

Commonwealth of Virginia



VENDORS MANUAL

A Vendor's Guide on How to do Business with the Commonwealth of Virginia

Revised
December 1998

Department of General Services
Division of Purchases and Supply
1111 East Broad Street
Richmond, VA 23219

VENDORS MANUAL
DECEMBER 1998 EDITION

INTRODUCTION

The *Vendors Manual* is published under the authority of 2.2-1111 of the *Code of Virginia*. Its purpose is to set forth rules and regulations applicable to the purchase of nontechnology goods and nonprofessional services by the Commonwealth. The 1998 edition incorporates changes legislated by the General Assembly and also includes a number of editorial changes to improve readability and understanding of the manual. This edition of the *Vendors Manual* is effective December 1, 1998. It supersedes all previous editions. A complete *Vendors Manual* containing all changes and a listing of changes made since publication of this edition may be obtained from the Department of General Services (DGS), Division of Purchases and Supply (DPS) on the eVA Internet Home Page (www.eva.virginia.gov) under "Manuals."

Any vendor providing nontechnology goods or nonprofessional services to the Commonwealth should be familiar with the contents of this manual. It generally applies to all state procurements except capital outlay construction (which is subject to the procedures of the *Construction and Professional Services Manual*) and the procurement of professional services as defined by the *Virginia Public Procurement Act (VPPA)*. Reference made throughout the *Vendors Manual* to the Department of Information Technology (DIT) or the Department of Technology Planning (DTP) is no longer valid, effective 7/1/03. Guidance for information technology procurements is issued by the Virginia Information Technologies Agency (VITA).

Your comments and suggestions for the improvement of state purchasing or this manual are always welcome. Comments should be addressed to:

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CHAPTER 1

AUTHORITY AND RESPONSIBILITY

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1. **General.** Public purchasing embraces a fundamental obligation to the general public to ensure that procurements are accomplished in accordance with the intent of the laws enacted by the appropriate legislative body. The intent of the Virginia General Assembly is set forth in the *Virginia Public Procurement Act (VPPA)*.

“To the end that public bodies in the Commonwealth obtain high quality goods and services at reasonable cost, that all procurement procedures be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety, that all qualified vendors have access to public business, and that no offeror be arbitrarily or capriciously excluded, it is the intent of the General Assembly that competition be sought to the maximum feasible degree, that procurement procedures involve openness and administrative efficiency, that individual public bodies enjoy broad flexibility in fashioning details of such competition, that the rules governing contract awards be made clear in advance of the competition, that specifications reflect the procurement needs of the purchasing body rather than being drawn to favor a particular vendor, and that the purchaser and vendor freely exchange information concerning what is sought to be procured and what is offered. Public bodies may consider best value concepts when procuring goods and nonprofessional services, but not construction or professional services. The criteria factors, and basis for consideration of best value and the process for the consideration of best value shall be as stated in the procurement solicitation.” (*Code of Virginia*, § 2.2-4300C).

This statement of intent by the General Assembly highlights the use of competition to the maximum feasible degree. Competitive procurement requires time and administrative effort; it does not guarantee that an agency's preferred brand or vendor will be selected. Conducted properly, competitive procurement responds to user needs, results in public confidence in the integrity of public purchasing, and generally brings the most favorable prices.

The *VPPA* applies generally to every “public body” in the Commonwealth which § 2.2-4301 of the *Code of Virginia* defines to include “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”

If there is to be a contract between a state agency and nongovernmental vendor, the *VPPA* and the regulations set forth by the Division of Purchases and Supply, to include this *Vendors Manual*, apply regardless of the source of funds by which the contract is to be paid or which may or may not result in monetary consideration for either party. These documents also 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.

1.1 **Authority and Responsibility.**

- a. **The Department of General Services, Division of Purchases and Supply (DGS/DPS).** DGS/DPS is the centralized purchasing agency for materials, supplies, equipment, printing and nonprofessional services required by any state agency or institution. All such purchases made by any department, division, officer, or agency of the Commonwealth shall be made in accordance with the *Code of Virginia*, Chapter 43, Title 2.2, and such rules and regulations as DGS/DPS may prescribe. DGS/DPS has the authority to make, alter, amend, or repeal regulations relating to the purchase of materials, supplies, equipment, nonprofessional services, and printing, and may specifically exempt particular agency purchases below a stated amount, or specific materials, equipment, nonprofessional services, supplies or printing (*Code of Virginia*, § 2.2-1111C). DGS/DPS has responsibility for the standardization of materials, equipment, and supplies purchased by or for any agency of the state (*Code of Virginia*, § 2.2-1112). DGS/DPS also has authority to establish criteria and procedures to obtain economical operation of all state-owned printing facilities (*Code of Virginia*, § 2.2-1113A). Agency heads have the ultimate responsibility to ensure that the acquisition of goods and services does not violate nor circumvent state law, executive orders, appropriations, regulations, or the provisions of this manual.
- b. **DGS/DPS Internet Home Page.** The DGS/DPS home page is eVA - Electronic procurement in VA. The eVA home page address is www.eva.virginia.gov. It is organized into vendor and agency user areas with separate links for the Virginia Distribution Center (VDC), surplus property, procurement law and policy, and DPS organization as well as links to related Web sites. Available electronically is the *VPPA*, the *Agency Procurement and Surplus Property Manual (APSPM)*, this manual, an alphabetical list of all state purchasing offices, list of agencies with increased delegated purchasing authority, surplus auction schedule, and recent Procurement Information Memoranda (PIMs) issued by the DPS Director. The DPS master contract list is updated weekly. Vendors are encouraged to periodically check the DGS/DPS website for changes and other information.

1.2 **Statutory Exemptions.** Purchasing through DGS/DPS is not mandatory in the following cases; (*Code of Virginia*, § 2.2-1119):

- a. Materials, equipment and supplies as are incident to the performance of a contract for labor or for labor and materials;
- b. Manuscripts, maps, audiovisual materials, books, pamphlets and periodicals purchased for the use of The Library of Virginia or any other library in the Commonwealth supported in whole or in part by state appropriations;
- c. Perishable articles, provided that no article except fresh fruit and vegetables, fresh fish, fresh meat, fresh fruit, fresh eggs and fresh milk shall be considered perishable within the meaning of this clause, unless so classified by DGS/DPS;
- d. Materials, equipment, and supplies needed by the Commonwealth Transportation Board; however, this exception may include office stationery and supplies, office equipment, janitorial equipment and supplies, coal and fuel oil for heating purposes only when authorized in writing by DGS/DPS;
- e. Materials, equipment, and supplies needed by the Virginia Alcoholic Beverage Control Board; however, this exception may include office stationery and supplies, office equipment, janitorial equipment and supplies, coal and fuel oil for heating purposes only when authorized in writing by DGS/DPS;
- f. Binding and rebinding of the books and other literary materials of libraries operated by the Commonwealth or under its authority;
- g. Printing of the records of the Supreme Court; and
- h. Financial services, including without limitation, underwriters, financial advisors, investment advisors and banking services.
- i. VCE purchases for supplies, materials, and services for use in and support of its production facilities up to any dollar amount. This exemption does not include purchases of equipment, software, hardware and printing.

1.3 **Administrative Exceptions.** DGS/DPS may delegate purchasing authority or authorize exceptions from its rules and regulations for particular agencies or for specified nontechnology goods, nonprofessional services, and printing. The following general exceptions have been granted:

- a. **Purchases under Delegated Authority.** State agencies may purchase within the dollar limits and categories delegated by DGS/DPS without requisitioning through DGS/DPS. A list of these agencies and their delegated levels is available from the DGS/DPS Internet home page (see 1.1b).
- b. **Acquisition of Telecommunications Equipment and Services.** The acquisition of telecommunications equipment, technology goods and services is the responsibility of the Virginia Information Technologies Agency (VITA).

1.4 **Agency Purchasing Function.** State agencies are authorized to make direct purchases of nontechnology goods and printing within the limits delegated by DGS/DPS. Other requirements must be processed through DGS/DPS as applicable. Agencies are authorized to contract for services up to any dollar amount subject to applicable laws, regulations, this manual, and fiscal restraints. Exceptions to this provision are covered in paragraphs 1.6 and 1.7 of this manual. Agency personnel having “official responsibility” or procurement must comply with the *VPPA* and the policies and procedures set forth in the *Agency Procurement and Surplus Property Manual (APSPM)* and this manual. A list of agency purchasing offices and their addresses is available from the DGS/DPS Internet home page (www.dgs.virginia.gov/dps) or on eVA (www.eva.virginia.gov)

1.5 **Purchases for Local Governments.** Upon request, DGS/DPS and VDOT may procure nontechnology material, equipment, supplies or services for local governments. Nonprofit educational television entities may also purchase through DGS/DPS. A volunteer fire company or volunteer rescue squad recognized by an ordinance to be a part of the safety program of a county, city, or town may purchase through DGS/DPS when such material, equipment, or service is sought through and approved by the governing body of the county, city, or town (*Code of Virginia*, § 2.2-1122D).

1.6 **Purchases from Term Contracts - (Mandatory Source)**

- a. A state agency may issue an agency purchase order in any amount, except for limitations imposed on specific contracts, for any item or service available on a term contract authorized for use by that agency, which DPS or another agency has established. Local governments may purchase from statewide contracts unless the contract is specifically limited to state agencies. If an item is available on a mandatory term contract or from the Virginia Distribution Center, an agency cannot use its local purchasing authority to purchase from another source unless the purchase does not meet the contract minimum order requirement. In an emergency, the use of contract sources may be waived by the applicable purchasing office responsible for administering the term contract. The sale or attempted sale by a vendor to a state agency of goods or services which are required to be ordered from a term contract or from a mandatory source (see paragraph 1.7), may subject a vendor to removal from the Vendors List if that vendor knowingly sells to a state agency goods or services which must be purchased under a term contract or from a mandatory source.
- b. VITA establishes contracts for ADP goods and services to include computers, software, telecommunications equipment and services for the use of state agencies and institutions.
- c. Term Contracts for goods or services are for the sole benefit of the Commonwealth of Virginia, its agencies and institutions and, in some cases, its political subdivisions. The contracts do not apply to government employees or other individuals, and ordering of goods from these contracts by individuals for personal use is prohibited.

1.7 **Purchases from State Agencies or Nonprofit Vendors**

- a. The *Code of Virginia* requires that certain goods or services be procured, where available, from designated state agencies or nonprofit vendors. These include:

- (1) Department of Corrections (*Code of Virginia*, §§ 2.2-1116, 53.1-47, 53.1-48, 53.1-49)
 - (2) Department for the Blind and Vision Impaired (*Code of Virginia*, §§ 2.2-1117 and 2.2-4344 A1(a))
- b. Goods or services may be procured without competition from nonprofit sheltered workshops and nonprofit organizations (*Code of Virginia*, §§ 2.2-1118 and 2.2-4344 A1(b)).

1.8 **Preferences**

- a. **Virginia Vendors.** Preference is given to materials, equipment and supplies produced in Virginia, goods, or services or construction provided by Virginia persons, firms or corporations in the event of a tie bid (see 6.5). Whenever the lowest responsive and responsible bidder is a resident of any other state and such state under its laws allows a resident contractor of that state a percentage preference, a like preference shall be allowed to the lowest responsible bidder who is a resident of Virginia and is the next lowest bidder (*Code of Virginia*, § 2.2-4324B). If the lowest bidder is a resident contractor of another state with an absolute preference, the bid shall not be considered. DGS/DPS will post and maintain a listing of preference laws provided by other states on the eVA website. (Absolute preference defined, see Appendix A.) See www.eva.virginia.gov for a listing of state preference laws.
- b. **Recycled Paper and Paper Products.** Agencies are encouraged to promote the use of recycled products. In determining the award of any contract for paper and paper products to be purchased for use by agencies of the Commonwealth, the Department of General Services, or agencies under their delegated purchasing authority, shall procure using competitive sealed bidding and shall award to the lowest responsible bidder offering recycled paper and paper products of a quality suitable for the purpose intended, so long as the bid price is not more than ten percent greater than the bid price of the low responsive and responsible bidder offering a product that does not meet the EPA Recommended Content Standards (*Code of Virginia*, § 2.2-4326).
- c. **Petitioning for Less Toxic Goods or Products.** Any person who manufactures, sells, or supplies goods or products may petition agency purchasing offices to include less toxic goods and products in its procurement process. The petitioner shall submit, prior to or during the procurement process, documentation which establishes that the goods or products meet the performance standards set forth in the applicable specifications. If an agency determines that the documentation establishes that the less toxic goods or products meet the performance standards set forth in the applicable specifications, it shall incorporate such goods or products into its procurement process. Agencies have been instructed to revise their procedures and specifications on a continuing basis to encourage the use of these products; however, they are not required to purchase, test, or evaluate any particular good or product other than those that would be purchased under regular purchasing procedures (*Code of Virginia*, § 2.2-4314).

- d. **Coal.** There is a preference for Virginia mined coal used in state facilities. In determining the award of any contract for coal to be purchased for use in state facilities with state funds, DPS shall procure using competitive sealed bidding and shall award to the lowest responsive and responsible bidder offering coal mined in Virginia, so long as its bid price is not more than four percent greater than the bid price of the low responsive and responsible bidder offering coal mined elsewhere (*Code of Virginia*, § 2.2-4325).
- e. **Recycled Oil and Recycled Antifreeze Preference.** The preference applies to lubricating oils containing re-refined oil or reprocessed oil, including engine lubricating oils, hydraulic fluids, and gear oils, excluding marine and aviation oils and reclaimed engine coolants, excluding coolants used in non-vehicular applications. It also applies to recycled antifreeze and other lubricants such as transmission, hydraulic and specialty oils, brake fluid and greases. Recycled oils shall meet American Petroleum Institute (API) and original equipment manufacturer's (OEM) standards and shall be API or equivalently certified. Recycled antifreeze (ethanol glycol) shall meet OEM standards and shall meet the cooling, freeze protection and corrosion resistance requirements of gasoline, diesel, propane, and natural gas engines with or without aluminum blocks.

Preference shall be given to products containing recycled oil and/or antifreeze, so long as the price is not more than 10% greater than the price of a non-recycled oil and/or antifreeze meeting specification and certification requirements.

- f. **Use of Recycled Goods or Products.** Any person who believes that particular goods or products with recycled content are functionally equivalent to the same goods or products produced from virgin materials may petition the procuring agency or institution to include the recycled goods or products in its procurement process. The petitioner shall submit documentation which establishes that the goods or products (i) contain recycled content and (ii) can meet the performance standards set forth in the applicable specifications prior to bid/proposal due date. If the procuring agency or institution which receives the petition request determines that the documentation demonstrates that the goods or products with recycled content will meet the performance standards set forth in the applicable specifications, it shall incorporate such goods or products into its procurement process. (See *Code of Virginia* § 2.2-4313.)

- 1.9 **Open Records.** Procurement proceedings, records, contracts, and orders are public records, 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.). Cost estimates relating to a proposed procurement transaction prepared by or for a state agency shall not be open to public inspection (*Code of Virginia*, § 2.2-4342B). Bid and proposal records are not available to the public for inspection until after the award except that any bidder, upon request, shall be afforded the opportunity to inspect bid records within a reasonable time after the opening and evaluation of all bids but prior to award, except in the event that the public body decides not to accept any of the bids and to rebid.

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

Despite the preceding restrictions as to when bidders, offerors, and the general public may inspect bid and proposal records, once bids have been publicly opened and their prices announced, the names of the bidders and their bid prices may be disclosed to anyone. Likewise, the identity of offerors submitting proposals in the competitive negotiation process may be disclosed.

Unsealed bid and unsealed proposal records 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 only after award of the contract.

Any inspection of records shall be subject to reasonable restrictions to ensure the security and integrity of the records (*Code of Virginia*, § 2.2-4342E).

A procuring agency may make reasonable charges for the copying, search time and computer time expended in the supplying of procurement records in response to a public request. The charge shall not exceed the actual cost to the procuring agency of supplying such records. Upon request the procuring agency will furnish in advance an estimate of the charges for supplying procurement records (*Code of Virginia*, § 2.2-3704F).

Trade secrets or proprietary information submitted by a bidder, offeror, or contractor in connection with a procurement transaction shall not be subject to public disclosure under the *Virginia Freedom of Information Act*; however, the bidder or offeror must invoke the protections of the *Code of Virginia*, § 2.2-4342F, prior to or upon submission of the data or other materials, and must identify the data or other materials to be protected and state the reason why protection is necessary. The proprietary or trade secret material submitted must be identified by some distinct method such as highlighting or underlining and must indicate only the specific words, figures, or paragraphs that constitute trade secret or proprietary information. The classification of an entire bid or proposal document, line item prices and/or total bid or proposal prices as proprietary or trade secrets is not acceptable. If, after being given reasonable time, the bidder or offeror refuses to withdraw an entire classification designation, the bid or proposal will be rejected.

CHAPTER 2

PROCUREMENT METHODS

In this Chapter look for . . .

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 - 2.2 Exceptions from Competitive Bidding**
 - 2.3 Small Purchase Procedures**
 - 2.4 Sealed or Formal Bids**
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 - 2.6 Competitive Negotiation**
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 - 2.10 Prequalification**
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2.1 Policy.

- a. Contracts with nongovernmental sources for the purchase, lease or rental of goods, printing, insurance, nonprofessional services, and construction, shall be awarded after competitive sealed bidding, or competitive negotiation as provided in this manual, unless otherwise authorized by law. Competition shall be sought to the maximum feasible extent. Competitive sealed bidding for a firm fixed price contract is the preferred method of contracting. In the solicitation or awarding of contracts, no public body shall discriminate against a bidder or offeror because of the race, religion, color, sex, national origin, age, disability or any other basis prohibited by state law relating to discrimination in employment (*Code of Virginia*, § 2.2-4310A). In addition it is the policy of the Commonwealth of Virginia to contribute to the establishment, preservation, and strengthening of small businesses and businesses owned by women and minorities and to encourage their participation in state procurement activities. Towards that end, the Commonwealth encourages firms to provide for the participation of such businesses through partnerships, joint ventures, subcontracts, and other contractual opportunities. In addition, all Commonwealth employees with purchasing responsibility who are involved in procurement decisions for goods and services are expected to notify and give every consideration to using qualified small business suppliers of procurement opportunities in a manner that is consistent with state and federal laws and regulations and with the provisions set forth in this manual. Whenever the agency or institution engages in a solicitation or request for quotes, it will include businesses selected from the list of certified small businesses maintained on the Department of Minority Business Enterprise (DMBE) and eVA web sites, www.dmbe.virginia.gov and www.eva.virginia.gov. This shall not exclude DMBE-certified women-owned and minority-owned businesses when they have received the DMBE small business certification.

- b. **Certified Vendors.** For the purposes of state procurement rules, no vendor shall be considered a Small, Women-Owned, or a Minority-Owned Business,(SWAM) or be entitled to the benefits of the state SWAM procurement opportunities, unless certified as such by the Commonwealth. Definition for SWAM is found in Appendix A.
- c. **Small Business Subcontracting Plan.** In accordance with the Commonwealth's policy of facilitating and maximizing the participation of small businesses and businesses owned by women and minorities in its purchasing programs, an evaluation criterion for all contracts in excess of \$100,000 shall be a Small Business Subcontracting Plan. This requirement is to ensure DMBE-certified small business participation, which will assist efforts toward achieving the statewide goal of 40% of the Commonwealth's discretionary spending in combined prime and subcontracts for DMBE-certified small businesses.

d. Set-Asides.

Procurements up to \$5,000 shall be set-aside exclusively for DMBE-certified small businesses, if available.

Procurements over \$5,000 to \$50,000 shall be set-aside exclusively for DMBE-certified small businesses, unless exempted or unless there is not a reasonable expectation that the agency or institution will receive at least two competitive bids or offers. The agency/institution will solicit four (4) DMBE-certified small businesses, if available. The agency/institution will solicit sources by mail, fax or electronically.

Procurements over \$50,000 may be set-aside in whole or in part, exclusively for DMBE-certified small businesses unless there is not a reasonable expectation that the agency or institution will receive at least two competitive bids or offers. Unless set-aside for Small Businesses only, the agency/installation will solicit at least six (6) valid sources, including a minimum of four (4) DMBE-certified small businesses, if available. When the terms and conditions of multiple awards are so provided in the solicitation, awards may be made to more than one bidder or offeror.

When setting aside procurements, there must be adequate competition to ensure the Commonwealth continues to obtain fair and reasonable prices and the orders must be placed through eVA. Set-asides do not apply to mandatory sources of procurement such as the Virginia Industries for the Blind, Virginia Correctional Enterprises or mandatory statewide contracts, nor does it apply to classifications of goods/services specifically exempted by DPS.

- e. **Award to Other Than Lowest Priced Bidder or Highest Ranked Offeror.** If not set-aside for small businesses only and if the provision for award to other than the lowest priced bidder or highest ranked offeror was made by including the appropriate clause in the solicitation, the award may be made to a reasonably priced DMBE-certified small business bidder or offeror that is other than the lowest responsive and responsible bidder or highest ranked offeror.

2.2 **Exceptions from Competitive Bidding.** DGS/DPS has determined that procurement by competitive bidding under the following circumstances is not practicable:

- a. Low dollar purchases within a limit designated by DPS (See 2.3);
- b. Emergency purchases (See 2.8);
- c. Sole source procurement (See 2.9);
- d. Where competitive negotiation is appropriate (See 2.6);
- e. Purchases under \$50,000 for testing or evaluation;
- f. Purchases from the federal government, other states and their agencies or institutions, and public bodies;
- g. Purchases under \$50,000 of used materials and equipment.

