Qualifications required of bidders/offerors; description of prequalification process (if applicable)
	Factors Considered in Evaluating Bids or Proposals
	Bid Form (ITBs)
	Instructions to Bidders/Offerors
	Special Terms and Conditions (unique contract requirements); Specifications
	General Terms and Conditions (general requirements for all contracts)
Public Notice of Intent to Award, or Notice to Award	

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# Chapter 43. Virginia Public Procurement Act

## Article 1. General Provisions

### § 2.2-4300. Short title; purpose; declaration of intent.

A. This chapter may be cited as the Virginia Public Procurement Act.

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

C. To the end that public bodies in the Commonwealth obtain high quality goods and services at reasonable cost, that all procurement procedures be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety, that all qualified vendors have access to public business and that no offeror be arbitrarily or capriciously excluded, it is the intent of the General Assembly that competition be sought to the maximum feasible degree, that procurement procedures involve openness and administrative efficiency, that individual public bodies enjoy broad flexibility in fashioning details of such competition, that the rules governing contract awards be made clear in advance of the competition, that specifications reflect the procurement needs of the purchasing body rather than being drawn to favor a particular vendor, and that the purchaser and vendor freely exchange information concerning what is sought to be procured and what is offered. Public bodies may consider best value concepts when procuring goods and nonprofessional services, but not construction or professional services. The criteria, factors, and basis for consideration of best value and the process for the consideration of best value shall be as stated in the procurement solicitation.

### § 2.2-4301. Definitions.

As used in this chapter:

“Affiliate” means an individual or business that controls, is controlled by, or is under common control with another individual or business. A person controls an entity if the person owns, directly or indirectly, more than 10 percent of the voting securities of the entity. For the purposes of this definition “voting security”

means a security that (i) confers upon the holder the right to vote for the election of members of the board of directors or similar governing body of the business or (ii) is convertible into, or entitles the holder to receive, upon its exercise, a security that confers such a right to vote. A general partnership interest shall be deemed to be a voting security.

“Best value,” as predetermined in the solicitation, means the overall combination of quality, price, and various elements of required services that in total are optimal relative to a public body’s needs.

“Business” means any type of corporation, partnership, limited liability company, association, or sole proprietorship operated for profit.

“Competitive negotiation” is the method of contractor selection set forth in § 2.2-4302.2.

“Competitive sealed bidding” is the method of contractor selection set forth in § 2.2-4302.1.

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

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

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

“Employment services organization” means 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.

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

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

“Job order contracting” means a method of procuring construction services 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 public body procuring the construction services. 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 §2.2-4302.2 or 2.2-4303.

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

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

“Potential bidder or offeror,” for the purposes of §§ 2.2-4360 and 2.2-4364, means a person who, at the time a public body negotiates and awards or proposes to award a contract, is engaged in the sale or lease of goods, or the sale of services, insurance or construction, of the type to be procured under 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.

“Professional services” means work performed by an independent contractor within the scope of the practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law, dentistry, medicine, optometry, pharmacy or professional engineering. “Professional services” shall also include the services of an economist procured by the State Corporation Commission.

“Public body” means any legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in this chapter. “Public body” shall include any metropolitan planning organization or planning district commission which operates exclusively within the Commonwealth of Virginia.

“Public contract” means an agreement between a public body and a nongovernmental source that is

enforceable in a court of law.

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

“Responsive bidder” means a person who has submitted a bid that conforms in all material respects to the Invitation to Bid.

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

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

## **§ 2.2-4302. Implementation.**

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

### **§ 2.2-4302.1. Process for competitive sealed bidding.**

The process for competitive sealed bidding shall include the following:

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

2. Public notice of the Invitation to Bid at least 10 days prior to the date set for receipt of bids by post-

ing on the Department of General Services' central electronic procurement website or other appropriate websites. In addition, public bodies may publish in a newspaper of general circulation. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities. In addition, bids may be solicited directly from potential contractors. Any additional solicitations shall include certified businesses selected from a list made available by the Department of Small Business and Supplier Diversity;

3. Public opening and announcement of all bids received;

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

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

### **§ 2.2-4302.2. Process for competitive negotiation.**

A. The process for competitive negotiation shall include the following:

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

2. Public notice of the Request for Proposal at least 10 days prior to the date set for receipt of proposals by posting on the Department of General Services' central electronic procurement website or other appropriate websites. Additionally, public bodies shall publish in a newspaper 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. Posting on the Department of General Services' central electronic

procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities. In addition, proposals may be solicited directly from potential contractors. Any additional solicitations shall include certified businesses selected from a list made available by the Department of Small Business and Supplier Diversity; and

3. For goods, nonprofessional services, and insurance, 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 public body shall select the offeror which, in its opinion, has made the best proposal and provides the best value, 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 public body determine in writing and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified than the others under consideration, a contract may be negotiated and awarded to that offeror; or

4. For professional services, the public body shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence, to provide the required services. Repetitive informal interviews shall be permissible. The offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. In addition, offerors shall be informed of any ranking criteria that will be used by the public body in addition to the review of the professional competence of the offeror. The Request for Proposal shall not, however, request that offerors furnish estimates of man-hours or cost for services. At the discussion stage, the public body may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of price for services. In accordance with § 2.2-4342, proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclu-

sion of discussion, outlined in this subdivision, on the basis of evaluation factors published in the Request for Proposal and all information developed in the selection process to this point, the public body shall select in the order of preference two or more offerors whose professional qualifications and proposed services are deemed most meritorious.

Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the public body can be negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable price.

Notwithstanding the foregoing, if the terms and conditions for multiple awards are included in the Request for Proposal, a public body may award contracts to more than one offeror.

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

B. For multiple projects, a contract for architectural or professional engineering services relating to construction projects, or a contract for job order contracting, may be negotiated by a public body, provided (i) the projects require similar experience and expertise, (ii) the nature of the projects is clearly identified in the Request for Proposal, and (iii) the contract is limited to a one-year term or when the cumulative total project fees reach the maximum cost authorized in this subsection, whichever occurs first.

Such contracts may be renewable for four additional one-year terms at the option of the public body. The fair and reasonable prices as negotiated shall be used in determining the cost of each project performed and the sum of all projects performed in a one-year contract term shall not exceed \$500,000, except that for:

1. A state agency, as defined in § 2.2-4347, the sum of all projects performed in a one-year contract term shall not exceed \$1 million as may be determined by the Director of the Department of General Services;

2. Any locality or any authority, sanitation district, metropolitan planning organization or planning district commission with a population in excess of 80,000, or any city within Planning District 8, the sum of all projects performed in a one-year contract term shall not exceed \$5 million and those awarded for any

airport as defined in § 5.1-1 and aviation transportation projects, the sum of all such projects shall not exceed \$1.5 million;

3. Architectural and engineering services for rail and public transportation projects by the Director of the Department of Rail and Public Transportation, the sum of all projects in a one-year contract term shall not exceed \$2 million. Such contract may be renewable for two additional one-year terms at the option of the Director;

4. Environmental, location, design, and inspection work regarding highways and bridges by the Commissioner of Highways, the initial contract term shall be limited to two years or when the cumulative total project fees reach \$5 million, whichever occurs first. Such contract may be renewable for two additional one-year terms at the option of the Commissioner, and the sum of all projects in each one-year contract term shall not exceed \$5 million; and

5. Job order contracting, the sum of all projects performed in a one-year contract term shall not exceed \$2 million.

Competitive negotiations for such contracts may result in awards to more than one offeror provided (i) the Request for Proposal so states and (ii) the public body has established procedures for distributing multiple projects among the selected contractors during the contract term.

C. For any single project, for (i) architectural or professional engineering services relating to construction projects, or (ii) job order contracting, the project fee shall not exceed \$100,000, or for architectural or engineering services for airports as defined in § 5.1-1 and aviation transportation projects, the project fee shall not exceed \$500,000, except that for:

1. A state agency as defined in § 2.2-4347, the project fee shall not exceed \$200,000, as may be determined by the Director of the Department of General Services;

2. Any locality or any authority or sanitation district with a population in excess of 80,000, or any city within Planning District 8, the project fee shall not exceed \$2 million; and

3. Job order contracting, the project fee shall not exceed \$400,000.

The limitations imposed upon single project fees pursuant to this subsection shall not apply to environmental, location, design, and inspection work regarding highways and bridges by the Commissioner of Highways or architectural and engineering services for rail

and public transportation projects by the Director of the Department of Rail and Public Transportation.

D. For the purposes of subsections B and C, any unused amounts from the first contract term shall not be carried forward to the additional term.

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

## Article 2. Contract Formation and Administration

### § 2.2-4303. Methods of procurement.

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

B. Professional services shall be procured by competitive negotiation.

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

Upon a written determination made in advance by (i) the Governor or his designee in the case of a procurement by the Commonwealth or by a department, agency or institution thereof or (ii) the local governing body in the case of a procurement by a political subdivision of the Commonwealth, that competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured through a licensed agent or broker selected in the manner provided for the procurement of things other than professional services set forth in § 2.2-4302.2. The basis for this determination shall be documented in writing.

