



City of Fairfax Virginia

PURCHASING RESOLUTION

JULY 2024

Contents

Article 1..... 1

General Provisions..... 1

 Section 1. Title..... 1

 Section 2. Authority..... 1

 Section 3. Definitions..... 1

Article 2..... 8

Procurement Policies..... 8

 Section 1. General..... 8

 Section 2. Methods of Procurement..... 8

 Competitive Sealed Bidding..... 8

 Competitive Negotiations..... 9

 Emergency..... 11

 Informal Procurement..... 11

 Sole Source 11

 Small Purchase..... 11

 Auction..... 11

 Reverse Auctioning 12

 Section 3. Construction Contracting 12

 Job order contracting; limitations..... 12

 Competitive procurement by localities on state-aid projects. 13

 Purchase of owner-controlled insurance in construction projects..... 13

 Retainage on construction contracts..... 13

 Deposit of certain retained funds on certain contracts with local governments; penalty for failure to timely complete. 14

 Public construction contract provisions barring damages for unreasonable delays declared void. 14

 Payment of Prevailing Wages for Work Performed on Public Works Contracts 15

 Section 4. Mandatory Terms and Conditions Applicable to All Contracts..... 15

 Employment discrimination by contractor prohibited. 15

 Compliance with federal, state, and local laws and federal immigration law..... 16

 Compliance with state law; foreign and domestic businesses authorized to transact business in the Commonwealth. 16

 Drug-free workplace to be maintained by contractor..... 17

 Section 5. General Purchasing Provisions 17

Authority to Bind the City	17
Certification of Funds	17
Modification of the contract.	18
Use of brand names.....	18
Comments concerning specifications.	18
Negotiation with lowest responsible bidder.	18
Cancellation, rejection of bids; waiver of informalities.	18
Discrimination prohibited; participation of small, women- owned, minority-owned, and service disabled veteran- owned businesses and employment services organizations.	19
Exclusion of insurance bids prohibited.....	19
Debarment.....	19
Withdrawal of bid due to error.	19
Contract pricing arrangements.....	20
Public inspection of certain records.	21
Joint and cooperative procurement.	21
Architectural and professional engineering term contracting; limitations.	22
Section 6. Prequalification.....	23
Prequalification generally; prequalification for construction.	23
Section 7. Preferences.....	24
Preference for Virginia products with recycled content and for Virginia firms.	25
Preference for energy-efficient and water-efficient goods.	25
Section 9. Bonds.....	25
Bid bonds.	25
Performance and payment bonds.....	26
Alternative forms of security.	27
Bonds on other than construction contracts.....	27
Action on performance bond.	27
Actions on payment bonds; waiver of right to sue.....	27
Article 3.....	29
Exemptions and Limitations.....	29
Exemption from operation of chapter for certain transactions.	29
Permitted contracts with certain religious organizations; purpose; limitations.....	29
Exemptions from competition for certain transactions.	29
Exemptions from competitive sealed bidding and competitive negotiation for certain transactions; limitations.....	30
Other exemptions for certain transactions.	30

Article 4.....	31
Remedies	31
Ineligibility.....	31
Appeal of denial of withdrawal of bid.....	31
Determination of nonresponsibility.....	31
Protest of award or decision to award.....	33
Effect of appeal upon contract.....	33
Stay of award during protest.....	33
Contractual disputes.....	34
Legal actions.....	34
Alternative dispute resolution.....	34
Article 5.....	35
Ethics in Public Contracting.....	35
Purpose.....	35
Proscribed participation by public employees in procurement transactions.....	35
Disclosure of subsequent employment.....	35
Prohibition on solicitation or acceptance of gifts; gifts by bidders, offerors, contractor or subcontractors prohibited.....	35
Kickbacks.....	36
Participation in bid preparation; limitation on submitting bid for same procurement.....	36
Purchase of building materials, etc., from architect or engineer prohibited.....	36
Certification of compliance required; penalty for false statements.....	37
Misrepresentations prohibited.....	37
Penalty for violation.....	37
Orders and contracts in violation of article.....	37

Article 1.

General Provisions

Section 1. Title.

This resolution shall be known as the City of Fairfax Purchasing Resolution.

Section 2. Authority.

A. The purpose of this section is to enunciate the 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.

B. 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 City that:

- Competition be sought to the maximum feasible degree.
- Procurement procedures involve openness and administrative efficiency.
- City departments enjoy broad flexibility in fashioning details of such competition.
- The rules governing contract awards be made clear in advance of the competition.
- Specifications reflect the procurement needs of the City rather than being drawn to favor a particular vendor.
- The purchaser and vendor freely exchange information concerning what is sought to be procured and what is offered.
- The City 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.

Section 3. Definitions.

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.

Bid is a competitively priced offer made by an intended seller, usually in reply to an Invitation for Bids (IFB).

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.

Collusion: A secret agreement or cooperation between two or more parties to accomplish a fraudulent, deceitful, or unlawful purpose.

Competitive negotiation is a method for purchasing goods and services, usually of a complex and technical nature whereby qualified individuals or firms are solicited by means of a Request for Proposals (RFP). Negotiations are conducted with selected offerors and the best proposal, as judged against criteria contained in the Request for Proposals, is accepted and an award issued.