2.3 **Small Purchase Procedures**

- a. **Single Quotation** (up to \$5,000). Where the agencies' or institutions' estimated cost of goods or nonprofessional services is \$5,000 or less, unless exempted, purchases shall be made upon receipt of a minimum of one (1) written or telephone (oral) quotation from a DMBE-certified small business, if available, provided the agency determines the price to be fair and reasonable. Additional small business sources may also be solicited. If more than one quote is solicited, the award will be made to the lowest responsive and responsible DMBE-certified small business bidder, provided the agency determines the price to be fair and reasonable.
- b. **Unsealed (Informal) Bids** (over \$5,000 to \$50,000). Agencies/institutions shall solicit via eVA Quick Quote a minimum of four (4) small businesses, if available. Vendors must be registered in eVA in order to respond to Quick Quotes in eVA. Quick Quote solicitation and award notices are not required to be publicly posted.
- c. **Unsealed Proposals** (Over \$5,000 to \$50,000). Agencies and institutions may obtain required goods or nonprofessional services using an informal Request for Proposals (RFP) up to \$50,000. Unsealed proposals for professional services may be solicited by faxback or informal Request for Proposals up to \$50,000. A written determination for the use of competitive negotiation is not required for unsealed RFPs. In lieu of an evaluation committee, the buyer or end user may solely evaluate and rank offers. Upon completion of the evaluation, negotiations shall be conducted with the offerors selected.
- d. **Unsealed Best Value Acquisition** (Over \$5,000 to \$50,000). Agencies and institutions may obtain required goods or nonprofessional services using best value concepts. A written determination for the use of competitive negotiation is not required for unsealed Best Value Acquisition. VBO advertising on eVA is not required up to \$50,000. The award will be made to the responsible Offeror(s) whose proposal, conforming to the solicitation, is the most advantageous and represents the Best Value to the Commonwealth, costs and other factors considered.

2.4 **Sealed (Formal) Bids**. Written sealed bids are required for goods or nonprofessional services when the estimated cost is over \$50,000. The solicitation will be publicly posted on the DGS/DPS eVA website (www.eva.virginia.gov) at least ten days prior to the date set for receipt of bids. This also applies to two-step sealed bidding. Written sealed bids received are held, unopened, until the date and time set in the solicitation, at which time they are publicly opened and the following information is read aloud:

- bidders' names;
- unit prices, lot prices, or total prices, as applicable;
- discount terms offered, if discount terms are to be considered in making the award; and
- brand names and model numbers if requested by the attendees.

Bids will be evaluated and awarded based upon the requirements set forth in the solicitation.

2.5 **Two-Step Sealed Bidding**. Two-step bidding is a method of procurement designed to expand the use and obtain the benefits of competitive sealed bidding where the lack of adequate specifications or rapid changes in the state of the art or technology make it more advantageous to the Commonwealth to first request unpriced technical proposals. The process consists of two steps, as follows:

Step One: An Invitation for Bids (IFB) is issued requesting the submission of unpriced offers. The issuing purchase office will evaluate the technical proposals and determine which are acceptable in accordance with the published evaluation criteria.

Step Two. An IFB is then prepared and distributed to only those bidders whose offers have been qualified in the first solicitation. The IFB includes a pricing schedule, reference to the request for a technical proposal, and a specific date and time is set for receipt of sealed bids. A public opening is held. Bids are evaluated and the contract is awarded to the lowest responsive and responsible bidder. There is no negotiation in the two-step competitive bid process; however, the Commonwealth at its option may request information from a bidder to clarify material contained in the technical proposal.

Combined Two-Step. The two steps can be combined to require the submission of the technical proposal and price at the same time in separate sealed envelopes. The envelopes must be identified showing "Technical Proposal" and "Bid Price" as appropriate, the bidder's name and address, and the bid reference number. In this procedure, the envelopes containing the technical proposals are opened and evaluated. The proposal or proposals that meet the bid criteria are selected. The envelopes containing the bid prices for those selected proposals are then opened and an award is made to the lowest responsive and responsible bidder. Vendors whose technical proposals were not selected will have their bid price envelope returned unopened.

2.6 **Competitive Negotiation** (Applies to sealed solicitations for other than Professional Services). Within the delegated purchasing authority of an agency, competitive negotiation may be used upon a determination made in advance by the purchasing agency and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the Commonwealth for procurement of goods, services, or insurance (*Code of Virginia*, § 2.2-

4303C). The writing shall document the basis for this determination. In competitive negotiation, a written Request For Proposal (RFP) is issued that describes in general terms what is to be procured, the factors to be used in evaluating the proposal, the applicable contractual terms and conditions, including any unique capabilities or qualifications required of the contractor.

A notice of the RFP will be publicly posted on the DGS/DPS eVA website (www.eva.virginia.gov) at least ten days prior to the date set for receipt of proposals and the notice will be published in a newspaper of general circulation in the area in which the contract is to be performed.

All prospective offerors will be furnished identical information in connection with a proposed negotiated procurement. Any changes or additions to the RFP will be issued to all prospective offerors in writing. Offerors are cautioned that unless a RFP is amended in writing it remains unchanged.

A public opening is not required. If the RFP states that a public opening will be held, the names of offerors submitting proposals is the only information read aloud. Oral presentations may be requested by the purchasing agency to clarify material in the offerors' proposals; negotiation is not conducted at this time. Proposals will be evaluated against the criteria contained in the RFP. Offerors who fail to correct a deficiency in their proposals, within an appropriate period of time, as determined by the purchasing office, or fail to submit required documentation or meet mandatory requirements, will result in their proposals being eliminated from further consideration.

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

- 2.7 **Best Value Acquisition (over \$50,000).** The *Virginia Public Procurement Act (VPPA)* allows public bodies to 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 (*Code of Virginia, § 2.2 -4300 C*). The agency/institution will publicly post a copy of the solicitation on the DGS/DPS eVA web site www.eva.virginia.gov. If fewer than the required number of sources are solicited, the procurement file must contain a statement as to the efforts made to obtain the required number of sources. *VBO* advertising is required. In addition to advertising in the *VBO*, Best Value Acquisitions (BVA) over \$50,000 shall be advertised in a newspaper of general circulation in the area in which the contract is to be performed. The award will be made to the responsible Offeror(s) whose proposal, conforming to the solicitation, is the most advantageous and represents the Best Value to the

Commonwealth, costs and other factors considered. If the value of the procurement is over \$100,000, see 2.1 c.

- 2.8 **Emergency Procurement.** 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. The writing shall document the basis for this determination. The agency will 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. For procurements over \$50,000, a notice will be posted on the DGS/DPS eVA website (www.eva.virginia.gov) and may be posted in other designated public areas or published in a newspaper of general circulation on the day the decision to award is announced or the award is made, whichever occurred first, or as soon thereafter as is practicable.
- 2.9 **Sole Source Procurement.** Upon a determination in writing that there is only one source practicably available for that which is to be procured, a contract may be negotiated and awarded to that source without competitive sealed bidding or competitive negotiation. The writing shall document the basis for this determination. The agency will 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. For procurements over \$50,000, a notice will be posted on the DGS/DPS eVA website (www.eva.virginia.gov) and may be posted in other designated public areas or published in a newspaper of general circulation on the day the decision to award is announced or the award is made, whichever occurred first.
- 2.10 **Prequalification.** It is sometimes necessary to qualify potential contractors or test products in advance of any procurement to determine if they meet the state's requirements. The criteria for prequalification will be made public to allow potential suppliers or contractors a fair opportunity to qualify for future recurring requirements. The state will be the sole judge of when prequalification of contractors or products is required.

When a service is involved, the capabilities, personal qualifications, equipment, and past performance of potential contractors are examined and evaluated against the established criteria. Those contractors that successfully meet or exceed the criteria are placed on a Qualified Contractors List (QCL) for the type of service involved.

When a Qualified Products List (QPL) is established, interested suppliers are urged to submit their products for qualification. The products are examined and tested for compliance with state requirements. Products that successfully meet the qualification procedure are placed on a QPL for that product.

Whenever qualified products or services are to be procured only bids or proposals offering products or services that have been prequalified and are listed on a QCL or QPL at the time of the bid or proposal opening can be considered.

The listing of a service or product on a QCL or QPL does not mean endorsement by the state or that the state in any way recommends the service or product offered. Also, the listing of a service or product does not release the contractor or supplier from compliance with contract

specifications and requirements for the service or product being purchased. Statutory guidance on prequalification of prospective contractors for construction is contained in *Code of Virginia*, § 2.2-4317.

CHAPTER 3

GENERAL REQUIREMENTS OF VENDORS

In this Chapter look for . . .

- 3.1 Application and Registration
 - 3.2 Changes in Registration
 - 3.3 Visits by Vendors
 - 3.4 Vendor Assistance to State Agencies
 - 3.5 Personal Interest and Gifts
 - 3.6 Prohibited Participation
 - 3.7 Responsible Bidder or Offeror
 - 3.8 Responsive Bidder
 - 3.9 Copyright
 - 3.10 Ownership of Artwork, Negatives and Other Submitted Information, etc.
 - 3.11 Vendor Promotional Advertising Prohibited
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- 3.1 **Application and Registration.** Vendors wishing to register as a regular bidder or offeror to do business with agencies and institutions of the Commonwealth must register in eVA. eVA is the Internet-based procurement system used by state agencies and institutions. To learn about eVA or register in eVA, vendors may go to www.eva.virginia.gov and click on “Learn About eVA” then “Join eVA Now” for the Supplier Toolkit. The direct link is <http://www.eva.virginia.gov/vendors/index.htm>. A registration fee will apply and other fees may be applicable. Basic and Premium registration levels are offered. Vendors registered at the Premium level will receive an e-mail “push” notification of requirements solicited by state agencies and institutions. In addition, many political subdivisions use eVA as their electronic order and delivery system. The information submitted on the registration will be used in determining the types of materials, equipment, supplies, or services for which the vendor will receive solicitations. Each purchasing office reserves the right to verify the vendor's capability prior to making an award. It is the responsibility of each vendor to maintain a current and accurate registration account in eVA. Vendors not registered with DGS/DPS who wish to respond to any of the Commonwealth's solicitations submitting an online electronic bid or proposal using eVA must first register in eVA. Applicants must allow sufficient time for the application to be processed. To be considered for an award, vendors must register in eVA prior to award. A paper registration package can be obtained by calling 1-866-289-7367. All purchase transactions, regardless of funding source, governed by the *VPPA* shall be processed through eVA to eVA registered vendors unless otherwise excluded in 14.9 b of the *APSPM*. Any purchases processed outside eVA will continue to be governed by applicable law and by the non-eVA policies and procedures contained in this manual and the *Agency Procurement and Surplus Property Manual (APSPM)* in effect at the time of the transaction.
- 3.2 **Changes in Registration.** It is the vendor's responsibility to keep current the registration information. Any changes in company name or FEIN number can only be made by an authorized eVA customer care representative. Requests should be emailed to

evacustomer@dgsvirginia.gov. All other changes to a vendor's registration account should be made by an authorized company representative.

- 3.3 **Visits by Vendors.** Visits by vendors or their representatives to purchasing offices are welcomed and encouraged. In order that the staff and vendors may schedule their time productively, an appointment is suggested. Appointments with DPS contract officers or purchasing managers may be scheduled Monday through Friday on official business days from 9:00 a.m. to 4:00 p.m. (phone 804-786-3842). Other state agencies establish their own hours.
- 3.4 **Vendor Assistance to State Agencies.** Vendor sales efforts of a consultative or advisory nature are encouraged. They assist agencies in keeping current with the latest state of the art technology and materials and are a valuable source of information. The furnishing of product or service information by a vendor is considered to be normal sales effort and does not entitle the vendor to preferential treatment in the awarding of contracts (see 3.6b). A vendor may offer, without compensation, assistance to agency personnel in developing specifications for a requirement and compete on that requirement. A purchasing office may provide the specifications to competing vendors for comment before issuing the solicitation (see 3.6b).
- 3.5 **Personal Interest, Donations, and Gifts.** No vendor shall offer any gift, gratuity, favor, or advantage to any state employee who exercises official procurement responsibility, develops procurement requirements, or otherwise influences procurement decisions. State employees may attend vendor-sponsored seminars or trade shows where the buying staffs will benefit from receiving product information and learning of new techniques and trends. Food, drinks, and give-away items offered to all participants at such functions may be accepted by state employees attending.

No state agency shall solicit or accept any donation, gift, grant, or contract without the written approval of the Governor except under written guidelines issued by the Governor which provide for the solicitation and acceptance of nongeneral funds. Monetary or non-monetary sponsorships exceeding nominal value by vendors in support of conferences and other events are considered donations and must comply with the Appropriation Act.

Vendors and employees of the Commonwealth are prohibited from exchanging anything exceeding nominal value at Expo events, which includes distributions by vendors at exhibit booths where the vendors are educating buyers about their products.

3.6 **Prohibited Participation.**

a. **From Architect or Engineer.**

- (1) No building materials, supplies, or equipment for any building or structure constructed by or for a public body shall be sold by or purchased from any person employed as an independent contractor by the public 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 and § 2.2-4374A.

- (2) No building materials, supplies, or equipment for any building or structure constructed by or for a public body shall be sold by or purchased from any person which has provided or is currently providing design services specifying a sole source for such materials, supplies, or equipment to be used in such building or structure to the independent contractor employed by the public body to furnish architectural or engineering services in which such person has a personal interest as defined in *Code of Virginia*, § 2.2-3101 and § 2.2-4374B.
- (3) The provisions of (1) and (2) above shall not apply in cases of emergency or for transportation-related projects conducted by the Department of Transportation.
- (4) These provisions do not apply to persons supplying architectural or engineering services under design/build contracts (*Code of Virginia*, § 2.2-4306).

b. **Other Contractors.** An independent contractor employed or otherwise paid by a state agency to design a project, develop a scope of work, write specifications, or otherwise define contract requirements is not eligible to compete for or receive the resulting contract, except in cases of emergency, when only one source is practicably available for both the defining of contract requirements and the performance of those requirements or when the public body determines in writing that the exclusion of such vendor would limit the number of potential qualified bidders or offerors in a manner contrary to the best interests of the public body. In addition the contractor may not be a subcontractor or supplier for the entity which is awarded the contract or any of that entity's subcontractors, however far removed. A vendor may offer, without consideration, assistance to agency personnel in developing specifications for a requirement and compete on that requirement; however, it is incumbent upon the agency buying staff to assure vendor provided specifications reflect the procurement needs of the purchasing body rather than being drawn to favor a particular vendor (*Code of Virginia*, § 2.2-4373).

3.7 **Responsible Bidder or Offeror.** In determining a responsible bidder or offeror, a number of factors including, but not limited to, the following are considered. The vendor should:

- a. be a regular dealer, supplier and/or an authorized dealer of the goods or services offered;
- b. have the ability to comply with the required delivery or performance schedule, taking into consideration other business commitments;
- c. have a satisfactory record of performance;
- d. have a satisfactory record of integrity; and,
- e. have the necessary facilities, organization, experience, technical skills, and financial resources to fulfill the terms of the purchase order or contract (See 9.5).

3.8 **Responsive Bidder.** A responsive bidder means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids. Examples of nonresponsiveness include, but are not limited to, failure to sign a bid, failure to return the required bid documents, substitution of terms, deletion of terms and conditions stated in the Invitation for Bids, and

failure to offer a product or service that meets the requirements of the Invitation for Bids. A bidder who fails to provide prices for all categories of labor in the pricing schedule of a time and materials service contract is considered non-responsive. This is true whether the price was left blank or the bidder entered a figure of \$0. Bidders who provide multiple prices for performing a service where a single price was solicited are also non-responsive.

3.9 **Copyright.** No vendor may copyright any work contracted for by the Commonwealth and produced for the Commonwealth without the prior written consent of the agency or DPS.

3.10 **Ownership of Artwork, Negatives, and Other Submitted Information**

- a. All artwork, negatives, dies, overlays, or similar materials used to print a job shall be the property of the Commonwealth and must be returned to the requisitioning agency upon completion.
- b. Ownership of all data, materials, and documentation originated and prepared for the state pursuant to a solicitation shall belong exclusively to the state and be subject to public inspection in accordance with the *Virginia Freedom of Information Act*. Information on protecting trade secrets or proprietary information is found in 1.9.

3.11 **Vendor Advertising Restrictions.** Advertising or promotional literature stating or implying that a Commonwealth agency or institution endorses a vendor's products or services is prohibited. Exceptions may only be granted by an agency's or institution's chief purchasing official.

A vendor may include a Commonwealth agency or institution in a client list, provided that the listing in no way states or implies that the Commonwealth agency or institution endorses the vendor's products or services. An agency or institution may choose to prohibit a contractor from including reference to that agency or institution in client lists used in advertising or promotional materials by including such a prohibition in the terms and conditions of its contract(s) with that contractor.

3.12 **Prohibited Contracts.**

- A. No state agency except for institutions of higher education as defined by §2.2-4321.1 H. shall contract for goods or services with a nongovernmental source if the source, or any affiliate of the source, is subject to the provisions of (i)§ [58.1-612](#) and fails or refuses to collect and remit the tax on its sales delivered by any means to locations within the Commonwealth or (ii) Article 2 (§ 58.1-320 et seq.) or Article 10 (§58.1-400 et seq.) of Chapter 3 of Title 58.1 and fails or refuses to remit income tax due thereunder. The provisions of clause (ii) shall not apply to any person that has (a) entered into a payment agreement with the Department of Taxation to pay the tax and is not delinquent under the terms of the agreement or (b) appealed the assessment of the tax in accordance with law and such appeal is pending.
- B. A state agency may contract for goods or services with a source prohibited under subsection A in the event of an emergency or where the nongovernmental source is the sole source of such goods or services.

- C. The determination of whether a source is a prohibited source shall be made by the Department of Taxation after providing the prohibited source with notice and an opportunity to respond to the proposed determination. The Department of Taxation shall notify the Department of General Services of its determination.
- D. The Department of General Services shall post public notice of all prohibited sources on its public internet procurement website and on other appropriate websites.
- E. The remedies provided in Article 5 (§ [2.2-4357](#) et seq.) shall not apply to any determination made pursuant to this section and the sole remedy for any adverse determination shall be as provided in subsection F.
- F. Any source aggrieved by a determination of the Department of Taxation made under this section may apply to the Tax Commissioner for correction of the determination. The Tax Commissioner shall respond within 30 days of receipt of the application for corrective action. Within 10 days after receipt of the Tax Commissioner's response, the aggrieved source may appeal to the Circuit Court for the City of Richmond. If it is determined that the determination of the Department of Taxation was arbitrary, capricious, or not in accordance with law, the sole relief shall be restoration of the source's eligibility to contract with state agencies. No claim for damages or attorney's fees shall be awarded.

3.13 **Subsequent/Additional Bid/Proposal for the Same Procurement.** Submission of a subsequent bid/proposal, unless specifically identified as an amendment to a previously submitted bid/proposal, shall constitute an additional bid/proposal submitted by the same bidder or offeror on the same IFB/RFP. For information on amending or withdrawing bids/proposals, see Section 5.11.

3.14 **Virus-free and Accessible Submittals.** It is the responsibility of the vendor to ensure that any electronic submission transmitted to an agency or institution is virus-free and in a format (e.g. Microsoft Word or Excel, Adobe Acrobat, etc.) that is accessible by that agency or institution. Documents not accessible by the purchasing agency may be cause to determine the bid nonresponsive.

CHAPTER 4

SOLICITATIONS

In this Chapter look for . . .

- 4.1 Selection of Bidders/Offerors
 - 4.2 Response Time
 - 4.3 Prebid or Preproposal Conference
 - 4.4 Receipt of Sealed Bids or Proposals
 - 4.5 Receipt of Unsealed or Informal Bids or Proposals
 - 4.6 Canceling or Amending a Solicitation
 - 4.7 Combining Responses to Separate Solicitations is Prohibited
 - 4.8 Postage
 - 4.9 Facsimile Bids or Proposals
 - 4.10 Late Bids or Proposals
 - 4.11 Bonds
 - 4.12 Insurance
 - 4.13 Specifications, Questions, and Comments
 - 4.14 Brand Names
 - 4.15 Contractor Registration (License)
 - 4.16 Notice of Pending Procurements
-

4.1 **Selection of Bidders/Offerors.** All qualified vendors have access to state business. Vendors registered in eVA at the Premium level for the particular commodity or service will automatically receive an e-mail notification of the solicitation. Selection of additional vendors will be at the discretion of the state agency or institution. All solicitations, addenda and award actions (including emergency and sole source awards) for goods and non-professional services above \$50,000 will be publicly posted on the eVA web site under Virginia Business Opportunity (VBO) Ads (http://vbo.dgs.state.va.us/index_list.asp). Professional service procurements must be posted over \$50,000. Any vendor not solicited may request a copy of the solicitation. When a Qualified Products List (QPL) or Qualified Contractors' List (QCL) has been established only those vendors whose products or services have been approved prior to bid or proposal opening will be considered for award.

On occasion, a competitive procurement may be restricted to manufacturers. When this is done, it will be explicitly stated in the solicitation that only bids or proposals from manufacturers will be considered.

4.2 **Response Time.** Normally, the time set for return of sealed bids is fourteen (14) to seventeen (17) calendar days after publication of the IFB. The minimum time for receipt of a sealed bid or proposal will not be less than ten calendar days from the date issued. In addition, mandatory conferences or site visits will not be scheduled less than ten calendar days from the date the

solicitation is issued and public notice requirements are completed. Vendors should check each solicitation to ascertain its due date.

4.3 **Prebid or Preproposal Conference.** On complex, critical, or high value procurements, a solicitation may contain a requirement to attend a prebid or preproposal conference. Attendance at conferences or site visits may be either optional or mandatory. The issuing agency may permit attendance through teleconferencing or videoconferencing for optional prebid/preproposal conferences. When mandatory attendance is stipulated in the solicitation, an attendance roster is signed by the attendees and only bids or proposals from those firms represented at the conference or visiting the site will be accepted. Vendors are cautioned that agencies are authorized to establish a cutoff time for late arrivals, after which no one will be permitted access to the conference. Conferences scheduled during a period of suspended state business operations will be rescheduled by the purchasing agency to a date and time which will permit proper notification to all potentially interested participants.