D. Construction may be procured only by competi-

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

1. By the Commonwealth, its departments, agencies and institutions on a fixed price design-build basis or construction management basis under § 2.2-4306;

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

3. By any governing body of a locality with a population in excess of 100,000, provided that the locality has the personnel, procedures, and expertise to enter into a contract for construction on a fixed price or not-to-exceed price design-build or construction management basis and shall otherwise be in compliance with the provisions of this section, § 2.2-4308, and other applicable law governing design-build or construction management contracts for public bodies other than the Commonwealth. The procedures of the local governing body shall be consistent with the two-step competitive negotiation process established in § 2.2-4302.2; or

4. As otherwise provided in § 2.2-4308.

E. Upon a determination in writing that there is only one source practicably available for that which is to be procured, a contract may be negotiated and awarded to that source without competitive sealed bidding or competitive negotiation. The writing shall document the basis for this determination. The public body shall issue a written notice stating that only one source was determined to be practicably available, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted on the Department of General Services' central electronic procurement website or other appropriate websites, and in addition, public bodies may publish in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.

F. In case of emergency, a contract may be awarded without competitive sealed bidding or competitive

negotiation; however, such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The public body shall issue a written notice stating that the contract is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted on the Department of General Services' central electronic procurement website or other appropriate websites, and in addition, public bodies may publish in a newspaper of general circulation on the day the public body awards or announces its decision to award the contract, whichever occurs first, or as soon thereafter as is practicable. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.

G. A public body may establish purchase procedures, if adopted in writing, not requiring competitive sealed bids or competitive negotiation for single or term contracts for goods and services other than professional services if the aggregate or the sum of all phases is not expected to exceed \$100,000; however, such small purchase procedures shall provide for competition wherever practicable. For local public bodies, such purchase procedures may allow for single or term contracts for professional services without requiring competitive negotiation, provided the aggregate or the sum of all phases is not expected to exceed \$60,000.

For state public bodies, purchases under this subsection that are expected to exceed \$30,000 shall require the (i) written informal solicitation of a minimum of four bidders or offerors and (ii) posting of a public notice on the Department of General Services' central electronic procurement website or other appropriate websites. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities.

H. A state public body may establish purchase procedures, if adopted in writing, not requiring competitive negotiation for single or term contracts for professional services if the aggregate or the sum of all phases

is not expected to exceed \$50,000; however such small purchase procedures shall provide for competition wherever practicable.

I. Upon a determination made in advance by a public body and set forth in writing that the purchase of goods, products or commodities from a public auction sale is in the best interests of the public, such items may be purchased at the auction, including online public auctions. Purchase of information technology and telecommunications goods and nonprofessional services from a public auction sale shall be permitted by any authority, department, agency, or institution of the Commonwealth if approved by the Chief Information Officer of the Commonwealth. 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.

J. 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.

#### **§ 2.2-4304. Cooperative procurement.**

A. Any public body may participate in, sponsor, conduct, or administer a cooperative procurement agreement on behalf of or in conjunction with one or more other public bodies, or public agencies or institutions or localities of the several states, of the United States or its territories, the District of Columbia, or the U.S. General Services Administration, for the purpose of combining requirements to increase efficiency or reduce administrative expenses in any acquisition of goods and services.

A public body may 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 being conducted on behalf of other public bodies, except for:

1. Contracts for architectural or engineering services; or
2. Construction in excess of \$200,000 by a local public body from the contract of another local public body that is more than a straight line distance of 75 miles from the territorial limits of the local public body procuring the construction. The installation of artificial turf or other athletic surfaces shall not be subject to the limitations prescribed in this subdivision. Nothing

in this subdivision shall be construed to prohibit sole source or emergency procurements awarded pursuant to subsections E and F of § 2.2-4303.

In instances where any authority, department, agency, or institution of the Commonwealth desires to purchase information technology and telecommunications goods and services from another public body's contract and the procurement was conducted on behalf of other public bodies, such purchase shall be permitted if approved by the Chief Information Officer of the Commonwealth. Any public body that enters into a cooperative procurement agreement with a county, city, or town whose governing body has adopted alternative policies and procedures pursuant to subdivisions A 9 and A 10 of § 2.2-4343 shall comply with the alternative policies and procedures adopted by the governing body of such county, city, or town.

B. Subject to the provisions of §§ 2.2-1110, 2.2-1111, 2.2-1120 and 2.2-2012, any authority, department, agency, or institution of the Commonwealth may participate in, sponsor, conduct, or administer a cooperative procurement arrangement on behalf of or in conjunction with public bodies, private health or educational institutions or with public agencies or institutions of the several states, territories of the United States, or the District of Columbia, for the purpose of combining requirements to effect cost savings or reduce administrative expense in any acquisition of goods and services, other than professional services. A public body may purchase from any authority, department, agency or institution of the Commonwealth'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 being conducted on behalf of other public bodies. In such instances, deviation from the procurement procedures set forth in this chapter and the administrative policies and procedures established to implement this chapter shall be permitted, if approved by the Director of the Division of Purchases and Supply.

Pursuant to § 2.2-2012, such approval is not required if the procurement arrangement is for telecommunications and information technology goods and services of every description. In instances where the procurement arrangement is for telecommunications and information technology goods and services, such arrangement shall be permitted if approved by the Chief Information Officer of the Commonwealth. However, such acquisitions shall be procured competitively.

Nothing herein shall prohibit the payment by direct

or indirect means of any administrative fee that will allow for participation in any such arrangement.

C. As authorized by the United States Congress and consistent with applicable federal regulations, and provided the terms of the contract permit such purchases:

1. Any authority, department, agency, or institution of the Commonwealth may purchase goods and non-professional services, other than telecommunications and information technology, from a U.S. General Services Administration contract or a contract awarded by any other agency of the U.S. government, upon approval of the director of the Division of Purchases and Supply of the Department of General Services;

2. Any authority, department, agency, or institution of the Commonwealth may purchase telecommunications and information technology goods and non-professional services from a U.S. General Services Administration contract or a contract awarded by any other agency of the U.S. government, upon approval of the Chief Information Officer of the Commonwealth; and

3. Any county, city, town, or school board may purchase goods and nonprofessional services from a U.S. General Services Administration contract or a contract awarded by any other agency of the U.S. government.

#### **§ 2.2-4305. Competitive procurement by localities on state-aid projects.**

No contract for the construction of any building or for an addition to or improvement of an existing building by any local governing body or subdivision thereof for which state funds of not more than \$50,000 in the aggregate or for the sum of all phases of a contract or project either by appropriation, grant-in-aid or loan, are used or are to be used for all or part of the cost of construction shall be let except after competitive sealed bidding or after competitive negotiation as provided under subsection D of § 2.2-4303. The procedure for the advertising for bids or for proposals and for letting of the contract shall conform, *mutatis mutandis*, to this chapter.

#### **§ 2.2-4306. Design-build or construction management contracts for Commonwealth authorized.**

A. Notwithstanding any other provisions of law, the Commonwealth may enter into contracts on a fixed price design-build basis or construction management basis in accordance with the provisions of this section and § 2.2-1502. Procedures to implement this section and any changes to such procedures shall be adopted by the Secretary of Administration after a public hearing and reviewed by the House Committee on Appro-

priations and the Senate Committee on Finance.

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

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

**§ 2.2-4307. Fixed-price or not-to-exceed-price design-build and construction management contracts for juvenile correctional facilities authorized- OMITTED**

**§ 2.2-4308. Design-build or construction management contracts for public bodies other than the Commonwealth; eligibility requirements; award of contract; records to be kept.**

A. While the competitive sealed bid process remains the preferred method of construction procurement for public bodies in the Commonwealth, any public body other than the Commonwealth may enter into a contract for construction on a fixed price or not-to-exceed price design-build or construction management basis provided the public body complies with the requirements of this section and has implemented procedures consistent with the procedures adopted by the Secretary of Administration for utilizing design-build or construction management contracts.

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

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

1. Have adopted, by ordinance or resolution, written procedures governing the selection, evaluation and award of design-build and construction management

contracts. Such procedures shall be consistent with those described in this chapter for the procurement of nonprofessional services through competitive negotiation. Such procedures shall also require Requests for Proposals to include and define the criteria of such construction project in areas such as site plans; floor plans; exterior elevations; basic building envelope materials; fire protection information plans; structural, mechanical (HVAC), and electrical systems; and special telecommunications; and may define such other requirements as the public body determines appropriate for that particular construction project. Such procedures for:

a. Design-build construction projects shall include a two-step competitive negotiation process consistent with the standards established by the Division of Engineering and Buildings of the Department of General Services for state agencies.

b. Construction management projects shall include selection procedures and required construction management contract terms consistent with the procedures as adopted by the Secretary of Administration.