Competitive sealed bidding is the offer of firm bids by individuals or firms competing for a contract, privilege, or right to supply specified services or goods.

Confirming Purchase Order is a purchase order issued after the fact to a vendor for goods or services ordered orally or by some other informal means. The order should be marked "CONFIRMING ORDER. DO NOT DUPLICATE."

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.

Consultant provides information, assistance, and guidance of a purely advisory nature, usually in the form of a report or other deliverable, setting forth alternative courses of action and recommendations based on the expertise possessed by the outside individual, firm or organization.

Construction management contract is 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.

Contract Administration is the management of all facets of a contract to assure the Contractor's total performance is in accordance with the contractual commitments and that the obligations of the Contractor under the terms and conditions of the contract are fulfilled.

Contract Management is the management of the organization's contracts and contract-related activities which may include accounting, administration, auditing, grants management, law, negotiation, logistics, price-structure compensation, delegation of purchasing authority, program management, termination and other business activities.

Contract, Fixed Price is a contract that provides for a firm unit or total price to be established at the time of order placement or contract award. The contractor bears the full risk for profit or loss.

Contract, Fixed Price, Incentive is a fixed price is agreed upon with a target cost/profit, a ceiling price, and a profit formula. Below target, the contractor and state share savings. Above ceiling, the contractor must assume all costs.

Contract, Fixed-Price With Escalation/De-escalation is a fixed price type of contract that provides for the upward and downward revision of the stated contract price upon the occurrence of certain contingencies (such as fluctuations in material costs and labor rates) specifically defined in the contract.

Contract, Requirements Type is a form of contract covering long-term requirements used when the total quantity required cannot be definitely fixed, but can be stated as an estimate or within maximum and minimum limits, with deliveries on demand.

Contract, Service is a contract for work to be performed by an independent contractor wherein the service rendered does not consist primarily of the acquisition of equipment or materials, or the rental of equipment, materials and supplies.

Contract, Time and Material is a contract providing for the procurement of supplies or services on the basis of direct labor hours at specified fixed hourly rates (which include direct and indirect labor, overhead, and profit) and material at cost, or at some bid percentage discount from manufacturer's catalog or list prices.

Contractor is an individual or firm that has entered into an agreement to provide goods or services to the City.

Cooperative Procurement is a procurement by a public body with one or more other public bodies, for the purpose of combining requirements for the purchase of like goods and/or services in order to increase efficiency and/or reduce administrative expenses. Usually one public body is lead and other public bodies can purchase from the contract.

Design-build contract is 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.

Disadvantaged Business Enterprise is a small business concern which is at least 51 percent owned by one or more socially and economically disadvantaged individuals, or, in the case of any corporation, partnership or limited liability company or other entity, at least 51 percent of the equity ownership interest in which is owned by one or more socially and economically disadvantaged individuals and whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

Emergency is an occurrence of a serious and urgent nature that demands immediate action.

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.

Force Majeure is an irresistible or extraordinary force, natural event, or effect that cannot be reasonably anticipated or foreseen, prevented, or controlled.

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

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

Ineligibility means an action taken to debar a prospective contractor from consideration for award of contracts.

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.

Information Technology includes telecommunications, automated data processing, databases, the Internet, management information systems, and related information, equipment, goods, and services.

Inspection is the examination and testing of goods and services to determine whether the goods and services furnished conform to contract requirements.

Job order contracting means a method of procuring construction by establishing a book of unit prices and then obtaining a contractor to perform work as needed using the prices, quantities, and specifications in the book as the basis of its pricing. The contractor may be selected through either competitive sealed bidding or competitive negotiation. 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 Code of Virginia § 2.2-4303.2.

Liquidated Damages is a sum stated in a contract to be paid as ascertained damages for failure to perform in accordance with the contract. The damage figure stipulated must be a reasonable estimate of the probable loss to the agency, and not calculated simply to impose a penalty on the contractor.

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, or any historically black college or university as defined in Code of Virginia § 2.2-1604, regardless of the percentage ownership by minority individuals or,

in the case of a corporation, partnership, or limited liability company or other entity, the equity ownership interest in the corporation, partnership, or limited liability company or other entity.

Notice of Award a Notice of Award is written notification stating that a vendor has received an award.

Notice of Intent to Award is a written notice publicly displayed, prior to award, that shows the selection of a vendor for the award of a specific contract or purchase order. This decision may be changed prior to the actual award of a contract or purchase order.

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.

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 (Code of Virginia § 2.2-3100 et seq.).

Prequalification is a procedure to prequalify products or vendors and limit consideration of bids or proposals to only those products or vendors which have been prequalified.

Prevailing wage rate means the rate, amount, or level of wages, salaries, benefits, and other remuneration prevailing for the corresponding classes of mechanics, laborers, or workers employed for the same work in the same trade or occupation in the locality in which the public facility or immovable property that is the subject of public works is located, as determined by the Commissioner of Labor and Industry on the basis of applicable prevailing wage rate determinations made by the U.S. Secretary of Labor under the provisions of the Davis-Bacon Act, 40 U.S.C. § 276 et seq., as amended.

Potential bidder or offeror means a person who, at the time the City 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.