4.4 **Receipt of Sealed Bids or Proposals.**

a. **General.** The solicitation will state that written sealed bids or proposals are to be received by the issuing purchase office prior to the date and hour specified in the solicitation. Bid or proposal receipt deadlines and public openings scheduled during a period of suspended state business operations will be rescheduled for processing at the appropriate times on the next regular business day. A special envelope or label may be furnished with the solicitation. It is imperative that the bid or offer be returned in this envelope. If return in the special envelope is not possible, the signed bid or proposal should be returned in a separate envelope or package, sealed and identified as follows:

From:

_____	_____	_____
Name of Bidder/Offeror	Due Date	Time
_____	_____	
Street or Box Number	IFB or RFP No.	
_____	_____	
City, State, Zip Code	IFB or RFP Title	

Name of Contract/Purchase Officer/Buyer:

The envelope should be addressed as directed in the solicitation.

If the special envelope or label is not used and a bid or proposal is mailed, the bidder or offeror takes the risk that the envelope, even if marked as described above, may be inadvertently opened and the information compromised which may cause the bid or proposal to be disqualified. Bids or proposals may be hand delivered to the designated

location in the office issuing the solicitation. No other correspondence or other bids or proposals should be placed in the envelope.

Bidders should be careful when electing to use private courier services to deliver their bids or proposals to the contracting agencies. Many agencies have different addresses for hand delivery versus the point of delivery established for postal delivery. It is solely the responsibility of the bidders/offerors to ensure that bids or proposals reach the designated address by the specified date and time shown on the solicitation.

b. **Receipt of Bids for Highway and Construction Maintenance Programs.** In procurement solicitations by the Department of Transportation by competitive sealed bidding for highway construction and maintenance contracts, the Department may accept bids in response to an Invitation to Bid at the Department's central office or at district offices or other satellite locations designated in the Invitation to Bid, in accordance with specifications adopted by the Department. An Invitation to Bid may authorize agents of the Department to accept from bidders, on a voluntary basis, a supplemental submission referencing the total bid amount on a form prescribed by the Department. Information contained in any supplemental submission may be made available to the public by the Department after the time for receiving bids has expired and before the public opening and announcement of all sealed bids (*Code of Virginia*, § 2.2-4322).

4.5 **Receipt of Unsealed Proposals.** The RFP for written unsealed proposals will state that they must be received by a date and time specified. Proposal receipt deadlines scheduled during a period of suspended state business operations will be rescheduled for the appropriate times on the next regular business day. Unlike sealed bids, special envelopes generally are not furnished. These proposals may also be hand delivered to the office issuing the solicitation. Unsealed proposal solicitations and responses may be electronic. Unsealed responses shall be received until the time and date specified in the solicitation.

4.6 **Canceling or Amending a Solicitation.** 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 will be made part of the contract file. A public body will 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 (*Code of Virginia*, § 2.2-4319).

Amendments may be made by the issuance of an addendum prior to the time set for receipt of responses. Acknowledgment of receipt of an addendum must be returned prior to the time set for receipt of bids or proposals, or accompany the bid or proposal. Failure to acknowledge receipt of an addendum may be cause for rejection of the bid or proposal.

4.7 **Combining Responses to Separate Solicitations is Prohibited.** A vendor shall not combine responses to separate IFBs or RFPs into one bid or proposal.

4.8 **Postage.** All bids or proposals should be weighed and the postage verified before mailing. The U.S. Postal Service does not deliver unstamped mail. Postage due mail may be delivered, but the state will not assume the responsibility for paying the amount due and may return or refuse the mail.

4.9 **Facsimile or Electronic Bids or Proposals.** Bids or proposals sent via facsimile or electronically, must meet the requirements for unsealed or sealed responses described below. The timing device used to document the receipt of bids or proposals will be designated by the purchasing agency. The time printed on the top of the facsimile copy will not govern the time of receipt.

- a. **Unsealed Proposals.** Facsimile or electronic proposals must be completely received in the office that issued the solicitation prior to the time and date designated for submission. The original copy of the facsimile or electronic transmission may be requested. If requested it must be received within five (5) working days.
- b. **Sealed Bids/Sealed Proposals.** Facsimile bids or proposals will be accepted from a third party or an agent of the bidder or offeror for sealed programs provided that the bids or proposals are submitted in sealed envelopes to the purchasing agency. The bidder/offeror is responsible for arranging the third party involvement in sealed bid/proposal programs and for faxing the complete bid/proposal to the third party, not just a summary or the cover sheet. The original bid or proposal and addenda may be requested and, if requested, must be received within five (5) business days. See 5.3 for signature requirements.

4.10 **Late Bids or Proposals.** To be considered, all bids or proposals must be received at the specific office location stipulated by the procuring activity on or before the date and hour designated on the solicitation. Vendors should pay particular attention to ensure that the bid or proposal is properly addressed. The state is not responsible if the bid or proposal does not reach the specific destination by the appointed time. Bids or proposals received after the date and hour designated are automatically disqualified and will not be considered. The official time used in the receipt of responses is that time on the clock or automatic time stamp machine in the procuring activity.

4.11 **Bonds.** A bid bond may be required in a solicitation and must accompany the bid. When the state requires a bid bond, it shall not exceed 5% of the amount bid (*Code of Virginia*, § 2.2-4336). Performance bonds and payment bonds, if requested, must be in an amount at least equal to 100% of the accepted bid or proposal (*Code of Virginia*, § 2.2-4337) and must be filed by the contractor within ten (10) days after receipt of the purchase order or notice of award, unless a written determination is made that it is in the best interest of the state to grant an extension.

A certified check or cash escrow may be accepted in lieu of a bid, payment, or performance bond. If approved by the Attorney General, a bidder may furnish a personal bond, property bond, or bank or savings institution's letter of credit on certain designated funds in the face amount required for the bid, payment or performance bond. Approval shall be granted only upon a determination that the alternative form of security proffered affords protection to the public body equivalent to a corporate surety's bond. VDOT is exempt from this requirement (*Code of Virginia*, § 2.2-4338).

If a performance bond requirement is not stated in the solicitation and the state later determines that a bond should be provided prior to the award of a contract, the contractor to whom the

award will be made shall provide a performance bond, and the state will pay the cost of the bond.

- 4.12 **Insurance.** Whenever work is to be performed on state-owned or leased property or facilities, the contractor shall be required to have Workers' Compensation, Employer's Liability, Commercial General Liability and Automobile Liability, and in certain types of programs Professional Liability/Errors and Omissions insurance coverage. The Commonwealth of Virginia must be named as an additional insured when requiring a Contractor to obtain Commercial General Liability coverage. In some cases, Workers' Compensation Insurance and Employer's Liability Insurance may not be required. Workers' Compensation insurance is required when the contractor has three (3) or more employees. If work is performed by a sole proprietor, the person does not need Workers' Compensation insurance, as they do not have employees. Employer's Liability is required if an employer has employees who are paid a wage or salary. Employer's Liability is not required for persons in business together, e.g., husband and wife, siblings or parents and children, as these persons would be considered owners not employees. For construction contracts, if any subcontractors are involved, subcontractors shall also be required to have workers' compensation insurance in accordance with *Code of Virginia*, § 2.2-4332 and 65.2-800 et seq. Stipulated insurance must be obtained prior to commencing work and be maintained during the entire term of the contract. The procuring office may require a certificate of insurance to be furnished prior to commencement of work and at anytime during contract performance.
- 4.13 **Specifications, Questions, and Comments.** It is the intent of the purchasing office to use specifications that encourage competition. Vendors are requested to inform the responsible purchasing office whenever they have comments or questions concerning specifications or solicitation requirements (*Code of Virginia*, § 2.2-4316). Suggestions concerning new products or improvements to specifications are encouraged and will be considered. This information should be provided to the issuing purchase office as early as possible but at least five (5) working days prior to bid or proposal due date to provide time to amend or cancel the solicitation before the scheduled receipt date.
- 4.14 **Brand Names.** When it is determined to be impractical to develop a generic specification, a brand name may be used to convey the general style, type, character and quality of the article desired. Unless otherwise provided in the solicitation, the name of a certain brand, make, or manufacturer does not restrict bidders or offerors to the specific brand, make, or manufacturer named. Any article which the public body, in its sole discretion, determines to be the equivalent of that specified, considering quality, workmanship, economy of operation, and suitability for the purpose intended shall be accepted (*Code of Virginia*, § 2.2-4315). The bidder or offeror is responsible to clearly and specifically indicate the product being offered and to provide sufficient descriptive literature, catalog cuts and technical detail to enable the Commonwealth to determine if the product offered meets the requirements of the solicitation. This is required, even if offering the exact brand, make, or manufacturer specified. Normally, in competitive sealed bidding, only the information furnished with the bid will be considered in the evaluation. Failure to furnish adequate data for evaluation purposes may result in declaring a bid nonresponsive. Unless the bidder or offeror clearly indicates in its bid/proposal that the product offered is an "equivalent" product, such bid/proposal will be considered to offer the brand name product referenced in the solicitation.

4.15 **Contractor Registration (License)**. State statutes and regulatory agencies require that some contractors be properly registered and licensed, or hold a permit, prior to performing specific types of services. It is the contractor's responsibility to comply with the rules and regulations issued by state regulatory agencies. An unlicensed vendor submitting a bid or proposal where such license is required is in violation of state law and the bid or proposal will be rejected. A vendor bidding on construction, demolition, repair, or improvements to facilities must be a registered contractor with the Department of Professional and Occupational Regulation in accordance with *Code of Virginia*, Title 54.1, Chapter 11, as follows:

If a procurement of \$1,000 or more involves construction, removal, repair, or improvement of any building or structure permanently annexed to real property or any other improvement to such real property, the contractor must possess one of the following licenses issued by the State Board for Contractors for the type of work involved prior to submitting a bid or proposal (*Code of Virginia*, §§ 54.1-1103 and 54.1-1115):

- **Contractor License A** - If the contract is \$120,000 or more or if the contractor does \$750,000 or more business within a 12-month period; or
- **Contractor License B** - \$7,500 - \$120,000 or if the contractor does between \$150,000 and \$750,000 in business within a 12-month period; or
- **Contractor License C** - \$1,000 - \$7,500 or if the contractor does less than \$150,000 in business within a 12-month period. **NOTE:** The Board shall require a master tradesmen license as a condition of licensure for electrical, plumbing and heating, ventilation and air conditioning contractors.

In addition, all nonresident contractors and subcontractors submitting bids on the above work who are not registered with the Department of Professional and Occupational Regulation shall register with the Department of Labor and Industry under the provisions of *Code of Virginia*, § 40.1-30.

Private Security Services. All solicitations for the installation, service, maintenance, or design of security equipment, security officer service, central station alarm condition monitoring service, and/or private investigator service require that the successful bidder have a Private Security Services Business License issued by the Department of Criminal Justice Services (see *Code of Virginia*, § 9-183.3). This applies regardless of the dollar value of the resulting contract. Assistance may be obtained from the Department of Criminal Justice Services at 804-786-0460.

4.16 **Notice of Pending Procurements**. DGS/DPS publishes the *Virginia Business Opportunities (VBO)* on the Internet (www.eva.virginia.gov) listing business opportunities anticipated to be over \$50,000 in value with state and some local government agencies. The intent of this policy is to broaden vendor participation and help Virginia companies, particularly small, women-owned, and minority-owned businesses, to know what bidding opportunities are available in state government. It also carries out the provision of § 2.2-4300C of the *Code of Virginia*, "that all qualified vendors have access to state business and no offeror be arbitrarily or capriciously

excluded.” Agencies are authorized to waive publication of emergency requirements, sole source procurements, procurements from mandatory sources, and purchases of items exempted by law from competitive procurement. The publication lists pertinent information such as the type of purchase, required location, response date, and point of contact. Public notice of pending procurements may also be published on other appropriate websites or posted at the agency.

CHAPTER 5

SOLICITATION RESPONSES

In this Chapter look for . . .

- 5.1 Solicitation Forms
 - 5.2 Vendor Name and Address
 - 5.3 Signature on Bid or Proposal
 - 5.4 Terms and Conditions
 - 5.5 Pricing and Discounts
 - 5.6 Samples
 - 5.7 Alternate Bids
 - 5.8 Taxes
 - 5.9 Time of Performance
 - 5.10 Questions Concerning Solicitations
 - 5.11 Amending or Withdrawing Bids or Proposals by Vendors
 - 5.12 Alterations to Bids or Proposals
 - 5.13 Mistakes in Bids
 - 5.14 Withdrawal of Bids
 - 5.15 Denial of Withdrawal of Bid
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- 5.1 **Solicitation Forms.** All vendors receiving an Invitation for Bid (IFB) or Request for Proposal (RFP) are expected to return the bid or proposal response to the purchasing office that issued the solicitation. If the vendor does not wish to submit a bid or proposal, a “No Bid” or a similar statement should be returned to the issuing office.
- 5.2 **Vendor Name and Address.** Purchase orders or contracts will be issued only to the firm’s name appearing on the bid or proposal form. If orders or payments are to be mailed to an address or addresses other than that shown on the face of the form, the bidder or offeror must so indicate and list the post office box, or street name and number, city, state, and zip code for the addressee.
- 5.3 **Signature on Bid or Proposal.** Facsimile bids or proposals on sealed programs will be accepted from a third party or an agent of the bidder or offeror provided that the bids or offerors are submitted in sealed envelopes (see 4.9). For sealed bid or sealed proposal programs, the bid or proposal, and all addenda returned by the bidder or offeror by facsimile must be signed. The original bid or proposal must be signed in ink. The person signing the bid or proposal must be a person authorized by the bidder or offeror to sign bids or proposals. Typewritten signatures are not acceptable. The person signing must include his or her title, and if requested, must verify his or her authority to bind his or her company in contract. Failure to sign the face of the bid/proposal in the space provided will result in rejection of the bid/proposal except if the unsigned bid/proposal is accompanied by other signed documents indicating the bidder's/offeror's intent to be bound [see 5.13c(1)(b)].

- 5.4 **Terms and Conditions.** Terms and Conditions and Instructions to Vendors incorporated by reference in the eVA purchase order are shown in Appendix B, Section I. Solicitations contain general terms and conditions which incorporate the procedures and provisions of this manual as well as all applicable statutory provisions such as the *Virginia Fair Employment Contracting Act (Code of Virginia, §§ 2.2-4200 through 2.2-4201)*. The General Terms and Conditions that are typically used in agency contracts are found in Appendix B, Section II. These provisions apply to all written solicitations issued by state agencies for procurements that are subject to the *DGS/DPS Agency Procurement and Surplus Property Manual (APSPM)* unless changed, deleted, or revised by the legal advisor to the agency or institution. Special conditions may change or rescind the procedures and provisions of this manual, and the solicitation should be read with care prior to submission of a bid or proposal. A bidder or offeror is not permitted to challenge the validity of the terms or conditions of the Invitation for Bids or Request for Proposal (*Code of Virginia, § 2.2-4360*). Modification of, or additions to, the General Terms and Conditions of an IFB or RFP may be cause for rejection of the bid or proposal. No modification of or addition to any provisions of a contract shall be effective unless reduced to writing and signed by the parties to the contract.
- 5.5 **Pricing and Discounts.** Solicitations normally request net price FOB destination. The net price is the list price less trade or volume discounts offered. Unit prices, extensions, and/or gross total must be shown as requested in the pricing schedule. Prompt payment discounts offered must be clearly shown in the space provided and will be taken if payment is made within the specified time frame, e.g., 2% 20 days. Such discounts will not be a factor in award unless specified in the solicitation. Correct pricing is extremely important, and price should be double checked before submitting a bid or proposal. In the case of errors in the extension of prices, the unit price shall govern.
- 5.6 **Samples.** Samples of materials or equipment for testing, evaluation, or demonstration purposes, when requested in a solicitation must be furnished at no cost. Each individual sample must be labeled with the bidder's or offeror's name, manufacturer's brand name and number, requisition number or contract program, and item referenced. Samples submitted by the successful bidder or offeror may be held for comparison with goods received. All samples submitted may be subjected to tests and evaluation by either a qualified laboratory or test panel, and the results will be a factor in making the award. Samples not destroyed in testing will be returned, if requested, to the bidder or offeror at his or her expense. Requests for return of samples will be honored upon the completion of testing and evaluation. Samples will be disposed of if not claimed within 60 days after pick-up notification has been given.
- 5.7 **Alternate Bids.** An alternate bid is a bid submitted in knowing variance from the specifications and must be clearly distinguished as an alternate by the bidder. Frequently, alternate bids incorporate the latest in technology and can result in substantial savings, not only in monetary terms but also in system-wide operational efficiencies. Vendors should contact buying offices with suggested revisions to specifications as soon as possible in the procurement process. An award cannot be made on an alternate bid; however, all bids may be rejected and the requirement resolicited with a revised specification using the features of the alternate.
- 5.8 **Taxes.**

- a. **Excise.** The Commonwealth of Virginia generally is exempt from paying federal excise taxes, except it must pay excise taxes for air transportation, the cost of which is generally defined as any amount paid within the United States for transportation of any person by air. Certain vaccines require that an excise tax be paid by the purchasing activity.
- b. **State Sales.** The Commonwealth of Virginia is generally exempt from paying Virginia's sales taxes on purchases of tangible personal property for its use or consumption. Sales tax, however, is paid by the Commonwealth on materials and supplies that are installed and become a part of real property, e.g., glued-down carpet. Contractors are not exempt from paying taxes on these categories, as they are considered to be a cost of doing business and should be considered in pricing when preparing a bid on a state contract. (Virginia Retail Sales and Use Tax Regulations, §§ 630-10-27 and 630-10-45. Also see §§ 58.1-603 and 58.1-604). If further interpretive assistance is required, contact the Department of Taxation, Office of Customer Services, 804-367-8037.
- c. **Sales and Use Tax - State Government and Political Subdivisions.** Virginia's Sales and Use tax does not apply to sales of tangible personal property to the Commonwealth of Virginia or to its political subdivisions, for their use or consumption, if the purchases are pursuant to required official purchase orders to be paid for out of public funds. The tax applies when such sales are made without the required purchase orders and are not paid for out of public funds. No exemption is provided for state or local government employee purchases of meals or lodging whether purchases are pursuant to required official purchase orders or not.
- d. **Sales and use Tax - Contractors.** Persons who contract with the Commonwealth or its political subdivisions to perform a service, and in conjunction therewith, furnish some tangible personal property, are deemed to be the consumers of all such property and are not entitled to exemption on the grounds that a governmental entity is a party to the contract. This is true even though title to the property provided may pass to the government and/or the contractor may be fully and directly reimbursed by the government. This same principle applies to persons who enter into contracts with a governmental entity to perform real property construction or repair.

5.9 **Time of Performance.** A specific date or number of calendar days required for delivery or performance after receipt of order may be stated in the terms and conditions of a solicitation. Otherwise, the date or number of days must be entered by the bidder in the space provided on the solicitation form (see 7.7).

5.10 **Questions Concerning Solicitations.** Questions concerning a solicitation should be directed to the person and phone number listed on the document. Always refer to the identification number and the opening date on the IFB or RFP. Bid tabulations are a matter of public record and are open for inspection to bidders and offerors after evaluations are complete but prior to award (see 1.9).

5.11 **Amending or Withdrawing Bids or Proposals by Vendors.** A bid/proposal may be amended and/or withdrawn by a bidder or offeror if the office issuing the solicitation receives such a request in writing before the due date and hour. The request must be signed by a person authorized to represent the person or firm that submitted the bid/proposal.

5.12 **Alterations To Bids or Proposals.** Prior to submission of a bid or proposal, alterations may be made, but they must be initialed by the person signing the bid or proposal. The proper procedure is to draw a single line through the information to be changed and insert the desired information and initial the change. Erasures, strikeouts, or the use of opaque fluid on bid or proposal forms that affect unit price, quantity, quality, or delivery may result in the rejection of the line item or items involved in the bid or proposal.

5.13 **Mistakes in Bids.**

a. **Correction.** Except as herein provided, no plea or claim of mistake shall be available to a bidder for recovery of any deposit or security required to be paid or posted or as a defense in any legal proceeding for the failure, neglect or refusal of the bidder to (1) execute a contract that has been awarded by the Commonwealth, (2) accept a purchase order issued by the Commonwealth to a bidder in response to a bid submitted by such bidder, or (3) perform in accordance with the terms, specifications and conditions of a contract.

b. **Mistakes Discovered Before Opening.** A bidder may correct mistakes discovered before the time and date set for receipt of bids by withdrawing and replacing or by correcting the bid (see 5.11 and 5.12).

c. **Mistakes Discovered After Opening But Before Award**

(1) **Informality.** An informality is a minor defect or variation of a bid or proposal from the exact requirements of the Invitation for Bids, or the Request for Proposal, which does not affect the price, quality, quantity, or delivery schedule for the goods, services, or construction being procured (*Code of Virginia*, § 2.2-4301). The procuring agency may, in its sole discretion, waive such informalities or permit the bidder/offeror to correct them, whichever procedure is in the best interest of the Commonwealth. Examples include the failure of a bidder/offeror to:

(a) Return the number of signed bids/proposals required by the solicitation.

(b) Sign the face of the bid/proposal in the space provided, but only if the unsigned bid/proposal is accompanied by other signed documents indicating the bidder's/offeror's intent to be bound.

(c) Acknowledge receipt of an addendum to the solicitation, but only if it is clear from the bid/proposal that the bidder/offeror received the addendum and intended to be bound by its terms, or the addendum involved had a negligible effect on price, quantity, quality, or delivery.

(2) **Judgment Errors.** Bids may not be withdrawn if the mistakes are attributable to errors in judgment, nor may such mistakes be waived or corrected.