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

B. The 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.

**§ 2.2-4308.1. Purchase of owner-controlled insurance in construction projects.**

A. Notwithstanding any other provision of law to the contrary, a public body may purchase at its expense an owner-controlled insurance program in connection with any public construction contract where the amount of the contract or combination of contracts is more than \$100 million, provided that no single contract valued at less than \$50 million shall be combined pursuant to this section. The public body shall provide notice if it intends to use an owner-controlled insurance program, including the specific coverages of such program, in any request for proposal, invitation to bid, or other applicable procurement documents.

B. A public body shall not require a provider of architecture or professional engineering services to

participate in the owner-controlled insurance program, except to the extent that the public body may elect to secure excess coverage. No contractor or subcontractor shall be required to provide insurance coverage for a construction project if that specified coverage is included in an owner-controlled insurance program in which the contractor or subcontractor is enrolled.

C. For the purposes of this section, “owner-controlled insurance program” means a consolidated insurance program or series of insurance policies issued to a public body that may provide for some or all of the following types of insurance coverage for any contractor or subcontractor working on or at a public construction contract or combination of such contracts: general liability, property damage, workers’ compensation, employer’s liability, pollution or environmental liability, excess or umbrella liability, builder’s risk, and excess or contingent professional liability.

#### **§ 2.2-4308.2. Registration and use of federal employment eligibility verification program required; debarment.**

A. For purposes of this section, «E-Verify program» means the electronic verification of work authorization program of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208), Division C, Title IV, § 403(a), as amended, operated by the U.S. Department of Homeland Security, or a successor work authorization program designated by the U.S. Department of Homeland Security or other federal agency authorized to verify the work authorization status of newly hired employees under the Immigration Reform and Control Act of 1986 (P.L. 99-603).

B. Any employer with more than an average of 50 employees for the previous 12 months entering into a contract in excess of \$50,000 with any agency of the Commonwealth to perform work or provide services pursuant to such contract shall register and participate in the E-Verify program to verify information and work authorization of its newly hired employees performing work pursuant to such public contract.

C. Any such employer who fails to comply with the provisions of subsection B shall be debarred from contracting with any agency of the Commonwealth for a period up to one year. Such debarment shall cease upon the employer’s registration and participation in the E-Verify program.

#### **§ 2.2-4309. Modification of the contract.**

A. A public contract may include provisions for modification of the contract during performance, but no fixed-price contract may be increased by more than

twenty-five percent of the amount of the contract or \$50,000, whichever is greater, without the advance written approval of the Governor or his designee, in the case of state agencies, or the governing body, in the case of political subdivisions. In no event may the amount of any contract, without adequate consideration, be increased for any purpose, including, but not limited to, relief of an offeror from the consequences of an error in its bid or offer.

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

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

#### **§ 2.2-4310. Discrimination prohibited; participation of small, women-owned, minority-owned, and service disabled veteran-owned business.**

A. In the solicitation or awarding of contracts, no public body shall discriminate against a bidder or offeror because 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, each public body shall include businesses selected from a list made available by the Department of Small Business and Supplier Diversity.

B. All public bodies shall establish programs consistent with this chapter to facilitate the participation of small businesses and businesses owned by women, minorities, and service disabled veterans in procurement transactions. The programs established shall be in writing and shall comply with the provisions of any enhancement or remedial measures authorized by the Governor pursuant to subsection C or, where applicable, by the chief executive of a local governing body pursuant to § 15.2-965.1, and shall include specific plans to achieve any goals established therein. State agencies shall submit annual progress reports on small, women-owned, and minority-owned business procurement and on service disabled veteran-owned business procurement to the Department of Small Business and Supplier Diversity in a form specified by the Department of Small Business and Supplier Diversity. The Department of Small Business and Supplier Diversity shall make information on service disabled veteran-owned procurement available to the Department of Veterans Services upon request.

C. Whenever there exists (i) a rational basis for

small business enhancement or (ii) a persuasive analysis that documents a statistically significant disparity between the availability and utilization of women-owned and minority-owned businesses, the Governor is authorized and encouraged to require state agencies to implement appropriate enhancement or remedial measures consistent with prevailing law.

D. In the solicitation or awarding of contracts, no state agency, department or institution shall discriminate against a bidder or offeror because the bidder or offeror employs ex-offenders unless the state agency, department or institution has made a written determination that employing ex-offenders on the specific contract is not in its best interest.

E. As used in this section:

“Minority individual” means an individual who is a citizen of the United States or a legal resident alien and who satisfies one or more of the following definitions:

1. “African American” means a person having origins in any of the original peoples of Africa and who is regarded as such by the community of which this person claims to be a part.

2. “Asian American” means a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands, including but not limited to Japan, China, Vietnam, Samoa, Laos, Cambodia, Taiwan, Northern Mariana Islands, the Philippines, a U.S. territory of the Pacific, India, Pakistan, Bangladesh, or Sri Lanka and who is regarded as such by the community of which this person claims to be a part.

3. “Hispanic American” means a person having origins in any of the Spanish-speaking peoples of Mexico, South or Central America, or the Caribbean Islands or other Spanish or Portuguese cultures and who is regarded as such by the community of which this person claims to be a part.

4. “Native American” means a person having origins in any of the original peoples of North America and who is regarded as such by the community of which this person claims to be a part or who is recognized by a tribal organization.

“Minority-owned business” means a business that is at least 51 percent owned by one or more minority individuals who are U.S. citizens or legal resident aliens, or in the case of a corporation, partnership, or limited liability company or other entity, at least 51 percent of the equity ownership interest in the corporation, partnership, or limited liability company or other entity is owned by one or more minority individuals who are

U.S. citizens or legal resident aliens, and both the management and daily business operations are controlled by one or more minority individuals.

“Service disabled veteran” means a veteran who (i) served on active duty in the United States military ground, naval, or air service, (ii) was discharged or released under conditions other than dishonorable, and (iii) has a service-connected disability rating fixed by the United States Department of Veterans Affairs.

“Service disabled veteran business” means a business that is at least 51 percent owned by one or more service disabled veterans or, in the case of a corporation, partnership, or limited liability company or other entity, at least 51 percent of the equity ownership interest in the corporation, partnership, or limited liability company or other entity is owned by one or more individuals who are service disabled veterans and both the management and daily business operations are controlled by one or more individuals who are service disabled veterans.

“Small business” means 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.

“State agency” means any authority, board, department, instrumentality, institution, agency, or other unit of state government. “State agency” shall not include any county, city, or town.

“Women-owned business” means a business that is at least 51 percent owned by one or more women who are U.S. citizens or legal resident aliens, or in the case of a corporation, partnership, or limited liability company or other entity, at least 51 percent of the equity ownership interest is owned by one or more women who are U.S. citizens or legal resident aliens, and both the management and daily business operations are controlled by one or more women.

### **§ 2.2-4311. Employment discrimination by contractor prohibited; required contract provisions.**

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

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

a. The contractor will not discriminate against any employee or applicant for employment because of race,

religion, color, sex, national origin, age, disability, or other basis prohibited by state law relating to discrimination in employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.

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

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

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

#### **§ 2.2-4311.1. Compliance with federal, state, and local laws and federal immigration law; required contract provisions.**

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

#### **§ 2.2-4311.2. Compliance with state law; foreign and domestic businesses authorized to transact business in the Commonwealth.**

A. All public bodies shall include in every written contract a provision that a 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 or as otherwise required by law.

B. Pursuant to competitive sealed bidding or competitive negotiation, all public bodies shall include in the solicitation a provision that requires a bidder or offeror organized or authorized to transact business in the Commonwealth pursuant to Title 13.1 or Title 50 to include in its bid or proposal the identification number issued to it by the State Corporation Commission. Any bidder or offeror that is not required to be authorized to transact business in the Commonwealth as a foreign business entity under Title 13.1 or Title 50

or as otherwise required by law shall include in its bid or proposal a statement describing why the bidder or offeror is not required to be so authorized.

C. Any bidder or offeror described in subsection B that fails to provide the required information shall not receive an award unless a waiver of this requirement and the administrative policies and procedures established to implement this section is granted by the Director of the Department of General Services or his designee or by the chief executive of a local governing body.

D. Any business entity described in subsection A that enters into a contract with a public body pursuant to this chapter 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.

E. A public body may void any contract with a business entity if the business entity fails to remain in compliance with the provisions of this section.

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

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

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

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

**§ 2.2-4313. Petition for recycled goods and products; periodic review of procurement standards- OMITTED**

**§ 2.2-4314. Petition for procurement of less toxic goods and products; periodic review of procurement standards- OMITTED**

**§ 2.2-4315. Use of brand names.**

Unless otherwise provided in the Invitation to Bid, the name of a certain brand, make or manufacturer shall not restrict bidders to the specific brand, make or manufacturer named and shall be deemed to convey the general style, type, character, and quality of the article desired. Any article that the public body in its sole discretion determines to be the equal of that specified, considering quality, workmanship, economy of operation, and suitability for the purpose intended, shall be accepted.

**§ 2.2-4316. Comments concerning specifications.**

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

**§ 2.2-4317. Prequalification generally; prequalification for construction.**

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

B. Any prequalification of prospective contractors for construction by a public body shall be pursuant to a prequalification process for construction projects adopted by the public body. The process shall be consistent with the provisions of this section.

