

# PROCUREMENT POLICY

## KING WILLIAM COUNTY, VIRGINIA



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# KING WILLIAM COUNTY PROCUREMENT POLICY

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## Article I. Purpose, Application, General Provisions and Definitions

### 1-1 . Purpose.

The purpose of this policy is to increase public confidence in purchasing by the County, to provide for fair and equitable treatment of all persons involved in public

purchasing by the County, to maximize the purchasing value of public funds, to foster competition in the procurement process to the maximum feasible extent, and to provide for a centralized purchasing system of quality and integrity. 1-2 . Effective date.

This policy shall be in effect upon adoption.

1-3. Authority.

This policy is adopted pursuant to §§ 2.2-4343 (10) and 15.2-1231 of the Code of Virginia and is intended to continue and re-establish the centralized purchasing system of King William County and to supersede the operation of the Virginia Public Procurement Act as it applies to the procurement actions of the departments, agencies, officers, and employees subject to this policy. Those sections set forth in § 2.2-4343 (12) of the Code of Virginia which, by law, apply to all counties, remain in effect and are incorporated herein or listed in the appendix to this policy for convenience. No other provisions of the Virginia Public Procurement Act shall apply unless specifically incorporated in this policy. As authorized by state law, this policy shall govern purchases by the constitutional officers of this county and the local board of social services. It shall not govern purchases of the county school board unless the school board shall, by resolution, opt into the County's centralized purchasing system. 1-4. Definitions.

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

- (a) Administrator - Administrator shall mean County Administrator, Constitutional Officer, Director of Social Services or other official in responsible charge of administration for any other public body using this county's purchasing policy.
- (b) 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.
- (c) Approving Authority – "Approving Authority" shall mean the Board of Supervisors, the King William County Social Services Board, or the five Constitutional Officers of King William County with respect to each of those offices.

- (d) Best Value - "Best value," as predetermined in the solicitation, means the overall combination of quality, price, and various elements of required services that in total are optimal relative to a public body's needs.
- (e) Board or Board of Supervisors – "Board" or "Board of Supervisors" shall mean the Board of Supervisors of King William County, Virginia.
- (f) Business - means any type of corporation, partnership, limited liability company, association, or sole proprietorship operated for profit.
- (g) Competitive Negotiation - Competitive negotiation is a method of procurement which consists of the following elements:
1. Issuance of a written request for proposal indicating in general terms that which is sought to be procured, specifying the factors that will be used in evaluating proposals, and containing or incorporating by reference the other applicable contractual terms and conditions including any unique capabilities or qualifications which will be required of the offeror.
  2. Public notice of the request for proposal at least ten (10) calendar days prior to the date set for receipt of proposals by posting on the King William County website and by publication in at least one newspaper of general circulation in King William County. In addition, proposals may be solicited directly from potential bidders and/or posted on the purchasing web site maintained by the Virginia Department of General Services as deemed appropriate by the Purchasing Agent.
  3. On the basis of the evaluation factors established by this policy and by the request for proposal, at least two (2) offerors deemed to be the most qualified, responsible and suitable on the basis of initial responses shall be selected. (If less than two (2) proposals are received, then less than two (2) offerors may be so selected.) Individual discussions shall then be had with each such offeror.
  4. Repetitive informal interviews shall be permissible. Offerors shall be encouraged to elaborate on their qualifications, scope of work, performance data, or expertise pertinent to the proposed project as well as any alternative concepts. These discussions may encompass non-binding estimates of total project costs, including, where appropriate, design, construction, and life cycle costs. Methods to be used in arriving at a price for services may also be discussed. Proprietary information from competing offerors shall not be disclosed to the public or to competitors. Price of service may be discussed and considered but will not be the sole determining factor in concluding negotiations.
  5. After negotiations have been conducted with each offeror so selected (such negotiations may be conducted by the public body or an agent or committee of the public body), the offeror shall be selected which in the opinion of the negotiator has made the best proposal and the contract shall be offered to that offeror. Should the negotiator, after the initial submission of proposals, determine in writing that only one offeror is fully

qualified, or that one offeror is clearly more qualified than the others under consideration, a contract may be negotiated and awarded to that offeror without further delay. A copy of such written determination shall be provided to the Purchasing Agent and to the approving authority when approval by other than the Purchasing Agent is required.