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.

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.

Protest is a written complaint about an administrative action or decision brought by a bidder or offeror with the intention of receiving a remedial result.

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

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

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

Public Works means the operation, erection, construction, alteration, improvement, maintenance, or repair of any public facility or immovable property owned, used or leased by a locality.

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.

Request for Proposals (RFP): All documents, whether attached or incorporated by reference, utilized for soliciting proposals; the RFP procedure requires negotiation with offerors (to include prices) as distinguished from competitive bidding when using an Invitation for Bids.

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.

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.

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.

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.

Software is all applications software, whether packaged or requiring development, and all systems software such as assemblers, compilers, CPU performance measurement systems, database management systems, file back-up and recovery, job accounting, operating systems, programming aids and development systems and soft-merge utilities.

Sole Source is a product or service which is practicably available only from one source.

Specification is a description of the technical requirements for a material, product, or service that includes the criteria for determining whether these requirements are met. A specification may describe the performance parameters which a supplier has to meet, or it may provide a complete design disclosure of the work or job to be done. Specifications for service contracts normally take the form of a statement of work.

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.

Surplus Property is property, other than real property, which is in excess of the needs of the City and which is not required for its foreseeable need. The property may be used or new, but possess some usefulness for the purpose for which it was intended or for some other purpose. It includes scrap, which is material that is damaged, defective, or deteriorated to the extent that it has no value except for its basic material content.

Vendor is one who sells goods or services.

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.

Article 2.

Procurement Policies

Section 1. General

All City 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.

Professional services, other than legal services, shall be procured by competitive negotiation.

Goods, services other than professional services, and insurance may be procured by competitive sealed bidding or competitive negotiation.

Section 2. Methods of Procurement

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 City has provided for prequalification of bidders, the Invitation to Bid shall include a statement of any requisite qualifications of potential contractors. The City may include in the Invitation to Bid criteria that may be used in determining whether a bidder who is not prequalified by the Virginia Department of Transportation is a responsible bidder pursuant to Code of Virginia § 2.2-4301. Such criteria may include a history or good faith assurances of (i) completion by the bidder and any potential subcontractors of specified safety training programs established by the U.S. Department of Labor, Occupational Safety and Health Administration; (ii) participation by the bidder and any potential subcontractors in apprenticeship training programs approved by state agencies or the U.S. Department of Labor; or (iii) maintenance by the bidder and any potential subcontractors of records of compliance with applicable local, state, and federal laws. No Invitation to Bid for construction services shall condition a successful bidder's eligibility on having a specified experience modification factor. 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 posting on the Department of General Services' central electronic procurement website or the city website. Separately, the city may post notice in a newspaper of general circulation. Bids shall be submitted electronically on the Department of General Services central electronic procurement website. The city may also require a certain number of paper submissions for review purposes. In addition, bids may be solicited directly from potential contractors;

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.

Competitive Negotiations: 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, indicating whether a numerical scoring system will be used in evaluation of the proposal, and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities, specifications or qualifications that will be required. Except with regard to contracts for architectural, professional engineering, transportation construction, or transportation-related construction services, the City may include as a factor that will be used in evaluating a proposal the proposer's employment of persons with disabilities to perform the specifications of the contract. In the event that a numerical scoring system will be used in the evaluation of proposals, the point values assigned to each of the evaluation criteria shall be included in the Request for Proposal or posted at the location designated for public posting of procurement notices prior to the due date and time for receiving proposals. No Request for Proposal for construction authorized by this chapter shall condition a successful offeror's eligibility on having a specified experience modification factor;

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 the city website. Separately, the city may post in a newspaper of general circulation. Proposals shall be submitted electronically on the Department of General Services central electronic procurement website. The city may also require a certain number of paper submissions for review purposes. In addition, proposals may be solicited directly from potential contractors;

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. The offeror shall state any exception to any contractual terms or conditions, including any liability provisions contained in the Request for Proposal in writing at the time of responding to such Request for Proposal if so requested by the public body. Such exceptions shall be considered during negotiation but shall not be used as a basis for scoring or evaluating which offerors are selected for negotiations. 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 City 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 City 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 City 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 City 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 City 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 Code of Virginia § 2.2-4342, proprietary information from competing offerors shall not be disclosed to the public or to competitors. For architectural or engineering services, the City shall not request or require offerors to list any exceptions to proposed contractual terms and conditions, unless such terms and conditions are required by statute, regulation, ordinance, or standards developed pursuant to Code of Virginia § 2.2-1132, until after the qualified offerors are ranked for negotiations. At the conclusion of discussion, outlined in this subdivision, on the basis of evaluation factors published in the Request for Proposal and all information developed in the selection process to this point, the City shall select in the order of preference two or more offerors whose professional qualifications and proposed services are deemed most meritorious.

Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the City can be negotiated at a price considered fair and reasonable and pursuant to contractual terms and conditions acceptable to the City, 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, the City may award contracts to more than one offeror.

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

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

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

Emergency: 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 when in excess of \$200,000. This notice shall be posted on the Department of General Services' central electronic procurement website or City website on the day the City awards or announces its decision to award the contract, whichever occurs first, or as soon thereafter as is practicable.