The application form used in such process shall set forth the criteria upon which the qualifications of prospective contractors will be evaluated. The application form shall request of prospective contractors only such information as is appropriate for an objective evaluation of all prospective contractors pursuant to such criteria. The form shall allow the prospective contractor seeking prequalification to request, by checking the appropriate box, that all information voluntarily

submitted by the contractor pursuant to this subsection shall be considered a trade secret or proprietary information subject to the provisions of subsection D of § 2.2-4342.

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

At least 30 days prior to the date established for submission of bids or proposals under the procurement of the contract for which the prequalification applies, the public body shall advise in writing each contractor who submitted an application whether that contractor has been prequalified. In the event that a contractor is denied prequalification, the written notification to the contractor shall state the reasons for the denial of prequalification and the factual basis of such reasons.

A decision by a public body denying prequalification under the provisions of this subsection shall be final and conclusive unless the contractor appeals the decision as provided in § 2.2-4357.

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

1. The contractor does not have sufficient financial ability to perform the contract that would result from such procurement. If a bond is required to ensure performance of a contract, evidence that the contractor can acquire a surety bond from a corporation included on the United States Treasury list of acceptable surety corporations in the amount and type required by the public body shall be sufficient to establish the financial ability of the contractor to perform the contract resulting from such procurement;

2. The contractor does not have appropriate experience to perform the construction project in question;

3. The contractor or any officer, director or owner thereof has had judgments entered against him within the past ten years for the breach of contracts for governmental or nongovernmental construction, including, but not limited to, design-build or construction management;

4. The contractor has been in substantial noncompliance with the terms and conditions of prior construction contracts with a public body without good cause. If the public body has not contracted with a contractor in

any prior construction contracts, the public body may deny prequalification if the contractor has been in substantial noncompliance with the terms and conditions of comparable construction contracts with another public body without good cause. A public body may not utilize this provision to deny prequalification unless the facts underlying such substantial noncompliance were documented in writing in the prior construction project file and such information relating thereto given to the contractor at that time, with the opportunity to respond;

5. The contractor or any officer, director, owner, project manager, procurement manager or chief financial official thereof has been convicted within the past ten years of a crime related to governmental or nongovernmental construction or contracting, including, but not limited to, a violation of (i) Article 6 (§ 2.2-4367 et seq.) of this chapter, (ii) the Virginia Governmental Frauds Act (§ 18.2-498.1 et seq.), (iii) Chapter 4.2 (§ 59.1-68.6 et seq.) of Title 59.1, or (iv) any substantially similar law of the United States or another state;

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

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

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

E. A state public body shall deny prequalification to any contractor who fails to register and participate in the E-Verify program as required by § 2.2-4308.2.

F. The provisions of subsections B, C, and D shall not apply to prequalification for contracts let under § 33.1-12.

### **§ 2.2-4318. Negotiation with lowest responsible bidder.**

Unless canceled or rejected, a responsive bid from the lowest responsible bidder shall be accepted as sub-

mitted, except that if the bid from the lowest responsible bidder exceeds available funds, the public body may negotiate with the apparent low bidder to obtain a contract price within available funds. However, the negotiation may be undertaken only under conditions and procedures described in writing and approved by the public body prior to issuance of the Invitation to Bid and summarized therein.

### **§ 2.2-4319. Cancellation, rejection of bids; waiver of informalities.**

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

B. A public body may waive informalities in bids.

### **§ 2.2-4320. Exclusion of insurance bids prohibited.**

Notwithstanding any other provision of law, no insurer licensed to transact the business of insurance in the Commonwealth or approved to issue surplus lines insurance in the Commonwealth shall be excluded from presenting an insurance bid proposal to a public body in response to a request for proposal or an invitation to bid. Nothing in this section shall preclude a public body from debarring a prospective insurer pursuant to § 2.2-4321.

### **§ 2.2-4321. Debarment.**

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

### **§ 2.2-4321.1. Prohibited contracts; exceptions; determination by Department of Taxation; appeal; remedies- OMITTED**

### **§ 2.2-4321.2. Public works contract requirements- OMITTED**

**§ 2.2-4322. Acceptance of bids submitted to the Department of Transportation- OMITTED**

**§ 2.2-4323. Purchase programs for recycled goods; agency responsibilities- OMITTED**

**§ 2.2-4324. Preference for Virginia products with recycled content and for Virginia firms.**

A. In the case of a tie bid, preference shall be given to goods 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 Department of General Services shall post and maintain an updated list on its website of all states with an absolute preference for their resident contractors and those states that allow their resident contractors a percentage preference, including the respective percentage amounts. For purposes of compliance with this section, all public bodies may rely upon the accuracy of the information posted on this website.

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

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.

**§ 2.2-4325. Preference for Virginia coal used in state facilities- OMITTED**

**§ 2.2-4326. Preference for recycled paper and paper products used by state agencies- OMITTED**

**§ 2.2-4327. Preference for community reinvestment activities in contracts for investment of funds.**

Notwithstanding any other provision of law, any county, town, or city that is authorized to and has established affordable housing programs may provide by resolution that in determining the award of any contract for time deposits or investment of its funds, the treasurer or director of finance of such county, town, or city may consider, in addition to the typical criteria, the investment activities of qualifying institutions that enhance the supply of, or accessibility to, affordable housing within the jurisdiction, including the accessibility of such housing to employees of the county, town, or city or employees of the local school board. No more than 50 percent of the funds of the county, town, or city, calculated on the basis of the average daily balance of the general fund during the previous fiscal year, may be deposited or invested by considering such investment activities as a factor in the award of a contract. A qualifying institution shall meet the provisions of the Virginia Security for Public Deposits Act (§ 2.2-4400 et seq.) and all local terms and conditions for security, liquidity and rate of return.

For the purposes of this section, affordable housing means the same as that term is defined in §15.2-2201.

**§ 2.2-4328. Preference for local products and firms; applicability.**

A. The governing body of a county, city or town may, in the case of a tie bid, give preference to goods, services and construction produced in such locality or provided by persons, firms or corporations having principal places of business in the locality, if such a choice is available; otherwise the tie shall be decided by lot, unless § 2.2-4324 applies.

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

**§ 2.2-4329.1. Energy forward pricing mechanisms.**

A. As used in this section, unless the context requires a different meaning:

“Energy” means natural gas, heating oil, propane, diesel fuel, unleaded fuel, and any other energy source except electricity.

“Forward pricing mechanism” means either: (i) a contract or financial instrument that obligates a public body to buy or sell a specified quantity of energy at a future date at a set price or (ii) an option to buy or sell the contract or financial instrument.

B. Notwithstanding any other law to the contrary but subject to available appropriation, a public body may use forward pricing mechanisms for budget risk reduction.

C. Forward pricing mechanism transactions shall be made only under the following conditions:

1. The quantity of energy affected by the forward pricing mechanism shall not exceed the estimated energy use for the public body for the same period, which shall not exceed 48 months from the trade date of the transaction; and

2. A separate account shall be established for operational energy for each public body using a forward pricing mechanism.

D. Before exercising the authority under this section, the public body shall develop written policies and procedures governing the use of forward pricing mechanisms and disclosure of the same to the public.

E. Before exercising authority under subsection B, the public body shall establish an oversight process that provides for review of the public body's use of forward pricing mechanisms. The oversight process shall include internal or external audit reviews; annual reports to, and review by, an internal investment committee; and internal management control.

### **§ 2.2-4330. Withdrawal of bid due to error.**

A. A bidder for a public construction contract, other than a contract for construction or maintenance of public highways, may withdraw his bid from 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 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 public body and stated in the advertisement for bids:

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

2. Where the public body opens the bids one day following the time fixed for the submission of bids, the bidder shall submit to the public body or designated official his original work papers, documents and materials used in the preparation of the bid 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 bid. The contract shall not be awarded by the public body until the two-hour period has elapsed.

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 bidder's request, be considered trade secrets or proprietary information subject to the conditions of subsection F of § 2.2-4342.

C. A public body may establish procedures for the withdrawal of bids for other than construction contracts.

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

E. If a bid is withdrawn in accordance with this section, the lowest remaining bid shall be deemed to be the low bid.

F. 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.

G. The public body shall notify the bidder in writing within five business days of its decision regarding the bidder's request to withdraw its bid. If the public

body denies the withdrawal of a bid under the provisions of this section, it shall state in such notice the reasons for its decision and award the contract to such bidder at the bid price, provided such bidder is a responsible and responsive bidder. At the same time that the notice is provided, the public body shall return all work papers and copies thereof that have been submitted by the bidder.

### **§ 2.2-4331. Contract pricing arrangements.**

A. Except as prohibited in this section, public contracts may be awarded on a fixed price or cost reimbursement basis, or on any other basis that is not prohibited.