6. When the terms and conditions of multiple awards are so provided for in the request for proposal, awards may be made to more than one offeror.
7. (Note that the procedure for competitive negotiation for the procurement of professional services over \$60,000 differs from the one defined here. See Section 2-3(g) of this Policy.)

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

1. Issuance of a written invitation to bid containing or incorporating by reference specifications and contractual terms and conditions applicable to the procurement. When it is impractical to prepare initially a purchase description to support an award based on prices, an invitation to bid may be issued requesting the submission of unpriced offers to be followed by an invitation to bid limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.
2. Public notice of the invitation to bid at least ten (10) calendar days prior to the dates set for receipt of bids by posting on the King William County website and may be advertised in a newspaper of general circulation in King William County.. In addition, proposals may be solicited directly from potential bidders and/or posted on the purchasing web site maintained by the Virginia Department of General Services as deemed appropriate by the Purchasing Agent.
3. Public opening and announcement of all bids received.
4. Evaluation of the bids based upon the requirements set forth in the invitation and the provisions of this policy.
5. Award to the lowest responsive and responsible bidder. When the terms and conditions of multiple bids are so provided for in the invitation for bid, awards may be made to more than one bidder. In the event only one bid is received and the Purchasing Agent in consultation with the using agency makes a determination that it would not be in the best interest of the County to re-bid the procurement, such determination shall be in writing and shall be provided to the approving authority when approval by other than the Purchasing Agent is required.

(i) 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.

- (j) County or Public Body - The terms County and Public Body shall be used interchangeably and unless the context specifically requires otherwise, shall mean the County of King William, Virginia, a political subdivision of the Commonwealth of Virginia, and shall include all other departments, public bodies corporate, agencies, sanitary districts and officers of the County to which this policy applies. It shall also include any other entity that has chosen to participate in this policy and has entered into a cooperative procurement agreement with the County.
- (k) County Administrator – “County Administrator” shall mean the County Administrator of King William County or a duly authorized designee.
- (l) Goods - Goods shall mean all material, equipment, supplies, printing, automated data processing, hardware and software.
- (m) Offeror – “Offeror” unless expressly indicated otherwise, shall mean both a bidder, i.e., a person who submits a competitive sealed bid in response to an Invitation to Bid, or a person who submits a proposal in response to a Request for Proposals.
- (n) Purchasing Agent – “Purchasing Agent” shall mean the County Administrator of King William County, Virginia, and where delegation is permitted by this policy, any person designated by the County Administrator to implement all or a portion of this policy.
- (o) 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.
- (p) Services - Services shall mean any work performed by an independent contractor wherein the service rendered does not consist primarily of the acquisition of equipment or materials or the rental of equipment, materials and supplies.
- (q) Using Agency – “Using Agency” shall mean any officer, employee, or other entity of the County requiring any goods, services, insurance, or construction to be procured under the policies and procedures established by this policy.

#### 1-5. Application of policy.

Except as provided in paragraph 2-4, this policy shall apply to all purchases or contracts for the purpose of procuring goods, services, insurance and construction involving the expenditure of public funds. This policy shall not apply to contracts

existing on the effective date of this policy and such contracts may be performed and/or renewed according to their terms. This policy is intended to provide for centralized competitive purchasing and covers all purchasing by all departments, officers, elements and employees of the County, including specifically, but not limited to, the King William Department of Social Services and Constitutional Officers. This policy is not intended to require review or approval by the Board of specific items procured by the Department of Social Services, the Constitutional Officers, or public bodies who have by agreement become subject to this policy, when sufficient funds have been appropriated to such entity or officer for the purpose of the procurement and this policy has been followed. The Purchasing Agent with regard to such entities and officers shall, however, by signing all purchase orders for such procurements prior to the placement of a firm order, certify compliance with this policy and any procedures issued pursuant to it. The Purchasing Agent shall not execute a purchase order if such procurement has not been in compliance with this policy and any procedures developed pursuant to it.