(3) **Nonjudgmental Mistakes**

- (a) Mistakes Where the Intended Correct Bid is Evident. If the mistake and the intended correct bid are clearly evident in the bid document, the bid shall be corrected to the intended correct bid and may not be withdrawn. Examples of mistakes that may be clearly evident in the bid document are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors.
- (b) Mistakes Where the Intended Correct Bid is Not Evident. A bidder may be permitted to withdraw a low bid if a mistake is clearly evident from the bid documents submitted by the bidder and/or a comparison with other bids.
- d. **Mistakes Discovered After Award**. Bids containing mistakes shall not be corrected or withdrawn after award of a contract or issuance of a purchase order. No plea or claim of mistake in a bid or resulting contract shall be available as a defense in any legal proceeding brought upon a contract or purchase order awarded to a bidder as a result of the breach or nonperformance of such contract or purchase order (see 7.14).
- e. **Construction**. A bidder for a public construction contract, other than a contract for construction or maintenance of public highways, may withdraw his or her bid from consideration if the bid price was substantially lower than the other bids due solely to a mistake therein, provided the bid was submitted in good faith, and the mistake was a clerical mistake as opposed to a judgmental mistake, and was actually because of 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. The bidder shall submit to the public body or designated official his or her original work papers, documents, and materials used in the preparation of the bid within one day after the date fixed for submission of bids. The work papers shall be delivered by the bidder in person or by registered mail at or prior to the time fixed for the opening of bids. Such work papers, documents and materials may be considered as trade secrets or proprietary information subject to the conditions of the *Code of Virginia*, § 2.2-4342F. The bids shall be opened one day following the time fixed by the public body for the submission of bids. Thereafter, the bidder shall have two hours after the opening of bids within which to claim in writing any mistake as defined herein and withdraw his or her bid. The contract shall not be awarded by the public body until the two-hour period has elapsed. Such mistake shall be proved only from the original work papers, documents and materials delivered as required herein [(*Code of Virginia*, § 2.2-4330A (ii))].

5.14 **Withdrawal of Bids**. If the lowest apparent responsive bid is 25% or more lower than the next low bid, the buyer may contact the bidder to confirm the bid price. If the bidder is able to verify, to the satisfaction of the purchasing office, that it was a nonjudgmental mistake, the bid may be withdrawn.

- a. If a bid is withdrawn, the lowest remaining bid shall be deemed to be the apparent low bid.
- b. 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.

- c. If the public body denies the request for withdrawal of a bid under the provisions of this section, it shall notify the bidder in writing stating the reasons for its decision and award the contract to such bidder at the bid price, provided such bidder is a responsive and responsible bidder.
- d. No bid may be withdrawn 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.

5.15 **Denial of Withdrawal of Bid.** If the state denies the withdrawal of a bid under the provisions of paragraph 5.14, it shall notify the bidder in writing stating the reasons for its decision and award the contract to such bidder at the bid price, provided such bidder is a responsible and responsive bidder (*Code of Virginia*, § 2.2-4330 F). The decision denying withdrawal of a bid shall be final and conclusive unless the bidder appeals the decision within ten days after receipt of the decision by invoking the appeals procedure in Chapter 9 or by instituting legal action as provided in the *Code of Virginia*, § 2.2-4364.

CHAPTER 6

EVALUATION AND AWARD

In this Chapter look for . . .

- 6. **General**
 - 6.1 **Evaluation of Bids and Proposals**
 - 6.2 **Acceptance Period**
 - 6.3 **Notice of Intent to Award and Notice of Award**
 - 6.4 **Multiple Awards and Split Awards**
 - 6.5 **Tie Bids**
 - 6.6 **Protest of Award or Decision to Award**
 - 6.7 **Negotiation with the Lowest Responsible Bidder**
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6. **General.** Factors other than price are considered in selecting the successful bidder/offeror. A determination must be made by the purchasing office as to whether the bidder/offeror is responsive to the requirements of the solicitation and whether or not they are a responsible bidder or offeror capable of furnishing the goods or services solicited (see sections 3.7 and 3.8). Any bidder who, despite being the apparent low bidder, is determined not to be a responsible bidder shall be notified in writing in accordance with section 9.5 of this manual. The state reserves the right to request samples of materials or equipment or further information prior to award even if not specifically required in the terms and conditions. Failure to provide requested material or information in a timely manner may be considered valid justification for rejection of the bid.

6.1 **Evaluation of Bids or Proposals**

- a. **Evaluation of Bids.** Bids are evaluated, the lowest responsive and responsible bidder is determined, and an award is made to that bidder (see 3.7); however, if the contract is over \$50,000, it may be set-aside for DMBE-certified small businesses only. The state reserves the right to reject any and all bids in whole or in part and to waive any informality in the bid. In the case of errors in the extension of prices, the unit price will govern (see 5.5). Bidders and subcontractors must have received their DMBE certification as a small business by the solicitation due date in order to be considered responsive.
- b. **Evaluation of Proposals - Goods and Nonprofessional Services.** Proposals are evaluated by the buyer, contracting officer, or an evaluation team, on the basis of the criteria set forth in the RFP. Proposals deemed to be fully qualified and best suited are selected on the basis of the factors stated in the RFP. As an option, evaluators may request presentations or discussions with offerors, as necessary, to clarify material in the offerors' proposals, to help determine those fully qualified and best suited. Offerors who fail to submit required documentation or meet mandatory requirements, in such time, for evaluation purposes may be eliminated from further consideration. Negotiations are then conducted with two or more of the selected offerors. Price is considered, but need not be

the sole determining factor. After negotiations have been completed, the purchasing office shall select the offeror (or offerors, if multiple awards are provided for in the RFP), which in its opinion has made the best proposal, and make the award accordingly. Offerors and subcontractors must have received their DMBE certification as a small business by the closing date of the RFP in order to receive points for the solicitation's evaluation criteria or to be considered a small business for set-asides. If so provided in the RFP, after negotiations have been held, offerors are given the opportunity to submit best and final offers. The state is not required to furnish a statement of the reasons why a particular proposal was not deemed the most advantageous (*Code of Virginia*, § 2.2-4359D). Should the purchasing office 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 others under consideration, a contract may be negotiated and awarded to that offeror.

c. The Commonwealth in its sole discretion may choose not to make an award to a bidder or offeror who is in litigation with the Commonwealth at the time of bid/proposal evaluation.

6.2 **Acceptance Period.** Bids are valid for a minimum of thirty (30) days unless a longer period of time is specified in the solicitation or in the bid response. If an award decision has not been made at the end of the stipulated days, the bid may be withdrawn at the written request of the bidder. If the bid is not withdrawn at that time, it remains in effect until an award is made or the bids are rejected.

6.3 **Notice of Intent to Award and Notice of Award.** When the evaluation is complete, the office that issued the solicitation will announce its decision by posting either a Notice of Intent to Award or Notice of Award on the DGS/DPS eVA web site. Notices may also be posted in their public notice posting area or other designated location as stated in the solicitation document. A copy of the notice will be mailed to any bidder submitting a self-addressed, stamped envelope for this purpose with the bid/proposal. A low bidder determined not to be a responsible bidder will be notified in writing see 9.5).

6.4 **Multiple Awards and Split Awards.** When the terms and conditions of multiple awards are so provided in the Invitation for Bids or Request for Proposal awards may be made to more than one bidder or offeror. Unless otherwise specified in the solicitation, purchasing offices may award a multi-line item procurement in whole or in part or on an individual line item basis. In determining whether to make separate line item awards on a multi-line item solicitation, consideration will be given to the agency's administrative costs for processing individual purchase documents, and separate invoices and checks.

6.5 **Tie Bids**

a. **Virginia Products or Firms.** A tie bid exists when two or more bidders offer products or services that meet all specifications, terms and conditions at identical prices. In the case of a tie bid, preference shall be given to goods produced in Virginia, good or services or construction provided by Virginia persons, firms or corporations, if such a choice is available; otherwise, the tie shall be decided by lot (*Code of Virginia*, § 2.2-4324). At the option of the office issuing the IFB, all bids may be rejected and the program rebid. Tie bids are reported to the Antitrust Unit of the Virginia Attorney General's Office (see also 1.8). Whenever any bidder is a resident of any other state and such state under its laws

allows a resident contractor of that state a preference, a like preference may be allowed to the lowest responsible bidder who is a resident of Virginia.

- b. **Recycled Content.** 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 then shall be given to the bidder whose goods contain the greatest amount of recycled content.

6.6 **Protest of Award or Decision to Award.** Any bidder or offeror submitting a bid or proposal in response to a solicitation may protest the award or decision to award a contract by submitting such protest in writing (to include electronic and facsimile submissions, followed up with the original document[s]) to the head of the purchasing office which issued the solicitation no later than ten calendar days after public notice of the award or announcement of the decision to award is made whichever occurs first. Any potential bidder or offeror on a contract negotiated on a sole source or emergency basis who desires to protest the award or decision to award such contract shall submit such protest in the same manner no later than ten calendar days after posting or publication of the notice of such contract as provided in paragraphs 2.7 and 2.8. The written protest must be received in the purchasing office not later than 5:00 p.m. on the tenth day. If the tenth day falls on a weekend or an official holiday, the ten-day period expires at 5:00 p.m. on the next regular workday. The protest shall include the specific basis for the protest and the relief sought. The head of the purchasing office concerned will issue a decision in writing within ten days stating the reason for the action taken. This decision shall be final unless the bidder or offeror appeals within ten days of the written decision by invoking the appeals procedure in Chapter 9 or institutes legal action as provided in the *Code of Virginia*, § 2.2-4364. If the protest of any actual or potential bidder or offeror depends in whole or in part upon information contained in public records pertaining to the procurement transaction which are subject to inspection, then the time within which the protest must be submitted shall expire ten days after those records are available for inspection by such bidder or offeror, or at such later time as provided in the *Code of Virginia*, § 2.2-4360. No protest shall lie for a claim that the selected bidder or offeror is not a responsible bidder or offeror. A bidder or offeror shall not challenge the validity of the terms or conditions of the Invitation for Bids or Request for Proposal.

6.7 **Negotiation with the 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 exceeds available funds, the state may negotiate with the apparent low bidder to obtain a contract price within available funds; however, such negotiation may be undertaken only under conditions and procedures described in writing and approved by the public body prior to issuance of the Invitation to Bid and summarized therein (*Code of Virginia*, § 2.2-4318).

CHAPTER 7

PERFORMANCE

In this Chapter look for . . .

- 7.1 Purchase Order, Authority and Shipment
 - 7.2 New/Used/Altered
 - 7.3 Packaging
 - 7.4 Substitutions
 - 7.5 Loss or Damage in Transit
 - 7.6 Freight
 - 7.7 Delivery
 - 7.8 Receipt of Shipments
 - 7.9 Overshipments/Overruns
 - 7.10 Inspection
 - 7.11 Assignment of Contract
 - 7.12 Contract Renewal or Extension
 - 7.13 Complaints on Vendor's Goods or Services
 - 7.14 Termination for Default
 - 7.15 Cancellation of Purchase Orders and Contracts
 - 7.16 Purchase Order Changes
 - 7.17 Contract Modification Restriction
 - 7.18 Termination for Convenience of the Commonwealth
 - 7.19 Claims
 - 7.20 Debarment
 - 7.21 Ineligibility or Disqualification of Manufacturer
 - 7.22 Debarment Period
 - 7.23 Debarment Notification and Appeal Procedure
 - 7.24 Suspension
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- 7.1 **Purchase Order, Authority and Shipment.** A purchase order is a document used by a state agency or institution to execute a purchase transaction with a vendor. The order number should be shown on all bills of lading, packing slips, back orders, invoices, etc. The receipt of a purchase order authorizes shipment (for requirements-type contracts, the receipt of a notice of award establishing a contract does not authorize shipment. Contractors who accept and deliver an order without a written purchase order or other properly executed Commonwealth contract form do so at their own risk.

- 7.2 **New/Used/Altered.** All supplies and equipment furnished must be new and in first class condition unless the solicitation and contract award specified used items. Demonstration, previously rented or reconditioned items are not considered new. No equipment is acceptable if serial numbers or any other manufacturers' identifying labels or marks have been removed, obliterated, or changed.

- 7.3 **Packaging.** Unless otherwise specified in the solicitation, new standard commercial packing and shipping containers shall be used. Shipping containers should be legibly marked or labeled on the outside with the commodity description and number, size, quantity, contract number, and agency purchase order number or purchase order number. A packing slip or invoice should accompany all shipments and should reference the purchase order number. Failure to do so may result in delayed payment processing.
- 7.4 **Substitutions.** Substitution is defined as delivery of an item that does not conform to the specifications of the purchase order or contract. Substitutions on purchase orders require the prior approval of the purchasing office issuing the award. Any item delivered not meeting specifications may be returned to the contractor at the contractor's expense. When an item is returned, the contractor must make immediate replacement with acceptable merchandise or be considered in default.
- 7.5 **Loss or Damage in Transit.** Delivery by a contractor to a common carrier does not constitute delivery to state agencies or political subdivisions. Any claim for loss or damage incurred during delivery shall be between the contractor and the carrier. The state accepts title only when goods are received regardless of the F.O.B. point. The receiving agency will note all apparent damages in transit on the freight bill and notify the contractor. Discovery of concealed damage or loss will be reported by the receiving agency to the carrier and the contractor within seven days of receipt and prior to removal from the point of delivery if possible. The contractor shall make immediate replacement of the damaged or lost merchandise or be in default of the contract. It shall be the contractor's responsibility to file a claim against the carrier. If damage is to a small quantity, with the approval of the agency, the contractor may deduct the amount of damage or loss from his or her invoice to the agency in lieu of replacement.
- 7.6 **Freight.** By signing an IFB the bidder certifies that the bid price(s) offered for F.O.B. destination include only the actual freight charges at the lowest and best rate and is based upon the actual weight of the goods to be shipped. Freight charges are, therefore, established for each individual purchase. If a requirement is bid F.O.B. origin, the contractor shall prepay the charges and add the amount to the invoice. A copy of the freight bill should be attached to all invoices that include freight charges. In a solicitation specifying F.O.B. origin the state will consider freight cost in the evaluation of bids.
- 7.7 **Delivery.** Delivery must be made by the date or period specified in the purchase order or contract or the contractor will be in default. The receiving sections of most state agencies are open during normal working hours, Monday through Friday, except on official holidays. If a contractor cannot make delivery as specified under an existing purchase order or contract, the contractor must immediately notify the ordering agency. The contractor may offer a new delivery date; however, if it is not acceptable to the agency and delivery cannot be made as originally specified, the contractor will be in default (see 7.14).
- 7.8 **Receipt of Shipments.**
- a. **General.** Shipments will be checked against the agency's copy of the ordering document to assure quantities, units, etc., match. Overshipments may be rejected and returned at the contractor's expense. Required grading certificates, USDA stamps, or any other proofs of

quality must precede or accompany the shipment. Contractors should ensure that they have been given a specific delivery location and obtain a signed receipt for goods delivered.

- b. **Printing Overruns, Underruns.** The State is not required to accept overruns provided “no overruns” is specified in the solicitation. However, an agency may, at its discretion, accept up to a ten percent overrun. The additional overrun price quoted shall not exceed the base lot price quoted for the equivalent incremental quantity. Whichever price is less will prevail. An agency may at its discretion accept an underrun, provided that credit is allowed the agency at the full base price per unit for the quantity of the underrun.

- 7.9 **Overshipments.** An agency should not accept goods in excess of those specified on the purchase order or contract unless it is recognized as a custom of that industry (e.g. printing, cable, fabric), is so stated in the bid, and is accepted by the buyer. Increases or decreases exceeding \$500 shall be provided for by a change order and shall be provided whenever requested by a supplier to ensure the supplier’s eVA transaction fee is accurate. Change orders for increases or decreases up to \$500 shall be prepared if requested by the supplier (see 8.9). In the event that an overshipment is not recognized until after receipt and not provided for in the award, the agency must notify the contractor that the overshipment will not be accepted and, unless the overshipment is picked up by the contractor, it will be returned at the contractor's expense.
- 7.10 **Inspection.** All materials, equipment, supplies, and services are subject to inspection and testing. Items or services that do not meet specifications may be rejected. Failure to reject upon receipt, however, does not relieve the contractor of liability for latent or hidden defects subsequently revealed when goods are put to use or tested. If latent defects are found, the contractor is responsible for replacing the defective goods within the delivery time originally stated in the solicitation and is liable for any resulting expenses incurred by the state.
- 7.11 **Assignment of Contract.** A contract shall not be assignable by the vendor in whole or in part without the written consent of the state purchasing office issuing the contract.
- 7.12 **Contract Renewal or Extension.** A term contract may contain a renewal clause describing the conditions under which it may be renewed. Term contracts for goods or nonprofessional services may not be renewed without a renewal clause, except that in exceptional or extenuating circumstances a contract may be extended by mutual consent for a limited period of time, not to exceed six (6) months. This action should be taken in writing prior to the expiration of the current contract. The state may extend the term of an existing contract for services to allow completion of any work undertaken but not completed during the specified term of the contract.
- 7.13 **Complaints on Vendor's Goods or Services.** Any differences between the provisions of the contract and subsequent performance will be reported by the ordering agency to the contractor on a Procurement Complaint Form. Vendors are required to respond to the agency and send a copy to DGS/DPS. Failure to respond within ten days may result in removal from the mailing list.

- 7.14 **Termination for Default.** In case of default by a contractor for failure to deliver or perform in accordance with the contract specifications or terms and conditions, the state may procure the articles or services from other sources and hold the defaulting contractor responsible for any resulting additional purchase and administrative costs. The state will normally repurchase from the next low bidder or purchase competitively by resolicitation. If the repurchase results in increased costs to the Commonwealth, a letter will be sent to the defaulted contractor requiring payment for additional costs. When repayment is requested, the contractor will be removed from the mailing list until the repayment has occurred. Contractors shall not be liable for any excess cost if the failure to perform arises out of any act of war, order of legal authority, strikes, act of God, or other unavoidable causes not attributed to their fault or negligence. Failure of a contractor's source to deliver is generally not considered to be an unavoidable cause. The burden of proof rests with the contractor.
- 7.15 **Cancellation of Purchase Orders and Contracts.** Cancellation of purchase orders will be made in writing by the purchasing office that issued the order. Orders or contracts may be canceled without a contractor's consent as provided in 7.14, Termination for Default, or 7.18, Termination for Convenience of the Commonwealth. A contractor may request cancellation, and the state will grant relief if the contractor is prevented from specific performance, including timely delivery, by an act of war, order of legal authority, act of God, or other unavoidable causes not attributed to the contractor's fault or negligence. Failure of a contractor's source to deliver is generally not considered to be an unavoidable cause. The burden of proof for need of such relief rests with the contractor. The state reserves the right to cancel all contracts with any contractor who fails to perform for any one contract.
- 7.16 **Purchase Order Changes.** A purchase order change is used to correct errors, to add or delete small quantities of goods, or to make other minor adjustments in the original orders. It may also be used to cancel an order (see 7.14 & 7.15). A contractor who deviates from the requirements of a purchase order or contract prior to receipt of an authorized change order does so at its own risk (see 7.17).
- 7.17 **Contract Modification Restriction.** No contract may be renewed or extended unless provided for in the original contract. No additional consideration may be paid to the contractor because of renewal or extension unless specifically authorized under the original contract. A public contract may include provisions for modification of the contract during performance, but no fixed price contract may be increased by more than 25 percent of the original amount of the contract or \$50,000, whichever is greater, without the advance written approval of the Governor or his designee. By executive order this is the Director of General Services. In no event may the amount of any contract, without adequate consideration, be increased for any purpose, including, but not limited to, relief of a bidder/offeror from the consequences of an error in its bid or offer (*Code of Virginia, § 2.2-4309A*). Contract modifications to purchases made under small purchase procedures shall not exceed 25% of the original contract price without advance written approval of the agency head or his or her designee. Contract renewals, extensions or modifications must be in writing under the signature of the buyer/contract officer responsible for the purchase.
- 7.18 **Termination for Convenience of the Commonwealth.** A purchase order or contract may be terminated for the convenience of the Commonwealth by delivering to the contractor a notice of termination specifying the extent to which performance under the purchase order or contract

is terminated, and the date of termination. After receipt of a notice of termination, the contractor must stop all work or deliveries under the purchase order or contract on the date and to the extent specified.

If the purchase order or contract is for commercial items sold in substantial quantities to the general public and no specific identifiable inventories were maintained exclusively for the Commonwealth's use, no claims will be accepted by the Commonwealth. Payment will be made for items shipped or services provided prior to receipt of the termination notice, unless otherwise specified in the contract.

If the purchase order or contract is for items being produced exclusively for the use of the Commonwealth, and raw materials or services must be secured by the contractor from other sources, the contractor shall order no additional materials or services except as may be necessary for completion of any portion of the work which was not terminated. The state may direct the delivery of the fabricated or non-fabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of the work, or direct the contractor to sell the same, subject to the state's approval as to price. The contractor may, with the approval of the state, retain the same, and apply a credit to the claim. The contractor must complete performance on any part of the purchase order or contract not terminated.

The contractor must submit any termination claim within 120 days after receipt of the notice of termination, or such longer period as the state for good cause may allow. This claim will be in a form and with certifications prescribed by the purchasing office that issued the purchase order. The claim will be reviewed and forwarded with appropriate recommendations to the requisitioning agency and/or the appropriate assistant attorney general for disposition in accordance with the *Code of Virginia*, § 2.2-514. Termination for convenience claims will be considered for only actual expenses incurred up to the time of termination.

- 7.19 **Claims.** Written notice of the contractor's intention to file a claim whether for money or other relief, must be given at the time of the occurrence or beginning of the work upon which the claim is based. Contractual claims whether for money or other relief shall be submitted in writing no later than sixty days after final payment. 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.

A contractor may not institute legal action prior to receipt of the purchasing office's decision on the claim unless that office fails to render such decision within thirty (30) days. The decision of the purchasing office shall be final and conclusive unless the contractor, within six months of the date of the final decision on the claim, institutes legal action as provided in the *Code of Virginia*, § 2.2-4364.