Informal Procurement: Any City contract when the estimated cost is less than \$200,000 in value shall be deemed an informal procurement and not be subject to the rules governing competitive sealed bidding or competitive negotiation for:

1. Goods and services other than professional services, if the aggregate or the sum of all phases is not expected to exceed \$200,000 and non-transportation-related construction, if the aggregate or the sum of all phases is not expected to exceed \$300,000; and
2. Transportation-related construction, if the aggregate or sum of all phases is not expected to exceed \$25,000.

However, such small purchase procedures shall provide for competition wherever practicable.

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 \$80,000. Where small purchase procedures are adopted for construction, the procedures shall not waive compliance with the Uniform State Building Code.

The Purchasing Agent shall adopt procedures that establish informal purchase procedures.

Sole Source: 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 and shall be included in the contract file or procurement record. The City 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 when in excess of \$200,000. This notice shall be posted on the Department of General Services' central electronic procurement website or City procurement website.

Small Purchase: Any purchase or lease of goods, professional or nonprofessional services, or for the purchase of insurance, construction, when the estimated cost is less than \$7,500, shall be deemed a small purchase and shall not be subject to the rules governing the competitive bidding process.

Auction: Upon a determination made in advance by the City and set forth in writing that the purchase of goods, products or commodities from a public auction sale is in the best interests of the

public, such items may be purchased at the auction, including online public auctions. The writing shall document the basis for this determination. However, bulk purchases of commodities used in road and highway construction and maintenance, and aggregates shall not be made by online public auctions.

Reverse Auctioning: 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.

Section 3. Construction Contracting

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

1. On a fixed price design-build basis or construction management basis as provided in Code of Virginia Chapter 43.1 (§ 2.2-4378 et seq.); or
2. The construction of highways and any draining, dredging, excavation, grading or similar work upon real property 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.

Job order contracting; limitations.

A. A job order contract may be awarded by the City for multiple jobs, provided (i) the jobs require similar experience and expertise, (ii) the nature of the jobs is clearly identified in the solicitation, and (iii) the contract is limited to a term of one year or when the cumulative total project fees reach the maximum authorized in this section, whichever occurs first. Contractors may be selected through either competitive sealed bidding or competitive negotiation.

B. Such contracts may be renewable for three 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 job performed, and the sum of all jobs performed in a one-year contract term shall not exceed the maximum threshold amount.

The maximum threshold amount shall be \$10 million. Subject to the maximum threshold amount, no individual job order shall exceed \$1 million.

C. For the purposes of this section, any unused amounts from one contract term shall not be carried forward to any additional term.

D. Order splitting with the intent of keeping a job order under the maximum dollar amounts prescribed in subsection B is prohibited.

E. The City shall not issue or use a job order, under a job order contract, solely for the purpose of receiving professional architectural or engineering services that constitute the practice of architecture or the practice of engineering as those terms are defined in Code of Virginia § 54.1-400.

However, professional architectural or engineering services may be included on a job order where such professional services (i) are incidental and directly related to the job, (ii) do not exceed \$25,000 per job order, and (iii) do not exceed \$75,000 per contract term.

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

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 Code of Virginia § 2.2-4303 or Chapter 43.1 (§ 2.2-4378 et seq.). The procedure for the advertising for bids or for proposals and for letting of the contract shall conform, mutatis mutandis, to this chapter.

Purchase of owner-controlled insurance in construction projects.

A. Notwithstanding any other provision of law to the contrary, the City 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 City 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. The City 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 City 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.

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.

Deposit of certain retained funds on certain contracts with local governments; penalty for failure to timely complete.

A. 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, the City 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 City 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 City 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 the City, 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.

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

D. The City's denial of 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 City shall be equal to the percentage of the contractor's total delay claim for which the City's denial is determined through litigation or arbitration to have been made in bad faith.

Payment of Prevailing Wages for Work Performed on Public Works Contracts

The City may adopt an ordinance requiring that, when letting contracts for public works paid for in whole or in part by funds of the City, or when overseeing or administering a public contract, its bid specifications, project agreements, or other public contracts applicable to the public works, bidders, offerors, contractors, and subcontractors shall pay wages, salaries, benefits, and other remuneration to any mechanic, laborer, or worker employed, retained, or otherwise hired to perform services in connection with the public contract at the prevailing wage rate. Each public contract of a locality that has adopted an ordinance shall contain a provision requiring that the remuneration to any individual performing the work of any mechanic, laborer, or worker on the work contracted to be done under the public contract shall be at a rate equal to the prevailing wage rate.

Section 4. Mandatory Terms and Conditions Applicable to All Contracts

Employment discrimination by contractor prohibited.

The City 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. 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.

c. If the contractor employs more than five employees, the contractor shall (i) provide annual training on the contractor's sexual harassment policy to all supervisors and employees providing services in the Commonwealth, except such supervisors or employees that are required to complete sexual harassment training provided by the Department of Human Resource Management, and (ii) post the contractor's sexual harassment policy in (a) a conspicuous public place in each building located in the Commonwealth that the contractor owns or leases for business purposes and (b) the contractor's employee handbook.

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.

Compliance with federal, state, and local laws and federal immigration law.

The City 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.