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

C. The following contract pricing arrangements shall not be prohibited by this section:

1. 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; or

2. A cost plus a percentage of the private investment made by a private entity as a basis for the procurement of commercial or financial consulting services related to a qualifying transportation facility under the Public-Private Transportation Act of 1995 (§ 56-556 et seq.) or a qualifying project under the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.) where the commercial or financial consulting services are sought to solicit or to solicit and evaluate proposals for the qualifying transportation facility or the qualifying project. As used in this section, "private entity" and "qualifying transportation facility" mean the same as those terms are defined in § 56-557 and "qualifying project" means the same as that term is defined in § 56-575.1.

### **§ 2.2-4332. Workers' compensation requirements for construction contractors and subcontractors.**

A. No contractor shall perform any work on a construction project of a department, agency or institution of the Commonwealth or any of its political subdivisions unless he (i) has obtained, and continues to maintain for the duration of the work, workers' compensation coverage required pursuant to the provisions of Chapter 8 (§ 65.2-800 et seq.) of Title 65.2 and (ii) provides prior to the award of contract, on a form furnished by the department, agency, or institution of

the Commonwealth or political subdivision thereof, evidence of such coverage.

B. The Department of General Services shall provide the form to such departments, agencies, institutions, and political subdivisions. Failure of a department, agency, institution or political subdivision to provide the form prior to the award of contract shall waive the requirements of clause (ii) of subsection A.

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

### **§ 2.2-4333. Retainage on construction contracts.**

A. In any public contract for construction that provides for progress payments in installments based upon an estimated percentage of completion, the contractor shall be paid at least ninety-five percent of the earned sum when payment is due, with no more than five percent being retained to ensure faithful performance of the contract. All amounts withheld may be included in the final payment.

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

### **§ 2.2-4334. Deposit of certain retained funds on certain contracts with local governments; penalty for failure to timely complete.**

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

shall forfeit his rights to the use of the escrow account procedure.

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

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

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

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

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

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

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

1. Allows a public body to recover that portion of delay costs caused by the acts or omissions of the contractor, or its subcontractors, agents or employees;

2. Requires notice of any delay by the party claiming the delay;

3. Provides for liquidated damages for delay; or

4. Provides for arbitration or any other procedure designed to settle contract disputes.

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

D. A public body denying a contractor's claim for costs or damages due to the alleged delaying of the contractor in the performance of work under any public construction contract shall be liable to and shall pay such contractor a percentage of all costs incurred by the contractor to investigate, analyze, negotiate, litigate and arbitrate the claim. The percentage paid by the public body shall be equal to the percentage of the contractor's total delay claim for which the public body's denial is determined through litigation or arbitration to have been made in bad faith.

### **§ 2.2-4336. Bid bonds.**

A. Except in cases of emergency, all bids or proposals for nontransportation-related construction contracts in excess of \$500,000 or transportation-related projects authorized under § 33.1-12 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 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 § 2.2-4317.

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 a public

body 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 § 33.1-12 and partially or wholly funded by the Commonwealth.

### **§ 2.2-4337. Performance and payment bonds.**

A. Except as provided in subsection H, upon the award of any (i) public construction contract exceeding \$500,000 awarded to any prime contractor; (ii) 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; (iii) construction contract exceeding \$500,000 in which the performance of labor or the furnishing of materials will be paid with public funds; or (iv) transportation-related projects exceeding \$350,000 that are partially or wholly funded by the Commonwealth, the contractor shall furnish to the public body the following bonds:

1. A performance bond in the sum of the contract amount conditioned upon the faithful performance of the contract in strict conformity with the plans, specifications and conditions of the contract. For transportation-related projects authorized under § 33.1-12, such bond shall be in a form and amount satisfactory to the public body.

2. A payment bond in the sum of the contract amount. The bond shall be for the protection of claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded, or to any subcontractors, in furtherance of the work provided for in the contract, and shall be conditioned upon the prompt payment for all materials furnished or labor supplied or performed in the furtherance of the work. For transportation-related projects authorized under § 33.1-12 and partially or wholly funded by the Commonwealth, such bond shall be in a form and amount satisfactory to the public body.

“Labor or materials” shall include public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site.

B. 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 § 2.2-4317.

C. Each of the bonds shall be executed by one or

more surety companies selected by the contractor that are authorized to do business in Virginia.

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

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

F. Nothing in this section shall preclude a public body 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 § 33.1-12 and partially or wholly funded by the Commonwealth.

G. 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.

H. The performance and payment bond requirements of subsection A for transportation-related projects that are valued in excess of \$250,000 but less than \$350,000 may only be waived by a public body if the bidder provides evidence, satisfactory to the public body, that a surety company has declined an application from the contractor for a performance or payment bond.

### **§ 2.2-4338. 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 Attorney General in the case of state agencies, or the attorney for the political subdivision in the case of political subdivisions, a bidder may furnish a personal bond, property bond, or bank or savings institution's letter of credit on certain designated funds in the face amount required for the bid, payment, or performance bond. Approval shall be granted only upon a determination that the alternative form of security proffered affords protection to the public body equivalent to a corporate surety's bond.

C. The provisions of this section shall not apply to the Department of Transportation.

**§ 2.2-4339. Bonds on other than construction contracts.**

A public body may require bid, payment, or performance bonds for contracts for goods or services if provided in the Invitation to Bid or Request for Proposal.

**§ 2.2-4340. Action on performance bond.**

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

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

A. 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 him for the labor or 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 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 claims payment, stating with substantial accuracy the amount claimed and the name of the person for whom the work was performed or to whom the material was furnished. Notice to the contractor shall be served by registered or certified mail, postage prepaid, in an envelope addressed to such contractor at any place where his office is regularly maintained for the transaction of business. Claims for sums withheld as retainages with respect to labor performed or materials furnished, shall not be subject to the time limitations stated in this subsection.

C. Any action on a payment bond shall be brought within one year after the day on which the person bringing such action last performed labor or last fur-

nished or supplied materials.

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

**§ 2.2-4342. Public inspection of certain records.**

A. Except as provided in this section, 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 (§ 2.2-3700 et seq.).

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

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

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 public body decides not to accept any of the proposals and to reopen the contract. Otherwise, proposal records shall be open to public inspection only after award of the contract.

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 submitted pursuant to subsection B of § 2.2-4317 shall not be subject to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.); however, the bidder, offeror or contractor shall (i) invoke the protections of this section prior to or upon submission of the data or other materials, (ii) identify the data or other materials to be protected, and (iii) state the reasons why protection is necessary.

## Article 3. Exemptions and Limitations

### § 2.2-4343. Exemption from operation of chapter for certain transactions.

A. The provisions of this chapter shall not apply to:

1. The Virginia Port Authority in the exercise of any of its powers in accordance with Chapter 10 (§62.1-128 et seq.) of Title 62.1, provided the Authority implements, by policy or regulation adopted by the Board of Commissioners, procedures to ensure fairness and competitiveness in the procurement of goods and services and in the administration of its capital outlay program. This exemption shall be applicable only so long as such policies and procedures meeting the requirements remain in effect.

2. The Virginia Retirement System for selection of services related to the management, purchase or sale of authorized investments, actuarial services, and disability determination services. Selection of these services shall be governed by the standard set forth in § 51.1-124.30.

3. The State Treasurer in the selection of investment management services related to the external management of funds shall be governed by the standard set forth in § 2.2-4514, and shall be subject to competitive guidelines and policies that are set by the Commonwealth Treasury Board and approved by the Department of General Services.

4. The Department of Social Services or local departments of social services for the acquisition of motor vehicles for sale or transfer to Temporary Assistance to Needy Families (TANF) recipients.

5. The College of William and Mary in Virginia, Virginia Commonwealth University, the University of Virginia, and Virginia Polytechnic Institute and State University in the selection of services related to the management and investment of their endowment funds, endowment income, gifts, all other nongeneral fund reserves and balances, or local funds of or held by the College or Universities pursuant to § 23-44.1, 23-50.10:01, 23-76.1, or 23-122.1. However, selection of these services shall be governed by the Uniform Prudent Management of Institutional Funds Act (§ 64.2-1100 et seq.) as required by §§ 23-44.1, 23-50.10:01, 23-76.1, and 23-122.1.

6. The Board of the Virginia College Savings Plan for the selection of services related to the operation and administration of the Plan, including, but not limited to, contracts or agreements for the management, pur-

chase, or sale of authorized investments or actuarial, record keeping, or consulting services. However, such selection shall be governed by the standard set forth in § 23-38.80.

7. Public institutions of higher education for the purchase of items for resale at retail bookstores and similar retail outlets operated by such institutions. However, such purchase procedures shall provide for competition where practicable.

8. The purchase of goods and services by agencies of the legislative branch that may be specifically exempted therefrom by the Chairman of the Committee on Rules of either the House of Delegates or the Senate. Nor shall the contract review provisions of § 2.2-2011 apply to such procurements. The exemption shall be in writing and kept on file with the agency's disbursement records.

9. Any town with a population of less than 3,500, except as stipulated in the provisions of §§ 2.2-4305, 2.2-4308, 2.2-4311, 2.2-4315, 2.2-4330, 2.2-4333 through 2.2-4338, 2.2-4343.1, and 2.2-4367 through 2.2-4377.