- 7.20 **Debarment.** Debarment as used in this section means action taken by the Director of the Division of Purchases and Supply (DPS) to exclude individuals or firms from contracting with state agencies for particular types of goods or nonprofessional services for specified periods of time. Debarment does not relieve the contractor of responsibility for existing obligations.

The purpose of debarment is to protect the Commonwealth from risks associated with awarding contracts to persons or firms having exhibited an inability or unwillingness to fulfill contractual requirements, and to protect state interests and the integrity of the state's procurement process by preventing individuals or firms who have displayed improper conduct from participating on Commonwealth requirements for specific periods of time.

Causes for Debarment. An individual or firm may be debarred for any of the following reasons:

- a. Breach (including anticipatory breach) of contract with a state agency. For default action see 7.14.
- b. Sale or attempted sale to a state agency of items or services which are required to be purchased under a state contract with another vendor, when the vendor knew or had reason to know that the items or services are required to be purchased under that contract.
- c. Stating an unwillingness or inability to honor a binding bid. A mere request to withdraw a bid, which does not otherwise state an unwillingness or inability to perform, is not a cause for debarment.
- d. Falsifying or misrepresenting manufacturer's specifications in order to appear responsive to a solicitation.
- e. Conferring or offering to confer any gift, gratuity, favor, or advantage, present or future, upon any employee of a state agency who exercises any "official responsibility" for a "procurement transaction" as those terms are defined in the *Code of Virginia*, § 2.2-4368. It is not necessary that the offer be accepted by the employee, or that the offer is made with intent to influence the employee in an official act. Extending to any state employee exercising official responsibility for a procurement transaction any discount or privilege not available to all state employees is considered to be offering an advantage.
- f. Failing to disclose a condition constituting a conflict of interest by any officer, director, owner, or partner of the vendor in a contract or purchase order awarded by DPS or any other agency of the state (*Code of Virginia*, § 2.2-3106).
- g. Any cause indicating that the individual or firm is not a responsible vendor.
- h. A determination by the Director of DPS that a vendor has used abusive or obscene language or a threatening manner toward state purchasing personnel during the performance of their duties or as a result of the performance of their duties.
- i. Sale, under nonemergency conditions, of building materials, supplies, or equipment for any building or structure constructed by or for the Commonwealth by an independent contractor employed 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 (*Code of Virginia*, § 2.2-3101 and § 2.2-4374).

- j. Sale, under nonemergency conditions, of building materials, supplies or equipment for any building or structure constructed by or for the Commonwealth by 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 such building or structure to the independent contractor employed by the Commonwealth to furnish architectural or engineering services in which such person has a personal interest as defined in *Code of Virginia*, § 2.2-3101.
- k. Sale of goods or services to the Commonwealth when such sale is prohibited by any debarment then in effect.
- l. Consent of the firm or individual being debarred.
- m. Conviction of any criminal offense involving public contracting. Examples include, but are not limited to, bribery (*Code of Virginia*, § 18.2-447) and knowingly making a false statement in regard to collusion on a solicitation (*Code of Virginia*, § 18.2-498.4). Conviction for any of the above of any officer, director, owner, partner, agent, or related business entity of a vendor shall constitute grounds for the removal of the vendor.
- n. Court judgment finding a violation of either federal or state antitrust laws.
- o. Conviction of any offenses indicating a lack of moral or business integrity.
- p. Failure to pay reprourement costs pursuant to a contract termination for default.

It is not necessary that there be a judicial determination of violations contained in subparagraphs a. through l. and p. for debarment to occur.

If the debarring official finds that the cause for debarment reflects on the contractor's traits or tendencies only with regard to certain goods or services, the debarment may apply only to such goods or services. Otherwise the debarment shall apply to all goods and services within the purview of the debarring agency (DPS).

7.21 **Ineligibility or Disqualification of Manufacturer.** Should any manufacturer commit any of the acts described in paragraph 7.20, bids offering material, equipment, or supplies manufactured by that firm may be rejected even though the bid is submitted by a vendor in good standing.

7.22 **Debarment Period.** Debarment shall be for a period of ninety (90) days to three (3) years, at the discretion of the debarring official, except as follows. The debarment for subparagraphs m., n., and o. of paragraph 7.20 shall be for a period of three (3) years. The debarment for subparagraph p. of paragraph 7.20 shall be for a period of one year or until the reprourement costs are paid or until the contract breach is resolved, whichever is longer. Debarment shall commence upon notification, or if later, upon expiration of any existing debarments.

Notwithstanding the prescribed duration of the debarment, at the discretion of the Director of DPS a debarment may be lifted or suspended at any time if it is in the best interest of the Commonwealth. A debarred individual or firm can apply for reinstatement at any time in writing to the debarring official citing actions taken to remedy the reason for debarment or

prevent recurrence of the situation that caused the debarment action to be taken and otherwise indicating that lifting or suspension of the debarment would be in the best interest of the Commonwealth. Examples of actions that the Director may take into consideration include, but are not limited to:

- a. Repayment by a debarred contractor of additional costs resulting from a default action for which the contractor had previously failed to reimburse the Commonwealth and was debarred.
- b. Disassociation with individuals or firms that were responsible for the debarment.

7.23 **Debarment Notification and Appeal Procedure.** Please see Chapter 9, Section 3.

7.24 **Suspension.** Suspension is a type of ineligibility based upon adequate evidence that a vendor has committed any of the grounds for debarment as listed in this manual under paragraph 7.20. In the event that an indictment against a vendor or its principles exists for any of the reasons listed in this manual, paragraphs 7.20 m., n., or o., the indictment shall constitute adequate evidence for suspension. The period of suspension shall not exceed one year unless requested by the Office of the Attorney General. The process for suspension will be governed by the same procedures used for debarment/ineligibility.

Adequate evidence means information sufficient to support the reasonable belief that a particular act or omission has occurred.

CHAPTER 8

CHARGES AND COLLECTIONS

In this Chapter look for . . .

- 8.1 Separate Agency Records
 - 8.2 Charge Cards for Small Purchases
 - 8.3 Billings and Invoices
 - 8.4 Partial Payments
 - 8.5 Contractor Payment Assistance
 - 8.6 Prompt Payment of Bills
 - 8.7 Payment Requirements: All Contracts
 - 8.8 Payment by Electronic Funds Transfer
 - 8.9 eVA Transaction Fees
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- 8.1 **Separate Agency Records.** Except when state agencies and institutions use charge cards for small purchases of goods and services, contractors must make separate accounts or charges for each agency since the agencies are individually responsible for payment. The name and address of the requisitioning agency is shown on each purchase order, delivery order, or agency purchase order.
- 8.2 **Charge Card Payments.** In an effort to streamline invoice and payment processing steps and sharply reduce paperwork, the Department of Accounts (DOA) has established a contract allowing agencies and institutions to use charge cards through two programs, the Small Purchase Charge Card (SPCC) and Gold Card. Unlike the typical consumer charge card, this program incorporates the features of corporate charge cards—national concept designed for business applications. Major program benefits include the reduction in the number of invoices submitted to Commonwealth agencies and institutions, reduction in internal requisitioning and purchase order processing steps, reduced vendor collections costs and payment to the vendor by the charge card company within as little as three business days. As a cost cutting endeavor, vendors are strongly encouraged to participate. Information can be obtained by calling DOA at 804-371-4350, by emailing cca@doa.virginia.gov, or by faxing at 804-786-9201.
- a. **Small Purchase Charge Card (SPCC).** The SPCC is issued for cardholder use for transactions up to \$5,000 and the cardholder's monthly transaction limit up to \$100,000 for the purchase of small dollar goods and services in accordance with the issuing agency's policies and procedures, *Agency Procurement and Surplus Property Manual*, and *Virginia Public Procurement Act*.
 - b. **Gold Card.** Gold cards are issued for purchase transactions up to \$50,000 for small dollar goods and services and a monthly transaction limit up to \$250,000. The Gold Card program is established to optimize the Commonwealth's participation in eVA and reduce the number of checks issued by the Commonwealth. The Gold Card program is administered through DOA Program Administrator who can be contacted at 804-371-4350.

- 8.3 **Billings and Invoices.** The invoices must be submitted to the state agency concerned. Prompt payment discounts will be taken if offered and payment is made within the prescribed time frame. Time will be computed from the date of delivery or performance or from the date a valid invoice is received, whichever is later. Invoices should reference the purchase order or contract number and be in accordance with the terms of such.
- 8.4 **Partial Payments.** Agencies may initiate partial payments when portions of the goods have been received in good condition and have been properly invoiced by the contractor and partial payment is authorized by the governing contract.
- 8.5 **Contractor Payment Assistance.** Requests for assistance regarding payment from a state agency should be addressed to the agency concerned. In the event a contractor, after contacting a state agency, has an unresolved payment problem in regard to a contract or purchase order, the contractor may contact the DGS/DPS Contract Compliance Section at 804-786-1602, or the appropriate agency contracting office for assistance.
- 8.6 **Prompt Payment of Bills** (*Code of Virginia*, §§ 2.2-4347 through 2.2-4354).
- a. Every state agency that acquires goods or services or conducts any other type of contractual business with nongovernmental, privately owned enterprises shall promptly pay for the completely delivered goods or services by the required payment date. Payment is deemed to have been made when offset proceedings have been instituted, as authorized under the Virginia Debt Collection Act (*Code of Virginia*, § 2.2-4801 et seq.).
 - b. Definitions - As used in this paragraph, unless the context clearly shows otherwise, the term or phrase:
 - (1) “Debtor” means any individual, business, or group having a delinquent debt or account with any state agency whose obligation has not been satisfied or set aside by court order or discharged in bankruptcy.
 - (2) “Contractor” means the entity that has a direct contract with any “state agency” as defined herein.
 - (3) “Payment date” means either (a) the date on which payment is due under the terms of a contract for provision of goods or services, or (b) if such date has not been established by contract, thirty days after receipt of a proper invoice by the state agency or its agent for the amount of payment due, or thirty days after receipt of the goods or services, whichever is later.
 - (4) “State agency” means any authority, board, department, instrumentality, institution, agency or other unit of state government.
 - (5) “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.

- c. Separate payment dates - Separate payment dates may be specified for contracts under which goods or services are provided in a series of partial deliveries or executions to the extent that such contract provides for separate payment for such partial delivery or execution.
- d. Defect or impropriety in the invoice or in the goods and/or services received - In instances where there is a defect or impropriety in an invoice or in the goods or services received, the state agency shall notify the supplier, using the Procurement Complaint Form, of the defect or impropriety if such defect or impropriety would prevent payment by the payment date within fifteen days after receipt of such invoice or such goods or services.
- e. Interest penalty; exceptions - Interest shall accrue, at the rate determined pursuant to paragraph f., on all amounts owed by a state agency to a contractor which remain unpaid after seven days following the payment date, except where a contract provides for a different rate of interest, or for the payment of interest in a different manner.
- f. The rate of interest charged a state agency pursuant to paragraph e. shall be the base rate on corporate loans (prime rate) at large United States money center commercial banks as reported daily in *The Wall Street Journal*. Whenever a split prime rate is published, the lower of the two rates is to be used. However, in no event shall the rate of interest charged exceed the rate of interest established pursuant to *Code of Virginia*, § 58.1-1812.
- g. Notwithstanding paragraph e., no interest penalty shall be charged when payment is delayed because of a disagreement between a state agency and a contractor regarding the quantity, quality or time of delivery of goods or services or the accuracy of any invoice received for such goods or services. The exception from interest penalty provided by this paragraph shall apply only to that portion of a delayed payment which is actually the subject of such a disagreement and applies only for the duration of such disagreement.
- h. Notwithstanding paragraph e., no interest penalty shall be paid to any debtor on any payment, or portion thereof, withheld pursuant to the Comptroller's Debt Set-off Program, as authorized by the Virginia Debt Collection Act (*Code of Virginia*, §§ 2.2-4801 through 2.2-4808), commencing with the date the payment is withheld. If, as a result of an error, a payment or portion thereof is withheld, and it is determined that at the time of set-off no debt was owed to the Commonwealth, then interest shall accrue at the rate determined pursuant to paragraph f. of this section on amounts withheld which remain unpaid after seven days following the payment date.
- i. Date of postmark deemed to be date payment is made - In those cases where payment is made by mail, the date of postmark shall be deemed to be the date payment is made. Generally speaking, all checks released by the Department of Accounts will be on the 30th day following delivery and receipt of a proper invoice.
- j. Notwithstanding the provisions of paragraph e., the provisions of *Code of Virginia*, § 2.2-4333, relating to retainage on construction contracts shall remain valid.
- k. Utility tariffs prescribed by the State Corporation Commission are exempt from the provisions of 8.6.

1. Contractors submitting invoices for interest due from a state agency should include, as a minimum, the following data:
 - (1) Original purchase order number or contract number;
 - (2) Envelope bearing postmark of the date payment was made. Where the envelope is not available, interest will be computed from the second business day after date of issue of the check;
 - (3) Original invoice number and date;
 - (4) Date of publication of the issue of *The Wall Street Journal* upon which the interest rate is based.
- m. The payment date for items in disagreement shall be 30 days after the resolution of such disagreement.

8.7 **Payment Requirements: All Contracts.** All contracts awarded by state Agencies and Institutions require the following action to be taken by contractors:

- a. Within seven days after receipt of amounts paid for work performed by the subcontractor under that contract:
 - (1) pay the subcontractor for the proportionate share of the total payment received from the agency attributable to the work performed by the subcontractor under that contract;
or
 - (2) notify the agency and subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.
- b. If an individual contractor, provide social security number in order to receive payment.
- c. If a proprietorship, partnership or corporation, provide federal employer identification number.
- d. Pay interest to subcontractors on all amounts owed by the contractor that remain unpaid after seven days following receipt by the contractor of payment from the state agency for work performed by the subcontractor under that contract, except for amounts withheld as allowed in paragraph 8.7a(2) above.
- e. Interest shall accrue at the rate of one percent per month.
- f. To include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor.

NOTE: A contractor's obligation to pay an interest charge to a subcontractor may not be construed to be an obligation of a state agency or institution of the Commonwealth. A contract modification may not be made for the purpose of providing reimbursement for such interest charge. A cost reimbursement claim may not include any amount for reimbursement for such interest charge.

8.8 **Payment by Electronic Funds Transfer.** The Commonwealth of Virginia disburses payments to vendors via paper checks. In addition, payments can be made to selected vendors with large transaction volume through the Commonwealth's Financial Disbursement System using Electronic Data Interchange (EDI) and its connectivity to the Automated Clearing House (ACH) network. Vendors who qualify for EDI through the Commonwealth's Financial Disbursement System will be paid in accordance with the Prompt Payment Act of Virginia which requires payment within 30 days of invoice or receipt of goods or services date, or by the terms and conditions established under contractual agreements with individual state agencies. Each party shall bear the respective fees and other charges assessed by its designated bank(s) and third party service providers for financial EDI payments. For additional information relating to benefits of using EDI and the eligibility criteria, contact the Department of Accounts at 804-692-0473 or www.doa.virginia.gov/General_Accounting/EDI/EDI_Main.cfm.

8.9 **eVA Transaction Fees.**

- a. Change Orders/Adjustments: The purchasing office is required to issue an eVA change order whenever the agency approves a change to a purchase order exceeding \$500. A supplier, however, may request that an agency issue an eVA change order for any amount up to \$500 in order to adjust the supplier's eVA transaction fee. Suppliers should contact the purchasing office that issued the eVA purchase order to request such a change. Suppliers may contact eVA Customer Care at 1-866-289-7367 or evacustomrcare@dgs.virginia.gov if additional assistance is required.
- b. Refunds: Suppliers requiring a refund on their eVA Fee Transaction Account should go to the eVA Payment Portal (<http://www.eva.virginia.gov/billing/index.htm>) and click on "Refund Policy" and follow the procedures.

CHAPTER 9

APPEALS

In this Chapter look for . . .

- 9. General
 - 9.1 Creation of the DGS/DPS Procurement Appeals Board
 - 9.2 Jurisdiction of the Board
 - 9.3 Appeal of Ineligibility or Disqualification Determination or Debarment
 - 9.4 Appeal of a Denial of Bid Withdrawal
 - 9.5 Appeal of Nonresponsibility Determination
 - 9.6 Protest of Award or Decision to Award
 - 9.7 Initiation of Appeal to the DGS/DPS Board
 - 9.8 Exhaustion of Administrative Procedures
 - 9.9 Effect of the Appeal on Procurement Proceedings
 - 9.10 Time and Place of Hearings
 - 9.11 Parties to the Appeal
 - 9.12 Hearing Procedures
 - 9.13 Small Purchase Procedures
 - 9.14 Administrative Support
 - 9.15 Board's Decision
 - 9.16 Judicial Review
 - 9.17 Alternative Dispute Resolution
-

9. **General.** The *Virginia Public Procurement Act (VPPA)* provides that a public body may establish administrative procedures for hearing procurement protests and appeals.

9.1 **Creation of the DGS/DPS Procurement Appeals Board**

- a. **DGS/DPS Procurement Appeals Board.** The DGS/DPS Procurement Appeals Board (hereinafter referred to as the Board) is established under the *Code of Virginia*, § 2.2-4365, to provide an impartial administrative review of contested decisions on the procurement of non-technology goods made by any agency of the Commonwealth that is required to follow the purchasing procedures set forth in this manual.

See paragraphs 1.1, 1.2 and 1.3 of this manual and *Code of Virginia*, §§ 2.2-1110 and 2.2-1111. The Board is neither empowered to review contested procurement decisions by the Department of Transportation, the Alcoholic Beverage Commission, nor is it empowered to review matters relating to service contracts or construction contracts, except that it may review appeals on the procurement of supplies, material, and equipment which are not part of a construction contract but which are purchased under the provisions of this manual.

b. Membership of the Board, Voting, and Conflicts of Interest

- (1) The Board will consist of members to be appointed by the Governor or his or her designee.
- (2) The Board will elect a chairperson from among its members to serve in that capacity for two years. The chairperson will be responsible for the administration of the Board and will preside over all meetings and hearings. The chairperson may appoint a member of the Board to act in his or her absence.
- (3) The Board may, by a simple majority of a quorum present and voting, adopt such procedures as are not inconsistent with law and this manual.
- (4) Any number of the Board shall be sufficient to hear an appeal. When an odd number is present, decisions on the appeal shall be made by a simple majority vote of those present. When an even number is present, the chairperson or the person presiding shall not vote. Since this is done only to avoid tie votes, the chairperson may participate fully in all deliberations prior to voting.
- (5) Members of the Board shall not discuss any issue on appeal with anyone other than members of the Board and its legal counsel prior to hearing an appeal. During the hearing, members shall not discuss the appeal with any party unless all parties or their legal counsel are present.
- (6) On any matter, including but not limited to the hearing of an appeal, if any member of the Board determines that he or she has a conflict of interest and will be unable to consider the matter fairly and impartially or determines that a reasonable person could think that he or she has a conflict or would be unable to consider the matter fairly and impartially, then he or she should withdraw from all further deliberations and votes on that matter. Any party appearing before the Board may challenge a member on these same grounds and, if the challenged member decides not to withdraw from the matter under consideration, then the remaining members of the Board shall make such inquiries as they deem necessary and shall vote to determine whether or not the challenged member should be disqualified from further deliberation and votes on the matter under consideration. The Board may likewise vote to disqualify a member from consideration of a particular matter at any time on its own motion.

9.2 **Jurisdiction of the Board**

- a. The Board may review appeals from procurement decisions on the purchase of goods made by any agency of the Commonwealth required to follow the purchasing procedures set forth in this manual.
- b. The Board has the authority to review the following:
 - (1) Appeals from a determination that the vendor is ineligible to participate in public contracts, e.g., debarment (*Code of Virginia*, § 2.2-4357).

- (2) Appeals from a denial of a request to withdraw a bid (*Code of Virginia*, § 2.2-4358).
- (3) Appeals from a determination of nonresponsibility (*Code of Virginia*, § 2.2-4359).
- (4) Appeals from denial of a protest of an award or decision to award (*Code of Virginia*, § 2.2-4360).

It is not intended that the establishment of this board supplants or interferes with the informal resolution of disputes between the procuring agency and the contractor. Informal resolution of complaints in lieu of appealing is encouraged.

9.3 **Appeal of Ineligibility or Disqualification Determination or Debarment** (*Code of Virginia*, § 2.2-4357). Any bidder, offeror or contractor refused permission to participate, or disqualified from, participation in public contracts shall be notified in writing. Prior to the issuance of a written determination of disqualification or ineligibility, the public body shall (i) notify the bidder in writing of the results of the evaluation, (ii) disclose the factual support for the determination, and (iii) allow the bidder an opportunity to inspect any documents which relate to the determination, if so requested by the bidder within five business days after receipt of the notice.

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

If the evaluation reveals that the bidder, offeror or contractor should be allowed permission to participate in the public contract, the public body shall cancel the proposed disqualification action. If the evaluation reveals that the bidder should be refused permission to participate, or disqualified from participation, in the public contract, the public body shall so notify the bidder, offeror or contractor. Such notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within ten days after receipt of the notice by initiating an appeal to the Board in accordance with paragraph 9.7 of this manual or appeals to the appropriate circuit court (*Code of Virginia*, § 2.2-4364).

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

9.4 **Appeal of a Denial of Bid Withdrawal**. (*Code of Virginia*, § 2.2-4358). Any bidder who requests in writing that a bid be withdrawn in accordance with paragraphs 5.13 and 5.14 of this manual will receive a written notice if that request is denied. The denial of bid withdrawal will be final unless the bidder, within ten days after receipt of the decision denying withdrawal, institutes an appeal to the Board in accordance with paragraph 9.7 of this manual or appeals to the appropriate circuit court (*Code of Virginia*, § 2.2-4364). If the Board determines that the decision refusing withdrawal of the bid was arbitrary or capricious, the sole relief shall be withdrawal of the bid.