Compliance with state law; foreign and domestic businesses authorized to transact business in the Commonwealth.

A. The City 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 Code of Virginia Title 13.1 or Title 50 or as otherwise required by law.

B. Pursuant to competitive sealed bidding or competitive negotiation, the City shall include in the solicitation a provision that requires a bidder or offeror organized or authorized to transact business in the Commonwealth pursuant to Code of Virginia 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 Code of Virginia 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 City Manager or his designee.

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

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

Drug-free workplace to be maintained by contractor.

The City 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.

Section 5. General Purchasing Provisions

Authority to Bind the City

Only the Purchasing Agent may bind the City to contract terms or conditions. Any term or condition invoked through an "I agree" click box or other comparable mechanism (i.e. "click wrap" agreement) does not bind the City or any City authorized end user to such terms or conditions, unless agreed to in writing by or on behalf of the Purchasing Agent.

Certification of Funds

Except in emergency, no order for delivery on a contract or open market order for supplies or contractual services for any City department shall be awarded until the chief financial officer has

certified that the unencumbered balance in the appropriation concerned, in excess of all unpaid obligations, is sufficient to defray the cost of such order (Code of Virginia §15.2-1238).

Modification of the contract.

The City 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 Purchasing Agent or his designee. 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.

The City 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.

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 City in its sole discretion determines to be the equal of that specified, considering quality, workmanship, economy of operation, and suitability for the purpose intended, shall be accepted.

Comments concerning specifications.

The City 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.

Negotiation with lowest responsible bidder.

Unless canceled or rejected, a responsive bid from the lowest responsible bidder shall be accepted as submitted, except that if the bid from the lowest responsible bidder exceeds available funds, the City 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 City prior to issuance of the Invitation to Bid and summarized therein.

Cancellation, rejection of bids; waiver of informalities.

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

Discrimination prohibited; participation of small, women- owned, minority-owned, and service disabled veteran- owned businesses and employment services organizations.

A. In the solicitation or awarding of contracts, the City shall not 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.

B. The City may, by ordinance, establish a program to facilitate the participation of small businesses, businesses owned by women, minorities, and service disabled veterans, and employment services organizations 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 City Manager pursuant to Code of Virginia § 15.2-965.1, and shall include specific plans to achieve any goals established therein. Contracts and subcontracts awarded to employment services organizations and service disabled veteran-owned businesses shall be credited toward the small business, women-owned, and minority-owned business contracting and subcontracting goals of state agencies and contractors.

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 the City in response to a request for proposal or an invitation to bid. Nothing in this section shall preclude the City from debarring a prospective insurer pursuant to Code of Virginia § 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 by the City. Any debarment procedure may provide for debarment on the basis of a contractor's unsatisfactory performance for the City.

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 City 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 City opens the bids one day following the time fixed for the submission of bids, the bidder shall submit to the Purchasing Agent 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 City 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 Code of Virginia § 2.2-4342.

C. The City 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 City shall notify the bidder in writing within five business days of its decision regarding the bidder's request to withdraw its bid. If the City 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 City shall return all work papers and copies thereof that have been submitted by the bidder.

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.

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 (Code of Virginia § 2.2-3700 et seq.).

B. Cost estimates relating to a proposed procurement transaction prepared by or for the City 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 City 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 City 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 Code of Virginia § 2.2-4317 shall not be subject to the Virginia Freedom of Information Act (Code of Virginia § 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. A bidder, offeror, or contractor shall not designate as trade secrets or proprietary information (a) an entire bid, proposal, or prequalification application; (b) any portion of a bid, proposal, or prequalification application that does not contain trade secrets or proprietary information; or (c) line item prices or total bid, proposal, or prequalification application prices.

Joint and cooperative procurement.

A. The City may participate in, sponsor, conduct, or administer a joint procurement

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

B. In addition, the City may purchase from another public body's contract or from the contract of the Metropolitan Washington Council of Governments or the Virginia Sheriffs' Association even if it did not participate in the request for proposal or invitation to bid, if the request for proposal or invitation to bid specified that the procurement was a cooperative procurement being conducted on behalf of other public bodies, except for:

1. Contracts for architectural or engineering services; or

2. Construction. This subdivision shall not be construed to prohibit sole source or emergency procurements awarded pursuant to subsections E and F of Code of Virginia § 2.2-4303. Subdivision 2 shall not apply to (i) the installation of artificial turf and track surfaces, (ii) stream restoration, or (iii) stormwater management practices, or (iv) the installation of playground equipment, including all associated and necessary construction and maintenance.

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 Code of Virginia § 2.2-4343 shall comply with the alternative policies and procedures adopted by the governing body of such county, city, or town.

The City 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 a cooperative procurement 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 City Purchasing Agent.

Nothing herein shall prohibit the payment by direct or indirect means of any administrative fee that will allow for participation in any such arrangement. As authorized by the United States Congress and consistent with applicable federal regulations, and provided the terms of the contract permit such purchases:

2. The City 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.

Architectural and professional engineering term contracting; limitations.

A. A contract for architectural or professional engineering services relating to multiple projects may be awarded by the City, 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 term of one year or when the cumulative total project fees reach the maximum authorized in this section, whichever occurs first.