#### 1-6. Procurement involving federal or state assistance or grant funds.

When any procurement involves the expenditure of state/federal assistance, grant, loan, or contract funds, the procurement shall be conducted in accordance with any mandatory federal or state requirements which are not reflected in this policy if the receipt of such funds is conditioned upon compliance with the mandatory procedures. This policy shall not prohibit compliance with the terms and conditions of any grant, gift or bequest which are otherwise consistent with law.

##### 1-6.1 Public-Private Partnerships.

The Public-Private Education Facilities and Infrastructure Act of 2002, Va. Code §§56-575.1, *et seq.*, (the "PPEA") grants the County of King William, a responsible public entity as defined in the PPEA, the authority to create public-private partnerships for the development of a wide range of qualifying projects for public use if the County determines there is a public need for the project and that private involvement may provide the project to the public in a timely or cost-effective fashion. Individually negotiated interim or comprehensive agreements between a private entity, as defined in the PPEA, and the County will define the respective rights and obligations of the County and the private entity. If a proposal is solicited or received pursuant to the PPEA, it is incumbent upon the County and all private entities to comply with the provisions of the PPEA as applicable and as may be amended. Guidelines applicable to such projects have been adopted by the Board of Supervisors and are found in Appendix 2.

#### 1-7. Cooperative procurement.

The County may participate in, sponsor or administer a cooperative agreement with one or more public bodies not a party to this policy for the purpose of increasing efficiency or to reduce expenses. Any such public body which enters into a cooperative agreement with the County shall comply with the terms of this county's purchasing

policy unless otherwise agreed. Except for contracts for professional services, the County may purchase from another public body's contract even if it did not participate in the request for proposal or invitation to bid, if the request for proposal or invitation to bid specified that the procurement was being conducted on behalf of other public bodies.

1-8. Contracts or purchases made in violation of this policy.

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

Article II. Purchasing Agent; Competition Requirements

## 2-1 . Delegation of authority.

The Purchasing Agent shall serve as the principal public purchasing official for the County and shall be responsible, under the supervision of the Board, for the procedures and methods used in the procurement of all goods, services, insurance, and construction as well as the management and disposal of surplus materials. The authority of the Purchasing Agent shall specifically, but without limitation, include the authority to select the method of procurement to be used and the authority to negotiate and execute contracts on behalf of the County for any and all procurements or for the disposition of materials. The Purchasing Agent shall ensure that all purchasing activities are conducted in accordance with the provisions of this policy. The Purchasing Agent may not delegate approval of the use of competitive negotiation instead of competitive sealed bidding as required by Subparagraph (h) of Section 2-3 of this policy, the declaration of a purchase as sole source as provided in Subparagraph (e) of Section 2-4 of this policy, nor the signing of purchase orders for amounts greater than \$5,000. In other matters the Purchasing Agent may delegate his authority to a duly authorized agent or agents.

Unless the Purchasing Agent specifically provides to the contrary, each administrator, as defined in this policy, is authorized and shall be responsible for initiating purchases in accordance with this policy for all goods and services to be used by the agency under such administrator. Such administrator may delegate the authority to make purchases to an agent or agents under his control, but every purchase in excess of \$5,000.00 shall be approved by the administrator. Any purchase in excess of \$5,000.00 shall require a request for purchase from the using agency and a corresponding purchase order issued by the Purchasing Agent. Every formal contract and purchase order shall be executed by the Purchasing Agent. The administrator shall indicate approval of any purchase requiring the same by signing the request for the purchase. The authority of the Purchasing Agent does not include approval of specific items to be procured by the Department of Social Services, the Constitutional Officers, or other public bodies who have by agreement become subject to this policy, when sufficient funds have been appropriated to such entity or officer for the purpose of the procurement and this policy has been followed. The Purchasing Agent with regard to such entities and officers shall, however, by signing all purchase orders for such procurements prior to the placement of a firm order, certify compliance with this policy and any procedures issued pursuant to it. The Purchasing Agent shall not execute a purchase order if such procurement has not been in compliance with this policy and any procedures developed pursuant to it.

## 2-2 . Documentation and procedures.

Documentation of competitive pricing or other documentation required by this policy, including a complete copy of any solicitation for competitive bids or proposals,

shall be submitted along with requests for payment and retained along with other papers related to the procurement in the County Finance Office. Such documentation shall be retained until the acquisition of goods is completed or the services have been rendered and after such time may be destroyed in accordance with County and State procedures governing records retention.