If no bid bond was posted, prior to appealing, the bidder must deliver to the procuring agency a certified check payable to the Treasurer of Virginia, or a cash bond naming the Commonwealth of Virginia as obligee, in the amount of the difference between the bid sought to be withdrawn and the next low bid. This security shall be released only upon the final determination that the bidder was entitled to withdraw the bid or upon acceptance of the awarded contract by the appealing bidder. The security shall be forfeited to the Commonwealth if the final decision is adverse to the appealing bidder who then fails to accept and enter into the contract or to appeal to a circuit court. In the event the bidder appeals to a circuit court and that court issues a decision adverse to the bidder upholding the Board's decision, the security shall be forfeited.

- 9.5 **Appeal of Nonresponsibility Determination.** (*Code of Virginia*, § 2.2-4359). A bidder found nonresponsible for a particular procurement by the purchasing agency will be notified in writing of the results of the evaluation and disclose the factual support for the determination. If requested by the bidder within five (5) business days after receipt of the notice, the bidder has an opportunity to inspect any documents which relate to the determination. Within ten (10) business days after receipt of the notice, the bidder may submit rebuttal information challenging the evaluation. Within five (5) business days of receipt of the rebuttal information, the purchasing agency shall issue its written determination of responsibility based on all information, with return receipt requested, stating the basis for the determination. A determination of nonresponsibility will be final unless the bidder, within ten days after receipt of the notice, initiates an appeal to the Board in accordance with paragraph 9.7 of this manual or appeals to the appropriate circuit court (*Code of Virginia*, § 2.2-4364).

This 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.

If the Board finds that the decision of the purchasing agency was not an honest exercise of discretion, but rather was arbitrary or capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid, the relief shall be as follows.

- a. If the award has not been made, the bidder's sole relief shall be a finding that the bidder is a responsible bidder for the contract in question.
- b. If the award of the contract has been made but performance on the contract has not begun, the performance of the contract may be enjoined by the Board.
- c. Where the award of the contract has been made and performance of the contract has begun, the procuring agency, not the Board, may elect to terminate the contract upon a finding that this action is in the best interests of the public. In this case, the performing contractor will be compensated for the cost of performance up to the time of termination, as stated in paragraph 7.18 of this manual, but will not be entitled to lost profits.

If action is brought in the appropriate circuit court challenging the determination of nonresponsibility and is found by the court to be a responsible bidder, the court may direct the

public body to award the contract, forthwith, to such bidder in accordance with the requirements of *Code of Virginia*, § 2.2-4364 and the Invitation to Bid.

- 9.6 **Protest of Award or Decision to Award.** (*Code of Virginia*, § 2.2-4360). Any bidder or offeror who wants to challenge an award or a decision to award a contract must submit a written protest in accordance with paragraph 6.6 of this manual within ten days after public notice of the award or the announcement of the decision to award, whichever occurs first. The protest shall include the specific basis for the protest and the relief sought. Any potential bidder or offeror on a contract negotiated on a sole source or emergency basis who desires to protest the award or decision to award such contract shall submit such protest in the same manner no later than ten days after posting or publication of the notice as provided in paragraphs 2.7 or 2.8. The head of the purchasing office will issue a decision in writing within ten days of the written protest. This written decision will be final unless the vendor initiates an appeal to the Board in accordance with paragraph 9.7 of this manual within ten days of the written decision or in the alternative institutes legal action as provided in the *Code of Virginia*, § 2.2-4364.

If the Board finds that the action taken by the purchasing agency was arbitrary or capricious, the relief shall be as follows:

- a. If the award has not been made, the vendor's sole relief shall be a finding to that effect. The purchasing agency will either cancel the proposed award or revise it to comply with the decision of the Board.
- b. If the award of the contract has been made, but performance has not begun, the performance of the contract may be enjoined by the Board.
- c. Where the award of the contract has been made and performance has begun, the purchasing agency, not the Board, may elect to terminate the contract if it finds that this action is in the best interest of the public. The performing contractor will be compensated for the cost of performance up to the time of termination, but will not be entitled to lost profits. Immediately upon receiving notice of termination or learning of the termination order, the performing contractor shall comply with the provisions of paragraph 7.18. If the Board determines, after a hearing which is 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 an act in violation of "Ethics in Public Contracting," as set forth in the *Code of Virginia*, §§ 2.2-4367 through 2.2-4377, the award of the contract to a particular bidder/offeror may be enjoined.

9.7 **Initiation of Appeal to the DGS/DPS Board.**

- a. An appeal to the Board must be initiated by the filing of a notice of appeal within the time limits prescribed in paragraphs 9.3 through 9.6 of this manual. It is not sufficient that notices of appeal be postmarked within the time limits. The appeal must actually be delivered within the time limits. **The Chairman of the Board shall make all decisions regarding the timeliness of the filing and receipt of any appeals to the Board. All decisions regarding the timeliness of the filing and receipt of any appeals to the Board shall be final and not subject to further appeal.** Notice of an appeal to the Board may

be sent by facsimile to 804-371-7877 and will be considered timely if the transmission is received in full within the time limits prescribed in paragraphs 9.3 through 9.6. The original hard copy must be promptly submitted. The appealing party assumes whatever risks are inherent in the selected method of delivery.

- b. The notice must be in writing and state:
 - (1) That an appeal is being filed
 - (2) The agency or institution of the Commonwealth involved in the dispute
 - (3) The decision from which the appeal is being taken
 - (4) The contract number and other identification of the contract
 - (5) The basis for the appeal
 - (6) The relief sought
- c. The notice must be submitted to:
 - (1) Via mail: Procurement Appeals Board
c/o Director
Division of Purchases and Supply
P. O. Box 1199
Richmond VA 23218-1199
 - (2) Via hand delivery: Procurement Appeals Board
c/o Director
Division of Purchases and Supply
1111 East Broad Street
Richmond VA 23219
 - (3) Via email: appealsboard@dgs.virginia.gov
- d. A copy must also be simultaneously delivered or mailed to the purchasing office involved in the procurement action and to the apparent successful vendor. In any appeal which alleges fraud, corruption, or an act in violation of *Code of Virginia*, § 2.2-4367 et seq., the appellant shall notify all other bidders, which notice may be by U. S. Mail, mailed on the date the notice of appeal is filed.
- e. The Board may waive errors or a lack of complete information in the contents of the notice of appeal in the interest of justice if the notice is sufficient to make known the nature of the appeal and the agency involved. The Board may not waive the requirement that the appeal be filed within the prescribed time limits.

9.8 **Exhaustion of Administrative Procedures.** A vendor need not utilize the foregoing appeal procedure of the Board, but if the vendor initiates this procedure, it must be exhausted prior to

instituting legal action concerning the same procurement transaction unless the procuring agency agrees otherwise (*Code of Virginia*, § 2.2-4364F).

9.9 **Effect of the Appeal on Procurement Proceedings.**

- a. Pending final determination of a protest or appeal, the validity of a contract awarded and accepted in good faith in accordance with Chapter 43, Title 2.2 of the *Code of Virginia* shall not be affected by the fact that a protest or appeal has been filed (*Code of Virginia*, § 2.2-4361).
- b. An award need not be delayed for the period allowed a bidder or offeror to protest or appeal, but in the event of a timely protest or appeal as provided in § 2.2-4360, or the filing of a timely legal action as provided in § 2.2-4364, no further action to award the contract will be taken unless there is a written determination by the purchasing agency that award of the contract is necessary to protect the public interest or unless the bid or offer would expire (*Code of Virginia*, § 2.2-4362). When such a written determination is made, copies shall be sent to all parties to a protest or appeal, and in the case of an appeal, to the applicable Procurement Appeals Board.

9.10 **Time and Place of Hearings.** The parties will be given at least a ten day notice of the time and place of the appeal hearing. Appeals may be heard earlier upon the consent of all parties. In scheduling hearings, the Board will consider but will not be bound by the desires of the parties. It will also bear in mind the need for completion of the appeals process in a timely manner.

9.11 **Parties to the Appeal.**

- a. Parties to the appeal shall consist of the following if they appear at the appeal hearing and ask to be made a party:
 - (1) In the case of an appeal from a determination of ineligibility for or disqualification from participation in public contracts, or from a determination of nonresponsibility:
 - (a) The party declared ineligible or disqualified
 - (b) The agency or institution of the Commonwealth which made the decision, and the Division of Purchases and Supply
 - (2) In the case of an appeal from the denial of a request to withdraw a bid:
 - (a) The bidder requesting that his or her bid be withdrawn
 - (b) The purchasing agency
 - (c) The agency or institution for which the procurement is being made if it is not the purchasing agency
 - (3) In the case of a vendor protesting an award or a decision to award a contract:

- (a) The vendor appealing
 - (b) The purchasing agency
 - (c) The agency for which the procurement is being made, if it is not the purchasing agency
- b. The Board may, on its own motion, make any of the above a party, even though they fail to appear or to request to be made a party, if it is necessary that they be heard for complete resolution of the matter on appeal. In cases where the Division of Purchases and Supply is not a party, it may appear before the Board and comment upon the matter being appealed and the implications of possible decisions upon the purchasing procedures of the Commonwealth.

9.12 **Hearing Procedures.** Hearings before the Procurement Appeals Boards are not trials and will not be conducted as such. The Administrative Process Act does not apply to these hearings (*Code of Virginia*, § 2.2-4001). The hearings will be informal, and each party will be given a reasonable period of time to state their position. Any party may be represented by legal counsel at the hearing. Rules of evidence do not apply, except that the Board may exclude evidence which is irrelevant or redundant and may limit testimony and argument as necessary to reasonably expedite the proceedings.

Witnesses may be called to testify, but the Board does not have subpoena power, and an oath will not be administered.

The Board may ask questions at any time but may not question any of the parties in closed session. The Board's chairperson may limit the number of witnesses and may permit or control the discussion to the extent that the Board, in its opinion, determines that the discussion will contribute to the identification and resolution of the issues.

Hearings will be open to the public, but the Board shall adjourn the hearing to deliberate and reach its decision in private.

Hearings will usually proceed in the following order subject to the desires of the Board:

- a. The appealing party will state its reasons for appealing and the desired relief. Points of contention between the vendor and the public body will be limited to those points raised to the public body by the vendor in its letter of protest.
- b. The appealing party will present its witnesses and evidence. The Board and other parties will be able to ask questions of each witness.
- c. Other parties may present their responses, the relief they desire, if any, and their witnesses and other evidence in the order determined by the Board. Questions may be asked of their witnesses by the Board or other parties to the appeal.

- d. When all evidence and final arguments of the parties have been presented, the Board shall deliberate in private session.

The hearings will be electronically recorded and the recordings retained for sixty days. If judicial review of the Board's decision is instituted, the recording will be retained until the judicial review has been completed. Any party may provide a court reporter at its own expense. If a court reporter is used, transcripts of the hearing shall be given to the Board at no expense upon its request. The Board may make such a transcript a part of its record. If the Board determines the transcript to be inaccurate or incomplete, it shall note for the record any inaccuracies or incomplete transcription of the hearing.

- 9.13 **Small Purchase Procedures.** If an appeal or protest involves the award of a contract or withdrawal of a bid on a contract for less than \$50,000, the vendor may request a small purchase appeals hearing. For such a hearing all appropriate provisions of this chapter will apply, except that the hearing may be conducted before a single member of the Board, designated by the chairperson, when the full Board is not scheduled to meet. The hearing may be held as soon as a member of the Board is available, and the notification time for the hearing may be shortened at the discretion of the chairperson.
- 9.14 **Administrative Support.** The Division of Purchases and Supply will furnish administrative support required including but not limited to arranging for a board hearing room, electronic recording facilities and supplies, and the preparation and mailing of hearing materials.
- 9.15 **Board's Decision.** The Board hearing the appeal will issue a written decision within ten (10) business days of the hearing date except when it must await a transcript of the hearing, in which case it will issue a written decision within ten (10) business days of receiving the transcript. The Board's decision will include a brief statement of the relevant facts, as the Board determined them to be true, which caused it to make its decision. This will be called the "Findings of Fact." The Board will then state its decision, giving in such detail as it considers necessary the reasons for its decision. The decision will be signed by the chairperson or designee.

Copies of the decision will be mailed to the parties and the Director of DPS, and will be available to other interested persons upon request.

- 9.16 **Judicial Review.** Any party to a hearing before the Board will be entitled to institute judicial review if such action is brought within thirty days after receipt of the Board's written decision or within thirty days of attempted postal delivery of the Board's written decision to the last mailing address provided to the Board by the party.

The findings of fact by the Board will be final and conclusive and will not be set aside by a Court unless fraudulent, arbitrary or capricious, or so grossly erroneous as to imply bad faith. No determination on an issue of law will be final if appropriate legal action is instituted in a timely manner (*Code of Virginia*, § 2.2-4365).

- 9.17 **Alternative Dispute Resolution (ADR)**

- a. Alternative Dispute Resolution is designed to increase the opportunity for relatively inexpensive and expeditious resolution of contract disputes. If an agency's final decision denying a contractual claim is challenged, the contractor and the agency are encouraged to resolve the dispute through the informal ADR process described below. However, participating in the ADR process does not relieve the contractor from complying with the filing deadlines for claims listed in 7.19, and does not imply that the agency's previously-issued decision is suspended or no longer final.
- b. The contractor requesting ADR shall give written notice to the agency purchasing office identifying the portions of the agency's decision that are in dispute and requesting that ADR be used. If the agency agrees to ADR, the agency and contractor shall each appoint a representative to participate in ADR on its behalf. Each party's representative shall be a senior manager who is not an attorney and who was not previously involved in the dispute. Each party shall furnish to the other party all non-privileged documents and information with respect to the dispute that either party believes to be appropriate and germane. The representatives may then negotiate in an effort to resolve the dispute without the need for legal counsel. The use of a facilitator to accelerate the resolution process is encouraged.
- c. No obligation to negotiate or continue negotiating shall be inferred from this paragraph 9.17 or from the parties' agreement to use ADR, and each party shall remain free to discontinue ADR at any time. No agreement shall be deemed to arise from any communication during the ADR process, unless the agreement is reduced to writing and signed by duly-authorized representatives of both parties. Any settlement or compromise of claim must be approved by the Commonwealth's Office of the Attorney General.
- d. Any compensation and expenses paid to the facilitator shall be shared equally by the two parties. In no event shall either party be entitled to reimbursement from the other party for any other cost incurred or effort expended as a result of the ADR process.

APPENDIX A

DEFINITIONS

Absolute Preference: An absolute preference is one in which a state will only consider bids from resident contractors residing within that state.

Acquisition Services Division (ASD): The Acquisition Services Division is a division of the Department of Information Technology (DIT). ASD is responsible for the establishment of all state contracts for ADP goods and services and all telecommunications equipment and services. In addition, ASD provides unlimited support to DIT's Data Center in its role as a Service Bureau to all agencies, institutions and localities of the Commonwealth of Virginia.

Administrative Lead Time: Administrative lead time is that period of time from initiation of the requirement by the user to issuance of an award.

Affiliate: 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.

Agency: For the purpose of this manual, agency means any department, authority, board, post, commission, division, institution, or office of the Commonwealth.

Agency Purchase Order (APO): An Agency Purchase Order is a form used by an agency to order goods, services and printing available on a State or term contract, or to procure goods or services from non-contract sources within its delegated purchase authority.

Alternative Dispute Resolution (ADR): any procedure used voluntarily to resolve issues in controversy without the need to resort to litigation. These procedures include, but are not limited to, mediation, fact-finding, and arbitration.

Appeal: Action taken by a bidder, offeror (actual or prospective) or by a contractor to seek a hearing before a disinterested person or panel or in an appropriate circuit court challenging a decision in accordance with Sections 2.2-4364 or 2.2-4365 of the *Virginia Public Procurement Act*.

Automated Data-Processing Equipment (ADPE): Computers and processors, including microcomputers, array processors and floating point processors; memory boards and systems; disk and magnetic tape devices, including disk packs and data modules; CRT display equipment, including graphics terminals, printers and teleprinters; plotters and digitizers; encoders, punches and readers; peripheral controllers, data converters, interface boards and tape certifiers; and data communications equipment, including communications controllers or front-end processors and network analyzers, testers, diagnostic systems, acoustic couplers, disk cartridges and diskettes.

Bartering: The act of exchanging one good or service for another, without the exchange of money.

Benchmark: A standard or point of reference used in measuring or judging quality, value, performance, price, etc.

Best and Final Offer (BAFO): The last offer provided by an offeror in response to a Request for Proposals and all further negotiation ceases. When the provision for receiving best and final offers is included in an RFP, offerors are given the opportunity to submit a best and final offer after negotiations have been held. After the best and final offers are submitted, no further negotiations shall be conducted with any of the offerors and the decision to award is based on rescoring of the best and final offers.

Best Value: The overall combination of quality, price, and various elements of required services that in total are optimal relative to a public body's needs, as predetermined in a solicitation. Best value concepts may be applied when procuring goods and nonprofessional services, but not construction or professional services. The criteria, factors, and basis for the consideration of best value and the process for the consideration of best value shall be as stated in the procurement solicitation (*Code of Virginia*, § 2.2-4301).

Best Value Acquisition (BVA): A process used to acquire goods and nonprofessional services in which best value concepts will be applied. The best value award is based on evaluation criteria as stated in the solicitation with consideration of price of the goods and nonprofessional services that offer the greatest benefit(s) in meeting the needs of the public body.

Bid: A competitively priced offer made by an intended seller, usually in reply to an Invitation for Bids (IFB). A price offer made at a public auction.

Bid Bond: n insurance agreement in which a third party agrees to be liable to pay a certain amount of money in the event a selected bidder fails to accept the contract as bid.

Bidder: One who submits a competitively priced offer in response to an Invitation for Bids (IFB).

Blanket Purchase Agreement (BPA): An arrangement under which a purchaser contracts with a vendor to provide for a purchaser's frequent, repetitive, small-order requirements for an item(s) or a service, on an as-required and over-the-counter basis. Properly prepared, such an arrangement sets a limit on the period of time it is valid and the maximum amount of money which may be spent at one time, or within a specified period, and specifically identifies those persons authorized to order or accept goods. The BPA may also contain other terms and conditions, such as the discount or the specific price list that applies to purchases made under the agreement and what items and services are included (or excluded) under the agreement.

Boiler Plate: General Terms and Conditions.

Broker: A person or agent acting as an independent manufacturer's or distributor's representative dealing in products or goods normally sold through the brokerage process in which there is a previously established relationship with the supplier before the bid is submitted.

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

Charge Card: In the context of this manual, the state-approved Small Purchase Charge Card (SPCC), used for small purchases (\$5,000 or less) of frequent, over-the-counter, Maintenance, Repair, and Operating (MRO) items used in the daily operations of any state activity, and for placing orders up to \$5,000 against term contracts.

Claim: a written assertion or demand, by one of the parties to a contract, which seeks, as a contractual right, payment of money, adjustment of contract terms, or other relief, for injury, loss, or damage arising under or relating to the contract.

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

Collusive Bidding: An unethical and illegal practice in which suppliers act in collusion to fix their bids in a collectively advantageous manner.

Commodity Code: A system of symbols (alpha, numeric or other) used to represent words to describe a commodity, e.g., Class 410 Furniture, Hospital - Specialized, Item 36, Incubators, Infant (410-36); 904 Services, Client, Item 02, Ambulance Service (904-02), to facilitate data sort capabilities of purchased goods/services for the purpose of analysis.

Competitive Bidding: The offer of firm bids by individuals or firms competing for a contract, privilege, or right to supply specified services or goods.

Competitive Negotiation: 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 Bid: A bid submitted in a sealed envelope to prevent disclosure of its contents before the deadline set for the receipt of all bids. Sealed bidding procedures are required on procurements of \$50,000 or more. Competitive sealed bidding shall not be used to contract for professional services.

Confirming Purchase Order: A purchase order issued after the fact by a procuring agency 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".

Consideration: Something of value given for a promise to make the promise binding. Consideration is one of the essential elements of a contract.

Construction: Construction shall mean building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavation, grading or similar work upon real property (*Code of Virginia*, § 2.2-4301).

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

Consulting Services: Advice or assistance of a purely advisory nature provided for a predetermined fee to an agency by an outside individual, firm, or organization under contract to that agency.

Consumer Price Index (CPI): The Consumer Price Index is a measure of the average change in prices over time in a fixed market basket of goods and services. Two CPIs are published: 1) the CPI for All Urban Consumers (CPI-U) which covers about 80% of the total populations and 2) the CPI for Urban Wage Earners and Clerical Workers (CPI-W) which covers 32% of the total population. The CPI is based upon prices of food, clothing, shelter, transportation, medical care, and other goods and services that people buy for day-to-day living.

Contract: When used as a noun in this Manual, contract refers to an agreement enforceable by law, between two or more competent parties, to do or not to do something, not prohibited by law, for a consideration. A contract is any type of agreement or order for the procurement of goods or services. As a verb, contract has its usual legal sense, signifying the making of an agreement for consideration.

Contract Administration: 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: 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, Cost-Plus-A-Fixed-Fee: A cost-reimbursement type contract that provides for the payment of a fixed fee to the contractor. The fixed fee, once negotiated, does not vary with the actual cost but may be adjusted as a result of any subsequent changes in the scope of work or services to be performed under the contract.

Contract, Cost-Plus-A-Percentage-Of-Cost: A form of contract which provides for a fee or profit at a specified percentage of the contractor's actual cost of accomplishing the work. Except in case of emergency affecting the public health, safety or welfare and for some insurance contracts, no public contract shall be awarded on the basis of cost plus a percentage of cost (*Code of Virginia*, § 2.2-4331).

Contract, Design-Build: 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.

Contract, Fixed Price: 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: 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: 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: 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. Such contracts are usually for one year or more in duration.