10. Any county, city or town whose governing body has adopted, by ordinance or resolution, alternative policies and procedures which are (i) based on competitive principles and (ii) generally applicable to procurement of goods and services by such governing body and its agencies, except as stipulated in subdivision 12.

This exemption shall be applicable only so long as such policies and procedures, or other policies and procedures meeting the requirements of § 2.2-4300, remain in effect in such county, city or town. Such policies and standards may provide for incentive contracting that offers a contractor whose bid is accepted the opportunity to share in any cost savings realized by the locality when project costs are reduced by such contractor, without affecting project quality, during construction of the project. The fee, if any, charged by the project engineer or architect for determining such cost savings shall be paid as a separate cost and shall not be calculated as part of any cost savings.

11. Any school division whose school board has adopted, by policy or regulation, alternative policies and procedures that are (i) based on competitive principles and (ii) generally applicable to procurement of goods and services by the school board, except as stipulated in subdivision 12.

This exemption shall be applicable only so long as such policies and procedures, or other policies or procedures meeting the requirements of § 2.2-4300, remain in effect in such school division. This provision shall

not exempt any school division from any centralized purchasing ordinance duly adopted by a local governing body.

12. Notwithstanding the exemptions set forth in subdivisions 9 through 11, the provisions of subsections C and D of § 2.2-4303, and §§ 2.2-4305, 2.2-4308, 2.2-4311, 2.2-4315, 2.2-4317, 2.2-4330, 2.2-4333 through 2.2-4338, 2.2-4343.1, and 2.2-4367 through 2.2-4377 shall apply to all counties, cities and school divisions, and to all towns having a population greater than 3,500 in the Commonwealth.

The method for procurement of professional services through competitive negotiation set forth in subsection B of § 2.2-4302.2 shall also apply to all counties, cities and school divisions, and to all towns having a population greater than 3,500, where the cost of the professional service is expected to exceed \$60,000 in the aggregate or for the sum of all phases of a contract or project. A school board that makes purchases through its public school foundation or purchases educational technology through its educational technology foundation, either as may be established pursuant to § 22.1-212.2:2 shall be exempt from the provisions of this chapter, except, relative to such purchases, the school board shall comply with the provisions of §§ 2.2-4311 and 2.2-4367 through 2.2-4377.

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

14. Procurement of any construction or planning and design services for construction by a Virginia nonprofit corporation or organization not otherwise specifically exempted when (i) the planning, design or construction is funded by state appropriations of \$10,000 or less or (ii) the Virginia nonprofit corporation or organization is obligated to conform to procurement procedures that are established by federal statutes or regulations, whether those federal procedures are in conformance with the provisions of this chapter.

15. Purchases, exchanges, gifts or sales by the Citizens' Advisory Council on Furnishing and Interpreting the Executive Mansion.

16. The Eastern Virginia Medical School in the selection of services related to the management and investment of its endowment and other institutional funds. The selection of these services shall, however, be governed by the Uniform Prudent Management of Institutional Funds Act (§ 64.2-1100 et seq.).

17. The Department of Corrections in the selection of pre-release and post-incarceration services.

18. The University of Virginia Medical Center to the extent provided by subdivision B 3 of § 23-77.4.

19. The purchase of goods and services by a local governing body or any authority, board, department, instrumentality, institution, agency or other unit of state government when such purchases are made under a remedial plan established by the Governor pursuant to subsection C of § 2.2-4310 or by a chief administrative officer of a county, city or town pursuant to § 15.2-965.1.

20. The contract by community services boards or behavioral health authorities with an administrator or management body pursuant to a joint agreement authorized by § 37.2-512 or 37.2-615.

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

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

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

B. For the purposes of this section, "faith-based organization" means a religious organization that is or

applies to be a contractor to provide goods or services for programs funded by the block grant provided pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193.

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

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

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

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

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

H. If an individual, who applies for or receives goods, services, or disbursements provided pursuant to a contract between a public body and a faith-based organization, objects to the religious character of the faith-based organization from which the individual re-

ceives or would receive the goods, services, or disbursements, the public body shall offer the individual, within a reasonable period of time after the date of his objection, access to equivalent goods, services, or disbursements from an alternative provider.

The public body shall provide to each individual who applies for or receives goods, services, or disbursements provided pursuant to a contract between a public body and a faith-based organization a notice in bold face type that states: "Neither the public body's selection of a charitable or faith-based provider of services nor the expenditure of funds under this contract is an endorsement of the provider's charitable or religious character, practices, or expression. No provider of services may discriminate against you on the basis of religion, a religious belief, or your refusal to actively participate in a religious practice. If you object to a particular provider because of its religious character, you may request assignment to a different provider. If you believe that your rights have been violated, please discuss the complaint with your provider or notify the appropriate person as indicated in this form."

#### **§ 2.2-4344. Exemptions from competition for certain transactions.**

A. Any public body may enter into contracts without competition for:

1. The purchase of goods or services that are produced or performed by:

a. Persons, or in schools or workshops, under the supervision of the Virginia Department for the Blind and Vision Impaired; or

b. Employment services organizations that offer transitional or supported employment services serving individuals with disabilities.

2. The purchase of legal services, provided that the pertinent provisions of Chapter 5 (§ 2.2-500 et seq.) remain applicable, or expert witnesses or other services associated with litigation or regulatory proceedings.

B. An industrial development authority or regional industrial facility authority may enter into contracts without competition with respect to any item of cost of "authority facilities" or "facilities" as defined in § 15.2-4902 or "facility" as defined in § 15.2-6400.

C. A community development authority formed pursuant to Article 6 (§ 15.2-5152 et seq.) of Chapter 51 of Title 15.2, with members selected pursuant to such article, may enter into contracts without competition with respect to the exercise of any of its powers permitted by § 15.2-5158. However, this exception shall not apply in cases where any public funds other than

special assessments and incremental real property taxes levied pursuant to § 15.2-5158 are used as payment for such contract.

D. The State Inspector General may enter into contracts without competition to obtain the services of licensed health care professionals or other experts to assist in carrying out the duties of the Office of the State Inspector General.

### **§ 2.2-4345. Exemptions from competitive sealed bidding and competitive negotiation for certain transactions; limitations.**

A. The following public bodies may enter into contracts without competitive sealed bidding or competitive negotiation:

1. The Director of the Department of Medical Assistance Services for special services provided for eligible recipients pursuant to subsection H of § 32.1-325, provided that the Director has made a determination in advance after reasonable notice to the public and set forth in writing that competitive sealed bidding or competitive negotiation for such services is not fiscally advantageous to the public, or would constitute an imminent threat to the health or welfare of such recipients. The writing shall document the basis for this determination.

2. The State Health Commissioner for the compilation, storage, analysis, evaluation, and publication of certain data submitted by health care providers and for the development of a methodology to measure the efficiency and productivity of health care providers pursuant to Chapter 7.2 (§ 32.1-276.2 et seq.) of Title 32.1, if the Commissioner has made a determination in advance, after reasonable notice to the public and set forth in writing, that competitive sealed bidding or competitive negotiation for such services is not fiscally advantageous to the public. The writing shall document the basis for this determination. Such agreements and contracts shall be based on competitive principles.

3. The Virginia Code Commission when procuring the services of a publisher, pursuant to §§ 30-146 and 30-148, to publish the Code of Virginia or the Virginia Administrative Code.

4. The Department of Alcoholic Beverage Control for the purchase of alcoholic beverages.

5. The Department for Aging and Rehabilitative Services, for the administration of elder rights programs, with (i) nonprofit Virginia corporations granted tax-exempt status under § 501(c)(3) of the Internal Revenue Code with statewide experience in Virginia in conducting a state long-term care ombudsman pro-

gram or (ii) designated area agencies on aging.

6. The Department of Health for (a) child restraint devices, pursuant to § 46.2-1097; (b) health care services with Virginia corporations granted tax-exempt status under § 501(c)(3) of the Internal Revenue Code and operating as clinics for the indigent and uninsured that are organized for the delivery of primary health care services in a community (i) as federally qualified health centers designated by the Health Care Financing Administration or (ii) at a reduced or sliding fee scale or without charge; or (c) contracts with laboratories providing cytology and related services if competitive sealed bidding and competitive negotiations are not fiscally advantageous to the public to provide quality control as prescribed in writing by the Commissioner of Health.

7. Virginia Correctional Enterprises, when procuring materials, supplies, or services for use in and support of its production facilities, provided the procurement is accomplished using procedures that ensure as efficient use of funds as practicable and, at a minimum, includes obtaining telephone quotations. Such procedures shall require documentation of the basis for awarding contracts under this section.

8. The Virginia Baseball Stadium Authority for the operation of any facilities developed under the provisions of Chapter 58 (§ 15.2-5800 et seq.) of Title 15.2, including contracts or agreements with respect to the sale of food, beverages and souvenirs at such facilities.