The Purchasing Agent shall develop appropriate forms and procedures to be used to track and report procurement transactions in which competitive sealed bidding or competitive negotiation is not used and to implement other requirements of this policy.

### 2-3 . Competition requirements.

Prior to any purchase of goods or services, reasonable price competition is desired. Reasonable price competition shall depend on the amount of the purchase and is defined in the following circumstances:

(a) For purchases in the amount of \$1,000 or less, no permanent documentation of solicitation of prices is required. The individual making the purchase is expected to compare prices by telephone, catalog or other appropriate means.

(b) For purchases in excess of \$1,000 and not greater than \$5,000, telephone calls shall be placed to at least two suppliers of the item. Oral quotes shall be obtained from the suppliers and a memo of the telephone conversation shall be made showing the item requested, date, time, company name, and price quoted. The Department will be required to keep documentation of quotes to be used in audit trail.

(c) For purchases in excess of \$5,000 but not greater than \$30,000 at least three (3) suppliers shall be contacted. Telephone (provided a memorandum is made of the supplier called and the item on which the quote is requested) or written contacts are acceptable. Documentation is required. Requests for quotation may also be posted on the County's web site and on the purchasing web site maintained by the Virginia Department of General Services if deemed appropriate by the Purchasing Agent. Prospective suppliers shall be required to submit a written quote within a specific time stated in the solicitation in order to receive further consideration. A Purchase Order is required **before** the money has been expended.

(d) For purchases in excess of \$30,000 but not greater than \$100,000, written solicitations and quotes are required and at least four (4) suppliers shall be contacted. Telephone solicitations for purchases less than \$20,000 (provided a written memorandum is made of the supplier contacted and the item on which the quote is requested) are acceptable. The supplier shall be required to submit a written quote within the specified time to be further considered. Requests for quotation shall be posted, at least ten(10) days prior to the due date, on the County's web site and on the purchasing

web site maintained by the Virginia Department of General Services and, if deemed appropriate by the Purchasing Agent, may be published in a newspaper of general circulation in King William County. A Purchase Order is required **before** the money has been expended.

(e) When a procurement transaction is made under (a), (b), (c) or (d) above the purchase shall be made from the offeror quoting the lowest price or best value unless the Administrator, using the evaluation factors in this policy for competitive negotiation or competitive sealed bidding as the case may be, documents in writing the reason for the determination that in the best interest of the county such purchase should be made from another offeror quoting a higher price. Such determination for purchases in excess of \$5,000 shall be approved by the Purchasing Agent.

(f) Purchases other than those set out in the following subparagraph (g) that in the aggregate or in the sum of all phases are expected to be in excess of \$100,000.00 shall be made by either competitive sealed bidding or competitive negotiation as defined in this policy.

(g) Purchases of professional services as that term is defined in § 2.2- 4301 of the Code of Virginia, when the cost of such services is expected to exceed \$60,000.00, shall be made in accordance with the process set forth in § 2.2- 4302.2 of the Code of Virginia.

(h) The Purchasing Agent shall have the authority to use competitive negotiation in the place of competitive sealed bidding (when those methods are required) to procure any goods, services or insurance, after documenting in advance the basis therefore in writing, as required by § 2.2-4303(C), Code of Virginia. Insurance may be procured through a licensed agent or broker selected in the manner provided for the procurement of things other than professional services set forth in § 2.2-4302.2, Code of Virginia, if the basis for doing so is approved by the Board. Construction in excess of the amount listed in subparagraph (f) of this section may be procured only by competitive sealed bidding, except that competitive negotiation may be used, upon a determination made in advance by the Purchasing Agent in writing, after making the findings required by § 2.2- 4303(D), Code of Virginia, to procure contracts for the construction of highways and any draining, dredging, excavation, grading or similar work upon real property.

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

(j) Construction may be procured only by competitive sealed bidding , except that competitive negotiation may be used in the following instances:By any public body on a fixed price design –build basis or construction management basis as provided in Chapter 43.1 of the VPPA

(k) By any public body for the construction of highways and any draining, dredging, excavation, grading or similar work upon real property upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, which writing shall document the basis for this determination.