Contract, Service: 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: 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.

Contract Officer, Purchase Officer, Buyer: A State employee whose primary assignment is purchasing goods or services.

Contractor: An individual or firm that has entered into an agreement to provide goods or services to the Commonwealth.

Cooperative Procurement: 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.

CORPRINT: Department of Corrections, Industrial Enterprises, Printing Facilities.

Cure Notice: A notice, either oral or in writing, that informs the Contractor that he or she is in default and states what the Contractor has to do to correct the deficiency. If the notice is oral it shall be confirmed in writing.

Debarment: An action taken by the Director of the Division of Purchases and Supply (DPS), or designee (debarring officials), within the scope of their procurement authority, to exclude individuals or firms from contracting with state agencies for particular goods or nonprofessional services for specified periods of time (*Code of Virginia*, § 2.2-4321).

Default: Failure to comply with the terms and conditions of a contract.

Design Specification: A purchase specification setting forth the essential characteristics that an item bid must possess to be considered for award.

Disadvantaged Business: 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.

Dispute: disagreement between parties to a contract over performance or other contract term requiring administrative action to resolve. See protest, alternative dispute resolution.

Division of Purchases and Supply (DPS): The Division of Purchases and Supply is a division of the Department of General Services. DGS/DPS is the State's centralized purchasing agency for materials, equipment, supplies, nonprofessional service and printing. DGS/DPS prescribes the rules and regulations for the purchase of materials, supplies, equipment, nonprofessional services, and printing (*Code of Virginia*, § 2.2-1109 et al).

Drug-free Workplace: A site for the performance of work done in connection with a specific contract awarded to a contractor in accordance with the *VPPA*, 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 a contract.

Emergency: An occurrence of a serious and urgent nature that demands immediate action.

Ethics: Pertaining to or relative to moral action, conduct, motive or character; as ethical emotion; professionally right or befitting; conforming to professional standards of conduct. The *Virginia Public Procurement Act (VPPA)* covers “Ethics in Public Contracting” (*Code of Virginia*, §§ 2.2-4367 through 2.2-4377).

Evaluation of Bids: The process of examining a bid after opening to determine the bidder’s responsibility, responsiveness to requirements, and other characteristics of the bid relating to selection for award.

Expedite: The act of contacting a supplier or carrier with the goal of *speeding up* the delivery date (see also Follow-Up).

Fair Market Value: Lowest purchase price paid by the state for like items or services purchased in a similar quantity within the last six months. If this information is not available, then the lowest of three phone quotes verified by price indices or purchases made by other government entities will be used.

Follow-Up: An activity that monitors the status of a purchase to ensure that specified delivery schedules are met.

Force Majeure: An irresistible or extraordinary force, natural event, or effect that cannot be reasonably anticipated or foreseen, prevented, or controlled. An act of God.

General Terms and Conditions: Standard clauses and requirements incorporated into all solicitations (IFB/RFP) and resulting contracts which are derived from laws, or administrative procedures of the government agency. (Also called “Boiler Plate.”)

Goods: Material, equipment, supplies, printing, and automated data processing hardware and software (*Code of Virginia*, § 2.2-4301).

Grant (or Grant-in-Aid): For the purposes of this manual, these are fund transfers made by one party to another (e.g., Federal to state or local government) for the procurement of goods and/or services, that may be undertaken for the purpose of a public interest, benefit, or undertaking, as specified under the terms of the agency granting the use of funds.

Hazardous Material: A substance or material which has been determined by the U. S. Secretary of Transportation to be capable of posing an unreasonable risk to health, safety, and property when transported in commerce.

Informality: A minor defect or variation of the bid or proposal from the exact requirements of the Invitation for Bids or the Request for Proposals, which does not affect the price, quality, quantity, or delivery schedule for the goods, services or construction being procured (*Code of Virginia*, § 2.2-4301).

Inspection: Examination and testing of goods and services to determine whether the goods and services furnished conform to contract requirements.

Invitation for Bids (IFB): A document, containing or incorporating by reference the specifications or scope of work and all contractual terms and conditions, that is used to solicit written bids for a specific requirement for goods or nonprofessional services. This type of solicitation is also referred to as an Invitation to Bid.

Late Bid or Proposal: A bid or proposal which is received at the place designated in the Invitation for Bids or Request for Proposals after the deadline established by the solicitation.

Latent Defect: A deficiency or imperfection that impairs worth or utility that cannot be readily detected from visual examination of a product. Examples would be the use of non-specification materials in manufacture, or missing internal parts such as a gasket, gear, or electrical circuit, etc.

Logistics: The process of planning, implementing, and controlling the efficient, effective flow and storage of goods, services, and related information from point of origin to point of consumption for the purpose of conforming to customer requirements.

Life-Cycle Costing: A cost-analysis tool which incorporates not only the purchase price of a piece of equipment, but all operating and related costs over the life of the item, including maintenance, down time, energy costs, etc., as well as salvage value.

Liquidated Damages: 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: “Minority” means an individual who is a citizen of the United States or a non-citizen who is in full compliance with United States immigration law and who satisfies one or more of the following definitions:

“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.

“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 Marianas, 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.

“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.

“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: A business concern that is at least 51% owned by one or more minority individuals or in the case of a corporation, partnership, or limited liability company or other entity, at least 51% of the equity ownership interest in the corporation, partnership, or limited liability company or other entity is owned by one or more minority individuals and both the management and daily business operations are controlled by one or more minority individuals.

Multiple Awards: The award of multiple contracts for goods or services, meeting the same specifications, resulting from one solicitation. When a Multiple Award clause is included in an Invitation for Bids/Request for Proposals, awards may be made to more than one bidder/offeror (*Code of Virginia*, § 2.2-4301). This is appropriate in situations where the award of a single contract would be impractical and awards are limited to the least number of suppliers necessary for a workable contract program.

Must, Shall: As used in specifications or requirements of a Request for Proposals (RFP), the terms "must" and "shall" identify requirements whose absence will have a major negative impact on the suitability of the proposed solution. Items labeled as "should" or "may" are highly desirable, although their absence will not have a large impact and would be useful, but are not necessary.

Negotiation: A bargaining process between two or more parties, each with its own viewpoints and objectives, seeking to reach an agreement, or settlement of, a matter of common concern, on terms that are mutually beneficial and satisfactory to both.

Non-Competitive Negotiation: The process of arriving at an agreement through discussion and compromise, when only one source is practicably available.

Nonprofessional Services: Any services not specifically identified as professional services in the definition of professional services (*Code of Virginia*, § 2.2-4301).

Nonprofit Sheltered Workshops and Nonprofit Organizations Serving the Handicapped: A work-oriented rehabilitative facility certified by the Department of Labor (DOL) under Statutory Provision Section 14 (C) Fair Labor Standards Act, with a controlled working environment and individual goals which utilizes work experience and related services for assisting the handicapped person to progress toward normal living and a productive vocational status (*Code of*

Virginia, § 2.2-4301). Nonprofit sheltered workshops and nonprofit organizations are also referred to as Employment Services Organizations (ESOs).

Notice of Award: A Notice of Award is written notification stating that a vendor has received an award by the State.

Notice of Intent to Award: The Notice of Intent to Award is a written notice, or bid tabulation sheet 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.

Offeror: A person who makes an offer in response to a Request for Proposals.

Order/Ship Time (OST): Order/Ship Time is the time after award required by suppliers to fill an order and ship by designated means (truck, rail, or air) to the delivery point.

Payment Bond, For Labor and Material: A bond required of a contractor to assure fulfillment of the contractor's obligation to pay all persons supplying labor or materials in the performance of the work provided for in the contract.

Performance Bond: A contract of guarantee executed in the full sum of the contract amount subsequent to award by a successful bidder to protect the government from loss due to his/her inability to complete the contract in accordance with its terms and conditions.

Performance Specification: A specification setting forth performance requirements that have been determined to be necessary for the item involved to perform and last as required.

Potential Bidder or Offeror: A person who, at the time an agency awards or proposes to award a contract, is engaged in the sale or lease of goods, or the sale of services, insurance or construction of the type to be procured under such contract, and who at such time is eligible and qualified in all respects to perform that contract, and who would have been eligible and qualified to submit a bid or proposal had the contract been procured through competitive sealed bidding or competitive negotiation (*Code of Virginia*, § 2.2-4301).

Pre-bid or Pre-proposal Conference: Meeting held with prospective bidders or offerors prior to submission of bids or proposals, to review, discuss, and clarify technical considerations, specifications, and standards relative to the proposed procurement.

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

Printing: The process or business of producing printed material by means of a printing press, copier or similar means or all copies of a publication produced by such means.

Procurement: The procedures for obtaining goods or services, including all activities from the planning steps and preparation and processing of a requisition, through receipt and acceptance of delivery and processing of a final invoice for payment.

Professional Services: Shall mean work performed by an independent contractor within the scope of the practice of accounting, actuarial services, architecture, land surveying, landscape architecture, dentistry, law, medicine, optometry, pharmacy, or professional engineering. "Professional Services" shall also include services of an economist procured by the State Corporation Commission (*Code of Virginia*, § 2.2-4301).

Proposal: An offer made by one party to another as a basis for negotiations, prior to the creation of a contract.

Proprietary Specification: A specification that restricts the acceptable product(s) or service(s) to that of one or more manufacturer(s) or vendor(s). A common example would be the use of a "brand name" specification that would exclude consideration of proposed "equals." Although all sole source specifications are proprietary, all proprietary specifications are not sole source. Proprietary items may be available from several distributors through competitive bidding.

Protest: A written complaint about an administrative action or decision brought by a bidder or offeror to the appropriate administrative section with the intention of receiving a remedial result.

Public Bid Opening: The process of opening and reading bids at the time and place specified in the Invitation for Bids and in the presence of anyone who wishes to attend.

Public Body: In the context of this manual, any state-funded agency that is required to follow the provisions of the *Code of Virginia* and the *Virginia Public Procurement Act (VPPA)*, in the course of their procurement activities.

Public Telecommunications Services: Public telecommunications are non-commercial educational or cultural radio and television programs and related instructional or informational material that may be transmitted by means of electronic communications (see also “Telecommunications Services”).

Purchase Order: A document used by DGS/DPS to execute a purchase transaction with a vendor. It serves as notice to a vendor that an award has been made and that performance can be initiated under the terms and conditions of the contract.

Purchasing Agency: A state agency or institution purchasing goods or services.

Qualified Contractors List (QCL): A list of contractors whose capability to provide a service has been evaluated and approved based on written prequalification procedures.

Qualified Products List (QPL): A list of products that have been tested and approved based on written prequalification procedures.

Regular Dealer: A person or firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and sold to the public in the usual course of business.

Request for Information (RFI): An informal document issued when an agency is not aware of the products available in the market which may satisfy its requirements. The use of an RFI does not require a purchase requisition, however a RFI may result in the development of a requisition, or the issuance of an IFB or RFP after an agency determines the types of products that are available which will satisfy its requirements. An RFI cannot be made into an agreement.

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.

Responsible Bidder or Offeror: A person or firm who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability which will assure good faith performance, and who has been prequalified, if required (*Code of Virginia*, § 2.2-4301).

Responsive Bidder: A person or firm who has submitted a bid which conforms in all material respects to the Invitation for Bids (*Code of Virginia*, § 2.2-4301).

Restocking Charge: Charges incurred by a purchasing agency for any material goods that are returned to a vendor or seller and are associated with the normal cost and expense that must be incurred by the vendor for accepting the return of an item to inventory (see section 10.8).

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. The purchase of goods or nonprofessional services, but not construction or professional services, may be made by reverse auctioning.

Sealed Bid: A bid which has been submitted in a sealed envelope to prevent its contents from being revealed or known before the deadline for the submission and opening of all bids.

Services: Services are any activities 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 (*Code of Virginia*, § 2.2-4301).

Set-asides: Reserving a procurement transaction exclusively for a specific group. The purpose of Small business set-asides is to award certain contracts exclusively to small businesses.

Shall, Must: As used in specifications or requirements of a Request for Proposals (RFP), the terms "must" and "shall" identify requirements whose absence will have a major negative impact on the suitability of the proposed solution. Items labeled as "should" or "may" are highly desirable, although their absence will not have a large impact and would be useful, but are not necessary.

Should, May: As used in a Request for Proposals (RFPs), the terms "should" or "may" are highly desirable, although their absence will not have a large impact and would be useful, but are not necessary.

Single Source: A single response to a competitive solicitation wherein competition was available but only one response was received (see paragraph 2.4i).

Small Business: An business independently owned or operated by one or more persons who are citizens of the United States or non-citizens who are in full compliance with United States immigration law, which, together with affiliates, has 250 or fewer employees, or average annual gross receipts of \$10 million or less averaged over the previous three years.

Small Business Subcontracting Plan: A completed form which bidders or offerors provide their: 1) DMBE-certified small business certification status, or 2) small business utilization plan in response to a specific solicitation.

Software: 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: A product or service which is practicably available only from one source.

Solicitation: An Invitation for Bids (IFB), a Request for Proposals (RFP), Quick Quote, Faxback Request, telephone calls, or any other document issued by the state to obtain bids or proposals for the purpose of entering into a contract.

Special Terms and Conditions: Special clauses pertaining to a specific procurement which may supplement or in some cases supersede one or more general terms and conditions, e.g., Award Clause, Extension of Contract.

Specification: 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.

Sponsorship: Any monetary or non-monetary benefit exceeding nominal value and received by a Commonwealth public body from a non-Commonwealth entity not excluding funding from vendors in support of conferences or other events.

Spot Purchase: A one-time purchase made in the open market. If it is under the small purchase threshold, it will be made in accordance with the applicable small purchase procedures. If it is over the small purchase threshold, it will be made by competitive sealed bidding or by an exception thereto authorized by law.

Subcontractor: 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: Property which is in excess of the needs of an agency 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. Surplus Property must be disposed of in accordance with *Code of Virginia*, § 2.2-1124.

SWAM: The acronym SWAM, includes small businesses, women-owned businesses and minority-owned businesses. Refer to individual definitions contained in this Appendix.

Technical Proposal: An unpriced proposal which sets forth in detail that which a vendor proposes to furnish in response to a solicitation.

Technical Specifications: Specifications that establish the material and performance requirements of goods and services.

Telecommunications Equipment: Defined as, but not limited to: channel service units, data compression units, line drivers, bridges, routers, and Asynchronous Transfer Mode switches (ATM), multiplexors and modems. Also, private branch exchanges (PBX), Integrated Services Digital Network (ISDN) terminal equipment, voice mail units, automatic call distribution (ACD), voice processing units and key systems. Video communications products such as: coders, multi-point conferencing units and inverse multiplexors.

Telecommunications Services: These services include, but are not limited to; data communication services, such as point-to-point and multipoint circuits, Internet, Frame Relay SMDS, ATM, and dial up lines, and voice communications services such as Centrex, business/private lines and WATS lines including 800 services, tie and access lines, long distance services, voice mail, pay phones, wireless communications and cellular services (see also "Public Telecommunications Services").

Term Contracting: A technique by which a source of supply is established for a specific period of time. Term contracts are established based on indefinite quantities to be ordered "as needed," although such contracts can specify definite quantities with deliveries extended over the contract period. Also see Contract, Requirements Type.

Termination For Convenience: The termination by a Commonwealth purchasing office, at its discretion, of the performance of work in whole or in part and makes settlement of the contractor's claims in accordance with appropriate policy and procedures.

Termination For Default: Action taken by a purchasing office to order a contractor to cease work under the contract, in whole or in part, because of the contractor's failure to perform in accordance with the contract's terms and conditions.

Unsealed Bid: An unsealed written offer conveyed by U. S. Mail, commercial courier service, facsimile, e-mail, Quick Quote, or other means. The bids are normally opened and recorded as received.

Used Equipment: Equipment which has been previously owned and used and is offered "where is" "as is." It does not include demonstration, factory rebuilt or remanufactured equipment marketed through normal distribution outlets.

Value Analysis: A systematic and objective evaluation of the value of a good or service, focusing on an analysis of function relative to the cost of manufacturing or providing the item or service. Value analysis provides insight into the inherent worth of the final good or service, possibly altering specification and quality requirements that could reduce costs without impairing functional suitability.

Vendor: One who sells goods or services.

Virginia Public Procurement Act: Chapter 43 of Title 2.2, *Code of Virginia*, which enunciates the public policies pertaining to governmental procurement from nongovernmental sources.

Will: As used in an Invitation for Bids or Request for Proposals, the word "will" is normally used to convey an obligation incurred by the agency or owner.

Women-Owned Business: A business concern that is at least 51% owned by one or more women who are citizens of the United States or non-citizens who are in full compliance with United States immigration law, or in the case of a corporation, partnership, or limited liability company or other entity, at least 51% of the equity ownership interest is owned by one or more women who are citizens of the United States or non-citizens who are in full compliance with United States immigration law, and both the management and daily business operations are controlled by one or more women who are citizens of the United States or non-citizens who are in full compliance with United States immigration law.

Written; writing; writings; in writing: The words "written," "writing," "writings," and "in writing" shall include any representation of words, letters, symbols, numbers, or figures, whether (i) printed or inscribed on a tangible medium or (ii) stored in an electronic or other medium and retrievable in a perceivable form and whether an electronic signature authorized by Chapter 42.1 (§et seq.) of Title 59.1 is or is not affixed (*Code of Virginia*, § 1-13.32).

APPENDIX B

Section I

TERMS AND CONDITIONS & INSTRUCTIONS TO VENDORS

These terms and conditions are incorporated by reference in the eVA purchase order. These terms and conditions apply to purchases between the agency or institution and the contractor, unless otherwise modified in writing on the face of the PO.

1. This contractual agreement is subject to the terms and conditions of the Commonwealth of Virginia *Vendors Manual* and any revisions thereto, as published by the Department of General Services, Division of Purchases and Supply.
2. Goods or Services delivered must be strictly in accordance with bid referred to and shall not deviate in any way from terms, conditions or specifications of the bid. Equipment, materials and/or supplies delivered on this order shall be subject to inspection and test upon receipt. If rejected, same shall remain the property of the vendor.
3. Purchase Order number shall be shown by vendor on all related invoices, delivery memoranda, bills of lading, packages and/or correspondence.
4. A SEPARATE INVOICE FOR THIS PURCHASE ORDER OR FOR EACH SHIPMENT THEREON SHALL BE RENDERED IMMEDIATELY FOLLOWING SHIPMENT. ALL COPIES SHALL BE FORWARDED DIRECT TO AGENCY AT INVOICE ADDRESS SHOWN.
5. STATE SALES AND USE TAX CERTIFICATE OF EXEMPTION, FORM ST-12 WILL BE ISSUED UPON REQUEST, IF YOU DO NOT HAVE SAME ON FILE.
6. DELIVERIES AGAINST THIS ORDER MUST BE FREE OF EXCISE OR TRANSPORTATION TAXES, EXCISE TAX EXEMPTION REGISTRATION NO. 54-73-0076K MAY BE USED WHEN REQUIRED.
7. In the absence of other contractual terms, payment shall be due 30 days after receipt of proper invoice, or material/service, whichever is the later.
8. If discount for prompt payment is allowed, the discount period will begin on the date of receipt of proper invoice, or material, whichever is the later.
9. In case of default by the successful bidder, or failure to deliver the supplies or services ordered by the time specified, the Commonwealth after due notice (oral or in writing), may procure them from other sources and hold vendor responsible for any excess cost occasioned thereby.
10. No substitution, change or deviation shall be made without written authority from the Commonwealth by Purchase Order Change.

11. Vendors and contractors providing goods to the Commonwealth of Virginia under this order herewith assure the Commonwealth that they are conforming to the provision of the *Civil Rights Act of 1964* as amended, as well as the *Virginia Fair Employment Contracting Act of 1975* as amended, where applicable.
12. This Purchase Order/Contract shall be governed in all respects, whether as to validity, construction, capacity, performance or otherwise by the laws of the Commonwealth of Virginia.
13. All prices unless otherwise specified are net F.O.B. Destination with transportation charges prepaid.
14. If shipment is made by freight or express and charges added to invoice, the original bill of lading properly receipted shall accompany invoice. All charges must be prepaid.
15. Vendors and contractors performing work on Commonwealth owned or leased facilities or property shall, during the entire term of the contract, maintain at a minimum, the insurance coverages as listed in the *Vendors Manual* and any revisions thereto.
16. eVA Transaction Fee: Purchase orders processed through the eVA procurement system will be subject to an eVA transaction fee set forth on the eVA Fee Schedule published on the eVA website (www.eva.virginia.gov). This fee will be invoiced to vendors by the eVA billing division.

**REQUIRED GENERAL TERMS AND CONDITIONS
GOODS AND NONPROFESSIONAL SERVICES**

Section II

- A. *VENDORS MANUAL*
- B. APPLICABLE LAWS AND COURTS
- C. ANTI-DISCRIMINATION
- D. ETHICS IN PUBLIC CONTRACTING
- E. IMMIGRATION REFORM AND CONTROL ACT OF 1986
- F. DEBARMENT STATUS
- G. ANTITRUST
- H. MANDATORY USE OF STATE FORM AND TERMS AND CONDITIONS
- I. CLARIFICATION OF TERMS
- J. PAYMENT
- K. PRECEDENCE OF TERMS
- L. QUALIFICATIONS OF BIDDERS OR OFFERORS
- M. TESTING AND INSPECTION
- N. ASSIGNMENT OF CONTRACT
- O. CHANGES TO THE CONTRACT
- P. DEFAULT
- Q. TAXES
- R. USE OF BRAND NAMES
- S. TRANSPORTATION AND PACKAGING
- T. INSURANCE
- U. ANNOUNCEMENT OF AWARD
- V. DRUG-FREE WORKPLACE
- W. NONDISCRIMINATION OF CONTRACTORS
- X. eVA BUSINESS-TO-GOVERNMENT VENDOR REGISTRATION
- Y. AVAILABILITY OF FUNDS
- Z. SET-ASIDES
- AA. BID PRICE CURRENCY

These General Terms and Conditions are required for use in written solicitations issued by state agencies for procurements that are subject to this manual unless changed, deleted or revised by the legal advisor to your agency. You should edit the wording to fit the type of solicitation (IFB or RFP) by either deleting or lining out the inappropriate words in all parenthesis. For service contracts clauses, Q, R, and S are normally not applicable and may be omitted. For goods contracts, omit clause T.