9. With the consent of the Governor, the Jamestown-Yorktown Foundation for the promotion of tourism through marketing with private entities provided a demonstrable cost savings, as reviewed by the Secretary of Education, can be realized by the Foundation and such agreements or contracts are based on competitive principles.

10. The Chesapeake Hospital Authority in the exercise of any power conferred under Chapter 271, as amended, of the Acts of Assembly of 1966, provided that it does not discriminate against any person on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability in the procurement of goods and services.

11. Richmond Eye and Ear Hospital Authority, any authorities created under Chapter 53 (§ 15.2-5300 et seq.) of Title 15.2 and any hospital or health center commission created under Chapter 52 (§ 15.2-5200 et seq.) of Title 15.2 in the exercise of any power conferred under their respective authorizing legislation, provided that these entities shall not discriminate

against any person on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability in the procurement of goods and services.

12. The Patrick Hospital Authority sealed in the exercise of any power conferred under the Acts of Assembly of 2000, provided that it does not discriminate against any person on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability in the procurement of goods and services.

13. Public bodies for insurance or electric utility services if purchased through an association of which it is a member if the association was formed and is maintained for the purpose of promoting the interest and welfare of and developing close relationships with similar public bodies, provided such association has procured the insurance or electric utility services by use of competitive principles and provided that the public body has made a determination in advance after reasonable notice to the public and set forth in writing that competitive sealed bidding and competitive negotiation are not fiscally advantageous to the public. The writing shall document the basis for this determination.

14. Public bodies administering public assistance and social services programs as defined in § 63.2-100, community services boards as defined in § 37.2-100, or any public body purchasing services under the Comprehensive Services Act for At-Risk Youth and Families (§ 2.2-5200 et seq.) or the Virginia Juvenile Community Crime Control Act (§ 16.1-309.2 et seq.) for goods or personal services for direct use by the recipients of such programs if the procurement is made for an individual recipient. Contracts for the bulk procurement of goods or services for the use of recipients shall not be exempted from the requirements of § 2.2-4303.

15. The Eastern Virginia Medical School in the exercise of any power conferred pursuant to Chapter 471, as amended, of the Acts of Assembly of 1964.

B. No contract for the construction of any building or for an addition to or improvement of an existing building by any local government or subdivision of local government for which state funds of not more than \$50,000 in the aggregate or for the sum of all phases of a contract or project either by appropriation, grant-in-aid or loan, are used or are to be used for all or part of the cost of construction shall be let except after competitive sealed bidding or after competitive negotiation as provided under of subsection D of § 2.2-4303. The procedure for the advertising for bids or for proposals and for letting of the contract shall conform, *mutatis mutandis*, to this chapter.

## **§ 2.2-4346. Other exemptions for certain transactions.**

The following public bodies may enter into contracts as provided in this section.

A. Contracts for certain essential election materials and services are exempted from the requirements of Articles 1 (§ 2.2-4300 et seq.), 2 (§ 2.2-4303 et seq.), and 5 (§ 2.2-4357 et seq.) of this chapter pursuant to § 24.2-602.

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

C. The Virginia Racing Commission may designate an entity to administer and promote the Virginia Breeders Fund created pursuant to § 59.1-372 without competitive procurement.

## **Article 4. Prompt Payment**

### **§ 2.2-4347. Definitions.**

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

“Contractor” means the entity that has a direct contract with any “state agency” as defined herein, or any agency of local government as discussed in § 2.2-4352.

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

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

“State agency” means any authority, board, depart-

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

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

#### **§ 2.2-4348. Exemptions.**

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

#### **§ 2.2-4349. Retainage to remain valid.**

Notwithstanding the provisions of this article, the provisions of § 2.2-4333 relating to retainage shall remain valid.

#### **§ 2.2-4350. Prompt payment of bills by state agencies- OMITTED**

#### **§ 2.2-4351. Defect or impropriety in the invoice or goods and/or services received- OMITTED**

#### **§ 2.2-4352. Prompt payment of bills by localities.**

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

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

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

Unless otherwise provided under the terms of the

contract for the provision of goods or services, every agency that fails to pay by the payment date shall pay any finance charges assessed by the supplier that shall not exceed one percent per month.

The provisions of this section shall not apply to the late payment provisions in any public utility tariffs or public utility negotiated contracts.

#### **§ 2.2-4353. Date of postmark deemed to be date payment is made.**

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

#### **§ 2.2-4354. Payment clauses to be included in contracts.**

Any contract awarded by any state agency, or any contract awarded by any agency of local government in accordance with § 2.2-4352, shall include:

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

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

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

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

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

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

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

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

**§ 2.2-4355. Interest penalty; exceptions-OMITTED**

**§ 2.2-4356. Comptroller to file annual report-OMITTED**

## **Article 5. Remedies**

**§ 2.2-4357. Ineligibility.**

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

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

If the evaluation reveals that the bidder, offeror or contractor should be allowed permission to participate in the public contract, the public body shall cancel the proposed disqualification action. If the evaluation reveals that the bidder should be refused permission to participate, or disqualified from participation, in the public contract, the public body shall so notify the bidder, offeror or contractor. The notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within ten days after receipt of the notice by invoking administrative procedures meeting the standards of § 2.2-4365, if available, or in the alternative by instituting legal action as provided in § 2.2-4364.

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.

**§ 2.2-4358. Appeal of denial of withdrawal of bid.**

A. A decision denying withdrawal of bid under the provisions of § 2.2-4330 shall be final and conclusive unless the bidder appeals the decision within ten days after receipt of the decision by invoking administrative procedures meeting the standards of § 2.2-4365, if available, or in the alternative by instituting legal action as provided in § 2.2-4364.

B. If no bid bond was posted, a bidder refused withdrawal of a bid under the provisions of § 2.2-4330, prior to appealing, shall deliver to the public body a certified check or cash bond in the amount of the difference between the bid sought to be withdrawn and the next low bid. Such security shall be released only upon a final determination that the bidder was entitled to withdraw the bid.

C. If, upon appeal, it is determined that the decision refusing withdrawal of the bid was not (i) an honest exercise of discretion, but rather was arbitrary or capricious or (ii) 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.

**§ 2.2-4359. Determination of nonresponsibility.**

A. Following public opening and announcement of bids received on an Invitation to Bid, the public body shall evaluate the bids in accordance with element 4 of the process for competitive sealed bidding set forth in § 2.2-4302.1. At the same time, the public body shall determine whether the apparent low bidder is responsible. If the public body so determines, then it may proceed with an award in accordance with element 5 of the process for competitive sealed bidding set forth in § 2.2-4302.1. If the public body determines that the apparent low bidder is not responsible, it shall proceed as follows:

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

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

3. Such notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within ten days after receipt of the notice by invoking administrative procedures meeting the standards of § 2.2-4365, if available, or in the alternative by instituting legal action as provided in § 2.2-4364.

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

B. If, upon appeal pursuant to § 2.2-4364 or 2.2-4365, it is determined that the decision of the public body was not (i) an honest exercise of discretion, but rather was arbitrary or capricious or (ii) 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 or directed award as provided in subsection A of § 2.2-4364 or both.

If it is determined that the decision of the public body was not an honest exercise of discretion, but rather was arbitrary or capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid, and an award of the contract has been made, the relief shall be as set forth in subsection B of § 2.2-4360.

C. A bidder contesting a determination that he is not a responsible bidder for a particular contract shall proceed under this section, and may not protest the award or proposed award under the provisions of § 2.2-4360.

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

## **§ 2.2-4360. Protest of award or decision to award.**

A. Any bidder or offeror, who desires to protest the award or decision to award a contract shall submit the protest in writing to the public body, or an official designated by the public body, no later than ten days after the award or the announcement of the decision to award, whichever occurs first. Public notice of the award or the announcement of the decision to award shall be given by the public body 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 ten days after posting or publication of the notice of such contract as provided in § 2.2-4303. 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 under § 2.2-4342, then the time within which the protest shall be submitted shall expire ten days after those records are available for inspection by such bidder or offeror under § 2.2-4342, or at such later time as provided in this section. No protest shall lie for a claim that the selected bidder or offeror is not a responsible bidder or offeror. The written protest shall include the basis for the protest and the relief sought. The public body or designated official shall issue a decision in writing within ten days stating the reasons for the action taken. This decision shall be final unless the bidder or offeror appeals within ten days of receipt of the written decision by invoking administrative procedures meeting the standards of § 2.2-4365, if available, or in the alternative by instituting legal action as provided in § 2.2-4364. Nothing in this subsection shall be construed to permit a bidder to challenge the validity of the terms or conditions of the Invitation to Bid or Request for Proposal.

B. If prior to an award it is determined that the decision to award is arbitrary or capricious, then the sole relief shall be a finding to that effect. The public body shall cancel the proposed award or revise it to comply with the law. If, after an award, it is determined that an award of a contract was arbitrary or capricious, then the sole relief shall be as hereinafter provided.