Such contracts may be renewable for three additional terms at the option of the City. Any unused amounts from one contract term shall not be carried forward to any additional term. The fair and reasonable prices as negotiated shall be used in determining the cost of each project performed.

1. The sum of all projects performed in a contract term shall not exceed \$10 million and the fee for any single project shall not exceed \$2.5 million.

B. Competitive negotiations for such architectural or professional engineering services contracts may result in awards to more than one offeror, provided (i) the Request for Proposal so states and (ii) the City has established procedures for distributing multiple projects among the selected contractors during the contract term. Such procedures shall prohibit requiring the selected contractors to compete for individual projects based on price.

Section 6. Prequalification

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 the City shall be pursuant to a prequalification process for construction projects adopted by the City. 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 Code of Virginia § 2.2-4342.

In all instances in which the City 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 City 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 the City denying prequalification under the provisions of this subsection shall be final and conclusive unless the contractor appeals the decision as provided in Code of Virginia §

2.2-4357.

C. The City may deny prequalification to any contractor only if the City 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 the City or any other public body without good cause. If the City has not contracted with a contractor in any prior construction contracts, the City 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. The City 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 VI of the Virginia Public Procurement Act (Code of Virginia § 2.2-4367 et seq.), (ii) the Virginia Governmental Frauds Act (Code of Virginia § 18.2-498.1 et seq.), (iii) Code of Virginia 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 City in a timely manner any information requested by the public body relevant to subdivisions 1 through 6 of this subsection.

Section 7. Preferences

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

B. The City shall, 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 Code of Virginia § 2.2-4324 applies.

C. Notwithstanding the provisions of subsections above, 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.

Preference for energy-efficient and water-efficient goods.

A. Reference Code of Virginia § [2.2-4328.1](#); as used in this section, "FEMP" means the Federal Energy Management Program.

B. When in the course of procuring goods, if the City of Fairfax receives two or more bids for products that are Energy Star certified, meet FEMP-designated efficiency requirements, appear on FEMP's Low Standby Power Product List, or are WaterSense certified, the City may only select among those bids unless, before selecting a different bid, the City provides a written statement that demonstrates the cost of the products that are Energy Star certified, meet FEMP-designated efficiency requirements, appear on FEMP's Low Standby Power Product List, or are WaterSense certified was unreasonable.

Section 9. Bonds

Bid bonds.

A. Except in cases of emergency, all bids or proposals for non transportation-related construction contracts in excess of \$500,000 or transportation-related projects authorized under Code of Virginia Article 2 (§ 33.2-208 et seq.) of Chapter 2 of Title 33.2 that are in excess of \$350,000 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. No forfeiture under a bid bond shall exceed the lesser of (i) the difference between the

bid for which the bond was written and the next low bid, or (ii) the face amount of the bid bond.

C. Nothing in this section shall preclude the City from requiring bid bonds to accompany bids or proposals for construction contracts anticipated to be less than \$500,000 for non transportation-related projects or \$350,000 for transportation-related projects authorized under Article 2 (§ 33.2-208 et seq.) of Chapter 2 of Title 33.2 and partially or wholly funded by the Commonwealth.

Performance and payment bonds.

A. Upon the award of any (i) nontransportation-related public construction contract exceeding \$500,000 awarded to any prime contractor; or (ii) transportation-related project authorized pursuant to Article 2 (§ 33.2 et seq.) of Chapter 2 of Title 33.2 exceeding \$350,000 that is partially or wholly funded by the Commonwealth, the contractor shall furnish to the City the following bonds:

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

2. A payment bond in the sum of the contract amount. 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.

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

C. Each of the bonds shall be filed with the City, or a designated office or official thereof.

D. Nothing in this section shall preclude the City from requiring payment or performance bonds for construction contracts below \$500,000 for non transportation-related projects or \$350,000 for transportation-related projects authorized under Code of Virginia Article 2 (§ 33.2-208 et seq.) of Chapter 2 of Title 33.2 and partially or wholly funded by the Commonwealth.

E. 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.

F. For indefinite delivery or quantity contracts awarded pursuant to subsection A, the contractor awarded such contract to furnish to the city a performance bond and a payment bond, each of which shall be equal to the dollar amount of the individual tasks identified in the underlying contract. Such contractor shall not be required to pay the performance bond and payment bond in the sum of the contract amount. For purposes of this section, "indefinite delivery or quantity contract" means a contract that only requires performance of contractual obligations upon the

request of the city and which establishes an annual cap for the total work that may be authorized for such contract.

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 City Attorney, a bidder may furnish a personal bond, property bond, or bank or savings institution's letter of credit on certain designated funds in the face amount required for 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 City equivalent to a corporate surety's bond.

Bonds on other than construction contracts.

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

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 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.

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 furnished or supplied materials.

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

Article 3.

Exemptions and Limitations

Exemption from operation of chapter for certain transactions.

1. 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.

2. The purchase of goods and services by the City when such purchases are made under a remedial plan established by the chief administrative officer of the City pursuant to Code of Virginia § 15.2-965.1.

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

4. The purchase of Virginia-grown food products for use by the City where the annual cost of the product is not expected to exceed \$100,000, provided that the procurement is accomplished by (i) obtaining written informal solicitation of a minimum of three bidders or offerors if practicable and (ii) including a written statement regarding the basis for awarding the contract.