Nothing in this section shall prevent the use of competitive sealed bidding or competitive negotiation in procurements under \$100,000, if deemed appropriate by the Purchasing Agent.

#### 2-4. Exceptions to competition requirements.

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

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

(b) The purchase of legal services or the hiring of expert witnesses, or the purchase of other services associated with litigation, regulatory proceedings, or other legal matters.

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

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

(e) Upon a determination by the Purchasing Agent in writing that there is only one source practicably available for that which is to be procured, a contract may be negotiated and awarded to that source without competition. The Purchasing Agent shall conduct appropriate negotiations as to price, delivery, and terms. A record of the sole source procurement shall be maintained listing the contractor's name, the amount, and qualifying circumstances. The Purchasing Agent shall provide a copy of the written determination to the County Administrator or other Approving Authority as required.

(f) In cases of emergency provided, however, such procurement shall be made with such competition as practicable under the circumstances. A written statement by the Purchasing Agent of the basis for the emergency and for the selection of the particular supplier shall be included in the contract file. The term "emergency" as used in this subparagraph means a situation where there exists

a threat to public health, welfare, or safety or when an unforeseen circumstance causes or has the potential to cause disruption of an essential service.

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

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

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

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

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

(l) Interdepartmental or interagency expenses or purchases;

(m) Contracts of employment;

(n) Advertising and legal notices;

(o) Dues and subscriptions;

(p) Employee educational expenses;

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

(r) Foster home placements;

(s) Treatment services provided to individuals under the Comprehensive Services Act;

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

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

(v) Instructional/specialty educational materials, promotional items, Crafts.

2-5. Purchases at auction.

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

Article III. Administrative Provisions.

3-1. Division of requirements.

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

3-2. Bid lists.

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

3-3. Cost plus contracts prohibited.

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

3-4. Limitation on terms of contracts and agreements.

No contract other than one for the professional services of an accountant, actuary, architect, land surveyor, landscape architect, attorney, doctor of medicine, dentist, optometrist, pharmacist or professional engineer shall be awarded for a period in excess of three (3) years. For the listed professional services, no contract shall be awarded for more than five (5) years, including all renewal terms.

3-5. Modification of contracts.

Contracts entered into by the County may include provisions for modification of the contract during performance but no fixed price contract may be increased by more than 10 percent of the amount of the contract or \$40,000, whichever is greater, without prior approval by the Board or other approving authority. Following such approval the Contract price will consist of the original Contract amount plus all such approved modifications. Any such modifications shall not exceed appropriations available for the project. In no event may the amount of any contract, without adequate consideration, be increased for any purpose, including, but not limited to, relief of an offeror from the consequences of an error in its bid or offer.

3-6. Prequalification of offerors.

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

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

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

- (1) The contractor does not have sufficient financial ability to perform the contract that would result from such procurement. If a bond is required to ensure performance of a contract, evidence that the contractor can acquire a surety bond from a corporation included on the United States Treasury list of acceptable surety corporations in the amount and type required by the public body shall be sufficient to establish the financial ability of such contractor to perform the contract resulting from such procurement;
- (2) The contractor does not have appropriate experience to perform the construction project in question;
- (3) The contractor has had judgments entered against him for the breach of contracts for construction;

- (4) The contractor has been in substantial noncompliance with the terms and conditions of prior construction contracts with the County without good cause. If the County has not contracted with a contractor in any prior construction contracts, the Purchasing Agent may deny prequalification if the contractor has been in substantial noncompliance with the terms and conditions of comparable construction contracts with another locality without good cause. In all instances, any such substantial noncompliance shall be documented;
- (5) The contractor has been convicted within the past five years of a felony involving moral turpitude regarding any procurement of or performance of a construction contract;
- (6) The contractor failed to provide to the Purchasing Agent in a timely manner any information requested relevant to subdivisions 1 through 5 above.

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

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

(c) Pre-qualification generally.

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

- (1) Pre-qualification of a prospective offeror shall not constitute a conclusive determination that a offeror is responsible, and such offeror may be rejected as not responsible on the basis of subsequently discovered information.
- (2) The failure of a prospective offeror to pre-qualify with respect to a given procurement shall not bar the offeror from seeking pre-qualification as to future procurements or from bidding or submitting proposals on procurements which do not require pre-qualification.