Where the award has been made but performance has not begun, the performance of the contract may be enjoined. Where the award has been made and performance has begun, the public body may declare the

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

C. Where a public body, an official designated by that public body, or an appeals board determines, after a hearing held following reasonable notice to all bidders, that there is probable cause to believe that a decision to award was based on fraud or corruption or on an act in violation of Article 6 (§ 2.2-4367 et seq.) of this chapter, the public body, designated official or appeals board may enjoin the award of the contract to a particular bidder.

### **§ 2.2-4361. 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.

### **§ 2.2-4362. Stay of award during protest.**

An award need not be delayed for the period allowed a bidder or offeror to protest, but in the event of a timely protest as provided in § 2.2-4360, or the filing of a timely legal action as provided in § 2.2-4364, no further action to award the contract shall 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.

### **§ 2.2-4363. Contractual disputes.**

A. Contractual claims, whether for money or other relief, shall be submitted in writing no later than 60 days after final payment. However, written notice of the contractor's intention to file a claim shall be given at the time of the occurrence or beginning of the work upon which the claim is based. Nothing herein shall preclude a contract from requiring submission of an invoice for final payment within a certain time after completion and acceptance of the work or acceptance of the goods. Pendency of claims shall not delay payment of amounts agreed due in the final payment.

B. Each public body shall include in its contracts a procedure for consideration of contractual claims. Such procedure, which may be contained in the contract or may be specifically incorporated into the contract by reference and made available to the contractor, shall establish a time limit for a final decision in writing by the public body. If the public body has established adminis-

trative procedures meeting the standards of § 2.2-4365, such procedures shall be contained in the contract or specifically incorporated in the contract by reference and made available to the contractor.

C. If, however, the public body fails to include in its contracts a procedure for consideration of contractual claims, the following procedure shall apply:

1. 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.

2. 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 public body's chief administrative officer or his designee. The contractor may not institute legal action prior to receipt of the final written decision on the claim unless the public body fails to render a decision within 90 days of submission of the claim. Failure of the public body 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 public body's failure to render a decision within 90 days shall be the contractor's right to institute immediate legal action.

D. A contractor may not invoke administrative procedures meeting the standards of § 2.2-4365, if available, or institute legal action as provided in § 2.2-4364, prior to receipt of the public body's decision on the claim, unless the public body fails to render such decision within the time specified in the contract or, if no time is specified, then within the time provided by subsection C. A failure of the public body to render a final decision within the time provided in subsection C shall be deemed a final decision denying the claim by the public body.

E. The decision of the public body shall be final and conclusive unless the contractor appeals within six months of the date of the final decision on the claim by the public body by invoking administrative procedures meeting the standards of § 2.2-4365, if available, or in the alternative by instituting legal action as provided in § 2.2-4364.

### **§ 2.2-4364. Legal actions.**

A. A bidder or offeror, actual or prospective, who is refused permission or disqualified from participation in bidding or competitive negotiation, or who is determined not to be a responsible bidder or offeror for a particular

contract, may bring an action in the appropriate circuit court challenging that decision, which shall be reversed only if the petitioner establishes that the decision was not (i) an honest exercise of discretion, but rather was arbitrary or capricious; (ii) 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 subsection B of § 2.2-4317. In the event the apparent low bidder, having been previously determined by the public body to be not responsible in accordance with § 2.2-4301, is found by the court to be a responsible bidder, the court may direct the public body to award the contract to such bidder in accordance with the requirements of this section and the Invitation to Bid.

B. A bidder denied withdrawal of a bid under § 2.2-4358 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 not (i) an honest exercise of discretion, but rather was arbitrary or capricious or (ii) 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 in the manner provided in § 2.2-4303, whose protest of an award or decision to award under § 2.2-4360 is denied, may bring an action in the appropriate circuit court challenging a proposed award or the award of a contract, which shall be reversed only if the petitioner establishes that the proposed award or the award is not (i) an honest exercise of discretion, but rather is arbitrary or capricious or (ii) in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms and conditions of the Invitation to Bid or Request for Proposal.

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

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

F. A bidder, offeror or contractor need not utilize administrative procedures meeting the standards of § 2.2-4365, if available, but if those procedures are

invoked by the bidder, offeror or contractor, the procedures shall be exhausted prior to instituting legal action concerning the same procurement transaction unless the public body agrees otherwise.

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

### **§ 2.2-4365. Administrative appeals procedure.**

A. A public body may establish an administrative procedure for hearing (i) protests of a decision to award or an award, (ii) appeals from refusals to allow withdrawal of bids, (iii) appeals from disqualifications and determinations of nonresponsibility, and (iv) appeals from decisions on disputes arising during the performance of a contract, or (v) any of these. Such administrative procedure shall provide for a hearing before a disinterested person or panel, the opportunity to present pertinent information and the issuance of a written decision containing findings of fact. The disinterested person or panel shall not be an employee of the governmental entity against whom the claim has been filed. The findings of fact shall be final and conclusive and shall not be set aside unless the same are (a) fraudulent, arbitrary or capricious; (b) so grossly erroneous as to imply bad faith; or (c) in the case of denial of prequalification, the findings were not based upon the criteria for denial of prequalification set forth in subsection B of § 2.2-4317. No determination on an issue of law shall be final if appropriate legal action is instituted in a timely manner.

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

### **§ 2.2-4366. Alternative dispute resolution.**

Public bodies may enter into agreements to submit disputes arising from contracts entered into pursuant to this chapter to arbitration and utilize mediation and other alternative dispute resolution procedures. However, such procedures entered into by the Commonwealth, or any department, institution, division, commission, board or bureau thereof, shall be nonbinding and subject to § 2.2-514, as applicable. Alternative dispute resolution procedures entered into by school boards shall be nonbinding.

## Article 6. Ethics in Public Contracting

### § 2.2-4367. Purpose.

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

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

### § 2.2-4368. Definitions.

As used in this article:

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

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

“Pecuniary interest arising from the procurement” means a personal interest in a contract as defined in the State and Local Government Conflict of Interests Act (§ 2.2-3100 et seq.).

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

“Public employee” means any person employed by a public body, including elected officials or appointed members of governing bodies.

### § 2.2-4369. Proscribed participation by public employees in procurement transactions.

Except as may be specifically allowed by subdivisions A 2, 3 and 4 of § 2.2-3112, no public employee having official responsibility for a procurement transaction shall participate in that transaction on behalf of the public body when the employee knows that:

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.

### § 2.2-4370. Disclosure of subsequent employment.

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

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

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

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

### § 2.2-4372. Kickbacks.

A. No contractor or subcontractor shall demand or receive from any of his suppliers or his subcontractors,

as an inducement for the award of a subcontract or order, any payment, loan, subscription, advance, deposit of money, services or anything, present or promised, unless consideration of substantially equal or greater value is exchanged.

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

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

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

#### **§ 2.2-4373. Participation in bid preparation; limitation on submitting bid for same procurement.**

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

#### **§ 2.2-4374. Purchase of building materials, etc., from architect or engineer prohibited.**

A. No building materials, supplies or equipment for any building or structure constructed by or for a public body shall be sold by or purchased from any person employed as an independent contractor by the public body to furnish architectural or engineering services, but not construction, for such building or structure or from any partnership, association or corporation in which such architect or engineer has a personal interest as defined in § 2.2-3101.

B. No building materials, supplies or equipment for any building or structure constructed by or for a public body shall be sold by or purchased from any person who has provided or is currently providing design services specifying a sole source for such materi-

als, supplies or equipment to be used in the building or structure to the independent contractor employed by the public body to furnish architectural or engineering services in which such person has a personal interest as defined in § 2.2-3101.

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

#### **§ 2.2-4375. Certification of compliance required; penalty for false statements.**

A. Public bodies may require public employees having official responsibility for procurement transactions in which they participated to annually submit for such transactions a written certification that they complied with the provisions of this article.

B. Any public employee required to submit a certification as provided in subsection A who knowingly makes a false statement in the certification shall be punished as provided in § 2.2-4377.

#### **§ 2.2-4376. Misrepresentations prohibited.**

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

#### **§ 2.2-4376.1. Contributions and gifts; prohibition during procurement process.**

A. No bidder or offeror who has submitted a bid or proposal to an executive branch agency that is directly responsible to the Governor for the award of a public contract pursuant to this chapter, and no individual who is an officer or director of such a bidder or offeror, shall knowingly provide a contribution, gift, or other item with a value greater than \$50 or make an express or implied promise to make such a contribution or gift to the Governor, his political action committee, or the Governor's Secretaries, if the Secretary is responsible to the Governor for an executive branch agency with jurisdiction over the matters at issue, during the period between the submission of the bid and the award of the public contract under this chapter. The provisions of this section shall apply only for public contracts where the stated or expected value of the contract is \$5 million or more. The provisions of this section shall not apply to contracts awarded as the result of competitive sealed bidding.

B. Any person who knowingly violates this section shall be subject to a civil penalty of \$500 or up to two times the amount of the contribution or gift, whichever is greater. The attorney for the Commonwealth shall initiate civil proceedings to enforce the civil penalties. Any civil penalties collected shall be payable to the State Treasurer for deposit to the general fund.

**§ 2.2-4377. Penalty for violation.**

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