5. 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, the City may comply with such federal requirements, notwithstanding the provisions of this chapter, only upon the written determination of the governing body 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.

Permitted contracts with certain religious organizations; purpose; limitations.

The City may enter into contracts with faith-based organizations on the same basis as any other nongovernmental source subject to the requirements of the Virginia Public Procurement Act, Code of Virginia § 2.2-4343.1

Exemptions from competition for certain transactions.

A. The City 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 Code of Virginia § 2.2-500-524 remain applicable, or expert witnesses or other services associated with litigation or regulatory proceedings.

Exemptions from competitive sealed bidding and competitive negotiation for certain transactions; limitations.

1. The City may purchase 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.

2. Public bodies administering public assistance and social services programs as defined in Code of Virginia § 63.2-100, community services boards as defined in Code of Virginia § 37.2-100, or any public body purchasing services under the Children’s Services Act (Code of Virginia § 2.2-5200 et seq.) or the Virginia Juvenile Community Crime Control Act (Code of Virginia § 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 Code of Virginia § 2.2-4303.

3. Upon a written determination made in advance by the City that competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured through a licensed agent or broker selected in the manner provided for the procurement of things other than professional services set forth in Code of Virginia § 2.2-4302.2. The basis for this determination shall be documented in writing.

Other exemptions for certain transactions.

A. Contracts for certain essential election materials and services are exempted from the requirements of the Virginia Public Procurement Act Articles 1 (Code of Virginia § 2.2-4300 et seq.), 2 (Code of Virginia § 2.2-4303 et seq.), and 5 (Code of Virginia § 2.2-4357 et seq.), and to the extent applicable, from the provisions of this resolution, pursuant to Code of Virginia § 24.2-602.

Article 4.

Remedies

Ineligibility.

A. Any bidder, offeror or contractor refused permission to participate, or disqualified from participation, in public contracts with the City shall be notified in writing. Prior to the issuance of a written determination of disqualification or ineligibility, the City 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 City shall issue its written determination of disqualification or ineligibility based on all information in its possession, including any rebuttal information, within five business days of the date the City 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 City 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 City 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 instituting legal action as provided in Code of Virginia § 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.

Appeal of denial of withdrawal of bid.

A. A decision denying withdrawal of bid submitted by a bidder or offeror shall be final and conclusive unless the bidder appeals the decision within ten days after receipt of the decision by instituting legal action as provided in the Code of Virginia.

B. If no bid bond was posted, a bidder refused withdrawal of a bid under the provisions of Code of Virginia § 2.2-4330, prior to appealing, shall deliver to the City 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 an honest exercise of discretion, but rather was arbitrary or capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid, the sole relief shall be withdrawal of the bid.

Determination of nonresponsibility.

A. Following public opening and announcement of bids received on an Invitation to Bid, the City shall

evaluate the bids in accordance with the process for competitive sealed bidding set forth in Code of Virginia § 2.2- 4302.1. At the same time, the City shall determine whether the apparent low bidder is responsible. If the City so determines, then it may proceed with an award in accordance with the process for competitive sealed bidding set forth in Code of Virginia § 2.2-4302.1. If the City determines that the apparent low bidder is not responsible, it shall send notice stating the basis for the determination, which shall be final unless the bidder appeals the decision within ten days of receipt of the notice by instituting legal action as provided in the Code of Virginia.

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. The Purchasing Agent shall be responsible for determining the responsibility of a bidder. In determining responsibility, the following criteria will be considered: a. The ability, capacity and skill of the bidder to perform the contract or provide the service required; b. Whether the bidder can perform the contract or provide the service promptly, or within the time specified, without delay or interference; c. The character, integrity, reputation, judgment, experience and efficiency of the bidder; d. The quality of performance of previous contracts or services; e. The previous and existing compliance by the bidder with laws and ordinances relating to the contract or services; f. The sufficiency of the financial resources and ability of the bidder to perform the contract or provide the service; g. The quality, availability and adaptability of the goods or services to the particular use required; h. The ability of the bidder to provide future maintenance and service for the use of the subject of the contract; i. Whether the bidder is in arrears to the City on debt or contract or is a defaulter on surety to the City or whether the bidder's City taxes or assessments are delinquent; j. Whether the bidder who is not prequalified by the Virginia Department of Transportation has complied with criteria set forth in the solicitation regarding safety training programs, apprenticeship, and compliance records; and k. Such other information as may be secured by the City Purchasing Agent having a bearing on the decision to award the contract. If an apparent low bidder is not awarded a contract for reasons of nonresponsibility, the City Purchasing Agent shall so notify that bidder and shall have recorded the reasons in the contract file.

C. If, upon appeal, it is determined that the decision of the City was not an honest exercise of discretion, but rather was arbitrary or capricious and the award for the particular City contract in question has not been made, the sole relief shall be a finding that the bidder is a responsible bidder for the contract in question.

If it is determined that the decision of the public body was not an honest exercise of discretion, but rather was arbitrary or capricious, or the terms or conditions of the Invitation to Bid, and an award of the contract has been made, the City may declare the contract void upon 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.