- A. **VENDORS MANUAL:** This solicitation is subject to the provisions of the Commonwealth of Virginia *Vendors Manual* and any changes or revisions thereto, which are hereby incorporated into this contract in their entirety. The procedure for filing contractual claims is in section 7.19 of the *Vendors Manual*. A copy of the manual is normally available for review at the purchasing office and is accessible on the Internet at www.dgs.virginia.gov/dps under "Manuals."
- B. **APPLICABLE LAWS AND COURTS:** This solicitation and any resulting contract shall be governed in all respects by the laws of the Commonwealth of Virginia and any litigation with

respect thereto shall be brought in the courts of the Commonwealth. The agency and the contractor are encouraged to resolve any issues in controversy arising from the award of the contract or any contractual dispute using the Alternative Dispute Resolution (ADR) procedures (*Code of Virginia*, § 2.2-4366). ADR procedures are described in Chapter 9 of the *Vendors Manual*. The contractor shall comply with all applicable federal, state and local laws, rules and regulations.

- C. **ANTI-DISCRIMINATION:** By submitting their (bids/proposals), (bidders/offerors) certify to the Commonwealth that they will conform to the provisions of the Federal Civil Rights Act of 1964, as amended, as well as the Virginia Fair Employment Contracting Act of 1975, as amended, where applicable, the Virginians With Disabilities Act, the Americans With Disabilities Act and § 2.2-4311 of the *Virginia Public Procurement Act (VPPA)*. If the award is made to a faith-based organization, the organization shall not discriminate against any recipient of goods, services, or disbursements made pursuant to the contract on the basis of the recipient's religion, religious belief, refusal to participate in a religious practice, or on the basis of race, age, color, gender or national origin and shall be subject to the same rules as other organizations that contract with public bodies to account for the use of the funds provided; however, if the faith-based organization segregates public funds into separate accounts, only the accounts and programs funded with public funds shall be subject to audit by the public body. (*Code of Virginia*, § 2.2-4343.1E).

In every contract over \$10,000 the provisions in 1. and 2. below apply:

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 any other basis prohibited by state law relating to discrimination in employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.
 - b. The contractor, in all solicitations or advertisements for employees placed by or on behalf of the contractor, will state that such contractor is an equal opportunity employer.
 - c. Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for the purpose of meeting these requirements.
2. The contractor will include the provisions of 1. above in every subcontract or purchase order over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.

- D. **ETHICS IN PUBLIC CONTRACTING:** By submitting their (bids/proposals), (bidders/offerors) certify that their (bids/proposals) are made without collusion or fraud and that they have not offered or received any kickbacks or inducements from any other (bidder/offeror), supplier, manufacturer or subcontractor in connection with their (bid/proposal), and that they have not conferred on any public employee having official responsibility for this 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 was exchanged.

- E. **IMMIGRATION REFORM AND CONTROL ACT OF 1986:** By entering into a written contract with the Commonwealth of Virginia, the Contractor certifies 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.
- F. **DEBARMENT STATUS:** By submitting their (bids/proposals), (bidders/offerors) certify that they are not currently debarred by the Commonwealth of Virginia from submitting bids or proposals on contracts for the type of goods and/or services covered by this solicitation, nor are they an agent of any person or entity that is currently so debarred.
- G. **ANTITRUST:** By entering into a contract, the contractor conveys, sells, assigns, and transfers to the Commonwealth of Virginia all rights, title and interest in and to all causes of action it may now have or hereafter acquire under the antitrust laws of the United States and the Commonwealth of Virginia, relating to the particular goods or services purchased or acquired by the Commonwealth of Virginia under said contract.
- H. **MANDATORY USE OF STATE FORM AND TERMS AND CONDITIONS FOR IFBs AND RFPs** (Insert wording below appropriate to the solicitation type as indicated):
1. (For Invitation For Bids): Failure to submit a bid on the official state form provided for that purpose shall be a cause for rejection of the bid. Modification of or additions to any portion of the Invitation for Bids may be cause for rejection of the bid; however, the Commonwealth reserves the right to decide, on a case by case basis, in its sole discretion, whether to reject such a bid as nonresponsive. As a precondition to its acceptance, the Commonwealth may, in its sole discretion, request that the bidder withdraw or modify nonresponsive portions of a bid which do not affect quality, quantity, price, or delivery. No modification of or addition to the provisions of the contract shall be effective unless reduced to writing and signed by the parties.
 2. (For Request For Proposals): Failure to submit a proposal on the official state form provided for that purpose may be a cause for rejection of the proposal. Modification of or additions to the General Terms and Conditions of the solicitation may be cause for rejection of the proposal; however, the Commonwealth reserves the right to decide, on a case by case basis, in its sole discretion, whether to reject such a proposal.
- I. **CLARIFICATION OF TERMS:** If any prospective (bidder/offeror) has questions about the specifications or other solicitation documents, the prospective (bidder/offeror) should contact the buyer whose name appears on the face of the solicitation no later than five working days before the due date. Any revisions to the solicitation will be made only by addendum issued by the buyer.
- J. **PAYMENT:**
1. **To Prime Contractor:**

- a. Invoices for items ordered, delivered and accepted shall be submitted by the contractor directly to the payment address shown on the purchase order/contract. All invoices shall show the state contract number and/or purchase order number; social security number (for individual contractors) or the federal employer identification number (for proprietorships, partnerships, and corporations).
- b. Any payment terms requiring payment in less than 30 days will be regarded as requiring payment 30 days after invoice or delivery, whichever occurs last. This shall not affect offers of discounts for payment in less than 30 days, however.
- c. All goods or services provided under this contract or purchase order, that are to be paid for with public funds, shall be billed by the contractor at the contract price, regardless of which public agency is being billed.
- d. The following shall be deemed to be the date of payment: the date of postmark in all cases where payment is made by mail, or the date of offset when offset proceedings have been instituted as authorized under the *Virginia Debt Collection Act*.
- e. **Unreasonable Charges.** Under certain emergency procurements and for most time and material purchases, final job costs cannot be accurately determined at the time orders are placed. In such cases, contractors should be put on notice that final payment in full is contingent on a determination of reasonableness with respect to all invoiced charges. Charges which appear to be unreasonable will be researched and challenged, and that portion of the invoice held in abeyance until a settlement can be reached. Upon determining that invoiced charges are not reasonable, the Commonwealth shall promptly notify the contractor, in writing, as to those charges which it considers unreasonable and the basis for the determination. A contractor may not institute legal action unless a settlement cannot be reached within thirty (30) days of notification. The provisions of this section do not relieve an agency of its prompt payment obligations with respect to those charges which are not in dispute (*Code of Virginia, § 2.2-4363*).

2. To Subcontractors:

- a. A contractor awarded a contract under this solicitation is hereby obligated:
 - (1) To pay the subcontractor(s) within seven (7) days of the contractor's receipt of payment from the Commonwealth for the proportionate share of the payment received for work performed by the subcontractor(s) under the contract; or
 - (2) To notify the agency and the subcontractor(s), in writing, of the contractor's intention to withhold payment and the reason.
- b. The contractor is obligated to pay the subcontractor(s) interest at the rate of one percent per month (unless otherwise provided under the terms of the contract) on all amounts owed by the contractor that remain unpaid seven (7) days following receipt of payment from the Commonwealth, except for amounts withheld as stated in (2) above. The date of mailing of any payment by U. S. Mail is deemed to be payment to the addressee.

These provisions apply to each sub-tier contractor performing under the primary contract. A contractor's obligation to pay an interest charge to a subcontractor may not be construed to be an obligation of the Commonwealth.

3. Each prime contractor who wins an award in which provision of a SWAM procurement plan is a condition to the award, shall deliver to the contracting agency or institution, on or before request for final payment, evidence and certification of compliance (subject only to insubstantial shortfalls and to shortfalls arising from subcontractor default) with the SWAM procurement plan. Final payment under the contract in question may be withheld until such certification is delivered and, if necessary, confirmed by the agency or institution, or other appropriate remedies may be assessed in lieu of withholding such payment.
 4. The Commonwealth of Virginia encourages contractors and subcontractors to accept electronic and credit card payments.
- K. **PRECEDENCE OF TERMS:** The following General Terms and Conditions *VENDORS MANUAL*, *APPLICABLE LAWS AND COURTS*, *ANTI-DISCRIMINATION*, *ETHICS IN PUBLIC CONTRACTING*, *IMMIGRATION REFORM AND CONTROL ACT OF 1986*, *DEBARMENT STATUS*, *ANTITRUST*, *MANDATORY USE OF STATE FORM AND TERMS AND CONDITIONS*, *CLARIFICATION OF TERMS*, *PAYMENT* shall apply in all instances. In the event there is a conflict between any of the other General Terms and Conditions and any Special Terms and Conditions in this solicitation, the Special Terms and Conditions shall apply.
- L. **QUALIFICATIONS OF (BIDDERS/OFFERORS):** The Commonwealth may make such reasonable investigations as deemed proper and necessary to determine the ability of the (bidder/offeror) to perform the services/furnish the goods and the (bidder/offeror) shall furnish to the Commonwealth all such information and data for this purpose as may be requested. The Commonwealth reserves the right to inspect (bidder's/offeror's) physical facilities prior to award to satisfy questions regarding the (bidder's/offeror's) capabilities. The Commonwealth further reserves the right to reject any (bid/proposal) if the evidence submitted by, or investigations of, such (bidder/offeror) fails to satisfy the Commonwealth that such (bidder/offeror) is properly qualified to carry out the obligations of the contract and to provide the services and/or furnish the goods contemplated therein.
- M. **TESTING AND INSPECTION:** The Commonwealth reserves the right to conduct any test/inspection it may deem advisable to assure goods and services conform to the specifications.
- N. **ASSIGNMENT OF CONTRACT:** A contract shall not be assignable by the contractor in whole or in part without the written consent of the Commonwealth.
- O. **CHANGES TO THE CONTRACT:** Changes can be made to the contract in any of the following ways:
1. The parties may agree in writing to modify the scope of the contract. An increase or decrease in the price of the contract resulting from such modification shall be agreed to by the parties as a part of their written agreement to modify the scope of the contract.

2. The Purchasing Agency may order changes within the general scope of the contract at any time by written notice to the contractor. Changes within the scope of the contract include, but are not limited to, things such as services to be performed, the method of packing or shipment, and the place of delivery or installation. The contractor shall comply with the notice upon receipt. The contractor shall be compensated for any additional costs incurred as the result of such order and shall give the Purchasing Agency a credit for any savings. Said compensation shall be determined by one of the following methods:

- a. By mutual agreement between the parties in writing; or
- b. By agreeing upon a unit price or using a unit price set forth in the contract, if the work to be done can be expressed in units, and the contractor accounts for the number of units of work performed, subject to the Purchasing Agency's right to audit the contractor's records and/or to determine the correct number of units independently; or
- c. By ordering the contractor to proceed with the work and keep a record of all costs incurred and savings realized. A markup for overhead and profit may be allowed if provided by the contract. The same markup shall be used for determining a decrease in price as the result of savings realized. The contractor shall present the Purchasing Agency with all vouchers and records of expenses incurred and savings realized. The Purchasing Agency shall have the right to audit the records of the contractor as it deems necessary to determine costs or savings. Any claim for an adjustment in price under this provision must be asserted by written notice to the Purchasing Agency within thirty (30) days from the date of receipt of the written order from the Purchasing Agency. If the parties fail to agree on an amount of adjustment, the question of an increase or decrease in the contract price or time for performance shall be resolved in accordance with the procedures for resolving disputes provided by the Disputes Clause of this contract or, if there is none, in accordance with the disputes provisions of the Commonwealth of Virginia *Vendors Manual*. Neither the existence of a claim nor a dispute resolution process, litigation or any other provision of this contract shall excuse the contractor from promptly complying with the changes ordered by the Purchasing Agency or with the performance of the contract generally.

P. **DEFAULT:** In case of failure to deliver goods or services in accordance with the contract terms and conditions, the Commonwealth, after due oral or written notice, may procure them from other sources and hold the contractor responsible for any resulting additional purchase and administrative costs. This remedy shall be in addition to any other remedies which the Commonwealth may have.

Q. **TAXES:** Sales to the Commonwealth of Virginia are normally exempt from State sales tax. State sales and use tax certificates of exemption, Form ST-12, will be issued upon request. Deliveries against this contract shall usually be free of Federal excise and transportation taxes. The Commonwealth's excise tax exemption registration number is 54-73-0076K. **(NOT NORMALLY REQUIRED FOR SERVICE CONTRACTS)**

R. **USE OF BRAND NAMES:** Unless otherwise provided in this solicitation, the name of a certain brand, make or manufacturer does not restrict (bidders/offerors) to the specific brand, make or manufacturer named, but conveys the general style, type, character, and quality of the article

desired. Any article which the public body, in its sole discretion, determines to be the equivalent of that specified, considering quality, workmanship, economy of operation, and suitability for the purpose intended, shall be accepted. The (bidder/offeror) is responsible to clearly and specifically identify the product being offered and to provide sufficient descriptive literature, catalog cuts and technical detail to enable the Commonwealth to determine if the product offered meets the requirements of the solicitation. This is required even if offering the exact brand, make or manufacturer specified. Normally in competitive sealed bidding only the information furnished with the bid will be considered in the evaluation. Failure to furnish adequate data for evaluation purposes may result in declaring a bid nonresponsive. Unless the (bidder/offeror) clearly indicates in its (bid/proposal) that the product offered is an equivalent product, such (bid/proposal) will be considered to offer the brand name product referenced in the solicitation. **(NOT NORMALLY REQUIRED FOR SERVICE CONTRACTS)**

S. **TRANSPORTATION AND PACKAGING:** By submitting their (bids/proposals), all (bidders/offerors) certify and warrant that the price offered for FOB destination includes only the actual freight rate costs at the lowest and best rate and is based upon the actual weight of the goods to be shipped. Except as otherwise specified herein, standard commercial packaging, packing and shipping containers shall be used. All shipping containers shall be legibly marked or labeled on the outside with purchase order number, commodity description, and quantity. **(NOT NORMALLY REQUIRED FOR SERVICE CONTRACTS)**

T. **INSURANCE:** By signing and submitting a bid or proposal under this solicitation, the bidder or offeror certifies that if awarded the contract, it will have the following insurance coverage at the time the contract is awarded. For construction contracts, if any subcontractors are involved, the subcontractor will have workers' compensation insurance in accordance with §§ 2.2-4332 and 65.2-800 et seq. of the *Code of Virginia*. The bidder or offeror further certifies that the contractor and any subcontractors will maintain these insurance coverage during the entire term of the contract and that all insurance coverage will be provided by insurance companies authorized to sell insurance in Virginia by the Virginia State Corporation Commission.

MINIMUM INSURANCE COVERAGES AND LIMITS REQUIRED FOR MOST CONTRACTS:

1. Workers' Compensation - Statutory requirements and benefits. Coverage is compulsory for employers of three or more employees, to include the employer. Contractors who fail to notify the Commonwealth of increases in the number of employees that change their workers' compensation requirements under the *Code of Virginia* during the course of the contract shall be in noncompliance with the contract.
2. Employer's Liability - \$100,000.
3. Commercial General Liability - \$1,000,000 per occurrence. Commercial General Liability is to include bodily injury and property damage, personal injury and advertising injury, products and completed operations coverage. The Commonwealth of Virginia must be named as an additional insured and so endorsed on the policy.

(Note to Agency/Institution: When the requirement is for parking facilities and garages for motor vehicle maintenance contracts, the forgoing sentence should be changed to read: These coverage should include Garage Owner's Liability. Contracts with movers or truck

transporters should also require motor carrier's liability. When in the judgment of a procurement officer, these limits and coverage are not warranted for the goods and services being procured, the Division of Risk Management should be contacted.)

4. Automobile Liability - \$1,000,000 per occurrence. (Only used if motor vehicle is to be used in the contract.)

NOTE: In addition, various Professional Liability/Errors and Omissions coverages are required when soliciting those services as follows:

<u>Profession/Service</u>	<u>Limits</u>
Accounting	\$1,000,000 per occurrence, \$3,000,000 aggregate
Architecture	\$2,000,000 per occurrence, \$6,000,000 aggregate
Asbestos Design, Inspection or Abatement Contractors	\$1,000,000 per occurrence, \$3,000,000 aggregate
Health Care Practitioner (to include Dentists, Licensed Dental Hygienists, Optometrists, Registered or Licensed Practical Nurses, Pharmacists, Physicians, Podiatrists, Chiropractors, Physical Therapists, Physical Therapist Assistants, Clinical Psychologists, Clinical Social Workers, Professional Counselors, Hospitals, or Health Maintenance Organizations.)	\$1,800,000 per occurrence, \$3,000,000 aggregate
(Limits increase each July 1 through fiscal year 2008, as follows: July 1, 2006 - \$1,850,000, July 1, 2007 - \$1,925,000, July 1, 2008 - \$2,000,000. This complies with §8.01-581.15 of the <i>Code of Virginia</i> .)	
Insurance/Risk Management	\$1,000,000 per occurrence, \$3,000,000 aggregate
Landscape/Architecture	\$1,000,000 per occurrence, \$1,000,000 aggregate
Legal	\$1,000,000 per occurrence, \$5,000,000 aggregate
Professional Engineer	\$2,000,000 per occurrence, \$6,000,000 aggregate
Surveying	\$1,000,000 per occurrence, \$1,000,000 aggregate

- U. **ANNOUNCEMENT OF AWARD:** Upon the award or the announcement of the decision to award a contract over \$50,000, as a result of this solicitation, the purchasing agency will publicly post such notice on the DGS/DPS eVA web site (www.eva.virginia.gov) for a minimum of 10 days.
- V. **DRUG-FREE WORKPLACE:** 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, 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.

- W. **NONDISCRIMINATION OF CONTRACTORS:** A bidder, offeror, or contractor shall not be discriminated against in the solicitation or award of this contract because of race, religion, color, sex, national origin, age, or disability, faith-based organizational status, any other basis prohibited by state law relating to discrimination in employment or because the bidder or offeror employs ex-offenders unless the state agency, department or institution has made a written determination that employing ex-offenders on the specific contract is not in its best interest. If the award of this contract is made to a faith-based organization and an individual, who applies for or receives goods, services, or disbursements provided pursuant to this contract objects to the religious character of the faith-based organization from which the individual receives or would receive the goods, services, or disbursements, the public body shall offer the individual, within a reasonable period of time after the date of his objection, access to equivalent goods, services, or disbursements from an alternative provider.
- X. **eVA Business-To-Government Vendor Registration:** The eVA Internet electronic procurement solution, website portal www.eVA.virginia.gov, streamlines and automates government purchasing activities in the Commonwealth. The eVA portal is the gateway for vendors to conduct business with state agencies and public bodies. All vendors desiring to provide goods and/or services to the Commonwealth shall participate in the eVA Internet e-procurement solution either through the eVA Basic Vendor Registration Service or eVA Premium Vendor Registration Service. All bidders or offerors must register in eVA; failure to register will result in the bid/proposal being rejected.
- a. eVA Basic Vendor Registration Service: \$25 Annual Registration Fee plus the appropriate order Transaction Fee specified below. eVA Basic Vendor Registration Service includes electronic order receipt, vendor catalog posting, on-line registration, electronic bidding, and the ability to research historical procurement data available in the eVA purchase transaction data warehouse.
 - b. eVA Premium Vendor Registration Service: \$25 Annual Registration Fee plus the appropriate order Transaction Fee specified below. eVA Premium Vendor Registration Service includes all benefits of the eVA Basic Vendor Registration Service plus automatic email or fax notification of solicitations and amendments.
 - c. For orders issued prior to August 16, 2006, the Vendor Transaction Fee is 1%, capped at a maximum of \$500 per order.
 - d. For orders issued August 16, 2006 and after, the Vendor Transaction Fee is:
 - (i) DMBE-certified Small Businesses: 1%, capped at \$500 per order.
 - (ii) Businesses that are not DMBE-certified Small Businesses: 1%, capped at \$1,500 per order.

- Y. **AVAILABILITY OF FUNDS:** It is understood and agreed between the parties herein that the agency shall be bound hereunder only to the extent of the funds available or which may hereafter become available for the purpose of this agreement.
- Z. **SET-ASIDES.** This solicitation is set-aside for DMBE-certified small business participation only when designated “SET-ASIDE FOR SMALL BUSINESSES” in the solicitation. DMBE-certified small businesses are those businesses that hold current small business certification from the Virginia Department of Minority Business Enterprise. This shall not exclude DMBE-certified women-owned and minority-owned businesses when they have received the DMBE small business certification. For purposes of award, bidders/offerors shall be deemed small business if and only if they are certified as such by DMBE on the due date for receipt of bids/proposals.
- AA. **BID PRICE CURRENCY.** Unless stated otherwise in the solicitation, bidders/offerors shall state bid/offer prices in US dollars.

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11-40	2.2-4304
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11-41.2:3	2.2-2404
11-41.2:4	2.2-2405
11-41.2:5	2.2-2406
11-41.4	Deleted
11-42	2.2-4319
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11-44	2.2-4310 A
11-44.1	2.2-4320
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11-46.3	2.2-4332
11-47	2.2-4324
11-47.01	2.2-4323
11-47.1	2.2-4325
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11-62	2.2-4339
11-62.1	2.2-4347
11-62.2	2.2-4350 A
11-62.3	2.2-4350 B
11-62.4	2.2-4351
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