D. 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.

E. 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.

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 City Purchasing Agent 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 City 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 Code of Virginia § 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 Code of Virginia § 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 Code of Virginia § 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 City 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 instituting legal action as provided in Code of Virginia § 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 City 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 City 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.

Where the City, an official designated by the City, 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 of the Virginia Public Procurement Act (Code of Virginia § 2.2-4367 et seq.), the City, designated official or appeals board may enjoin the award of the contract to a particular bidder.

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.

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 Code of Virginia § 2.2-4360, or the filing of a timely legal action as provided

in Code of Virginia § 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.

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.

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 City Manager or his designee. The contractor may not institute legal action prior to receipt of the final written decision on the claim unless the City fails to render a decision within 90 days of submission of the claim. Failure of the City 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 City’s failure to render a decision within 90 days shall be the contractor’s right to institute immediate legal action.

B. A contractor may not institute legal action as provided in Code of Virginia § 2.2-4364, prior to receipt of the City’s decision on the claim, unless the City fails to render such decision within the time.

C. The decision of the City shall be final and conclusive unless the contractor appeals within six months of the date of the final decision on the claim by the City by instituting legal action as provided in Code of Virginia § 2.2-4364.

Legal actions.

No bidder, offeror, potential bidder or offeror, or contractor shall institute any legal action until all statutory requirements have been met.

Alternative dispute resolution.

The City may enter into agreements to submit disputes arising from contracts entered into pursuant to Code of Virginia §2.2-4366 to arbitration and utilize mediation and other alternative dispute resolution procedures. Any such agreements shall be approved by the City Attorney.

Article 5.

Ethics in Public Contracting

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 (Code of Virginia § 2.2-3100 et seq.), the Virginia Governmental Frauds Act (Code of Virginia § 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 of the Code of Virginia.

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.

Proscribed participation by public employees in procurement transactions.

No City employee, except having official responsibility for a procurement transaction (except as may be specifically allowed by subdivisions B 1, 2, and 3 of Code of Virginia § 2.2-3112) shall participate in that transaction on behalf of the City 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.

Disclosure of subsequent employment.

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

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

- A. No City 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 City may recover the value of anything conveyed in violation of this section.

B. No bidder, offeror, contractor or subcontractor shall confer upon any City 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.

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.

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, the City may permit such person to submit a bid or proposal for that procurement or any portion thereof if the City 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 City.

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 the City shall be sold by or purchased from any person employed as an independent contractor by the City 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 Code of Virginia § 2.2-3101.

B. No building materials, supplies or equipment for any building or structure constructed by or for the City shall be sold by or purchased from any person who has provided or is currently providing design services specifying a sole source for such materials, supplies or equipment to be used in the building or structure to the independent contractor employed by the City to furnish architectural or engineering services

in which such person has a personal interest as defined in Code of Virginia § 2.2-3101.

C. The provisions of subsections A and B shall not apply in cases of emergency.

Certification of compliance required; penalty for false statements.

A. The City may require City 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 section.

B. Any City 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 Code of Virginia § 2.2-4377.

Misrepresentations prohibited.

No City 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.

Penalty for violation.

The penalty for violations of any provisions under this section is provided in the Code of Virginia, §2.2-4377.

Orders and contracts in violation of article.

If any department or agency of the City government purchases or contracts for any supplies or contractual services contrary to the provisions of Code of Virginia § 15.2-1238 or the rules and regulations made thereunder, such order or contract shall be void and the head of such department or agency shall be personally liable for the costs of such order or contract.

SURPLUS PROPERTY MANAGEMENT

The Office of Procurement Services is responsible for the disposal of surplus property and inventory as applicable by law. Disposition of surplus property is accomplished in any one of various ways to best meet the needs of the City, as well as maximize either the reutilization or resale value of the property. Initially, the City encourages maximum re-use of materials, whenever possible, after which, property may be disposed of in the manner that best meets the needs of the City.

Employees and members of their immediate family are not eligible to acquire property for personal use before such property has been declared surplus and has been made available to the general public. All sales of surplus property shall be sold on the basis of competitive bids wherever feasible.

Authority and Responsibility for Federal Surplus Property

Surplus property acquired with federal funds shall be disposed of in accordance with The *Federal Property and Administrative Act* of 1949, Section 484 as amended.

DONATIONS

Accepting Donations:

The Chief Financial Officer is responsible for approving the acceptance of donated items or services with a fair market value of \$5,000 or more, and ensuring accepted items are properly accounted for. Department Heads or their equivalents may accept donated items or services with a fair market value under \$5,000.

Inasmuch as the City is not offering consideration nor is it purchasing or initiating the provision of services, the City may accept a gift of services pursuant to the Virginia State Government Volunteers Act. Such services must be provided from a person who acts of his own free will and without any financial gain.

Making Donations:

When the fair market value of an item exceeds \$5,000, the Fairfax City Council, as appropriate and allowed by law, may offer surplus City property to charitable or non-profit organizations or public bodies for sale or donation, where appropriate. When the fair market value of a surplus item is less than \$5,000, the Chief Financial Officer may donate the item directly to charitable or nonprofit organizations as appropriate and allowed by law.