A decision by the Purchasing Agent denying pre-qualification shall be final and conclusive.

### 3-7 . Pre-bid conferences.

When deemed necessary by the Purchasing Agent, a pre-bid conference with prospective bidders may be held after draft specifications have been prepared. Such conferences are for the purpose of detecting unclear provisions and tend to widen competition by removing unnecessarily restrictive language. After such conference, final specifications shall be prepared.

### 3-8 . Comments or questions regarding solicitations.

Once invitations to bid or requests for proposal have been advertised, should a prospective offeror find any discrepancy in or omission from the specifications, requests for proposal, or other contract documents, or should he be in doubt as to their meaning, he shall at once notify the specified contact person who will send written instructions to all offerors. The County will not be responsible for any oral instructions.

### 3-9 . Bonds.

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

### 3-10 . Offeror's responsibilities.

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

### 3-11. Signatures.

The firm, corporation or individual name of the offeror must be signed in ink to any proposals or bids submitted. In the case of a corporation, the title of the officer signing must be stated and each officer must be thereunto duly authorized. In the case of a partnership, the signature of at least one of the partners must follow the firm name using the term "member of the firm" or "general partner". 3-12. Withdrawal or cancellation of bids.

Except as provided in the second paragraph of this section, an offeror may withdraw or cancel a bid or proposal at any time prior to the date set for bid opening. After such time the offeror may not withdraw for a period of sixty (60) calendar days. Any offeror may be required to clarify his offer or acknowledge by written confirmation that the minimum requirements of the specifications are included in the proposal.

The withdrawal of bids for construction contracts shall be handled in the manner specified in the advertisement for bids in accordance with the provisions of § 2.2- 4330.A. of the Code of Virginia. 3-13. Tie bids.

If more than one bid or proposal received is for the same total amount or unit price, quality and service being equal, the tie bidders shall be invited to resubmit written bids below the original bid and the award shall be made to the bidder with the lowest price. If all tied bidders refuse to resubmit, then the award shall be decided by lot. 3-14 . Evaluation of sealed bids.

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

- (a) The ability, capacity and skill of the bidder to perform the contract or provide the service required;
- (b) Whether the bidder can perform the contract or provide the service promptly, or within the time specified, without delay or interference;
- (c) The character, integrity, reputation, judgement, experience, and efficiency of the bidder;
- (d) The quality of performance of previous contracts or services;
- (e) The previous and existing compliance by the bidder with laws and ordinances relating to the contract or service;
- (f) The sufficiency of financial resources and ability of the bidder to perform the contract or provide the service;
- (g) The quality, availability and adaptability of the goods or services to the particular use required;
- (h) The ability of the bidder to perform future maintenance and service for use of the subject of the contract;
- (i) The number and scope of conditions attached to the bid; and

(j) Any other condition or criteria included in the request for bids or the instructions to bidders. 3-15 . Evaluation of proposals under competitive negotiation.

When competitive negotiation is the method of procurement selected, the following factors shall be considered in a descending order of importance in determining the most qualified firm or individual.

(a) Any special qualifications or requirements set forth in the proposal documents.

(b) Qualifications of the project manager and project teams.

(c) Overall qualifications and experience of firm and any subcontractor to be used.

(d) Quality of the content of the proposal and its responsiveness to the request for proposal.

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

(f) The location of the office that will have the responsibility for providing the services and the ability of the proposer to respond quickly to requests or requirements of the County.

(g) Financial ability of the firm to perform future maintenance and service for use of the subject of the contract.

(h) Cost estimates (which may or may not be required at the time of submission of the proposal, depending upon the circumstances).

### 3-16 . Negotiation when bids exceed available funds.

If the lowest acceptable bid exceeds available funds, the County may negotiate with the bidder to obtain a contract price within available funds. The negotiations shall be confined to a reduction in the contract price and shall not deal with changes in the contract requirements.

### 3-17. Cancellation or rejection of solicitations.

An invitation to bid, a request for proposal, any other solicitation, or any and all bids or proposals received may be canceled or rejected when the Purchasing Agent determines that it is in the best interest of the County to do so. The reasons therefore shall be made a part of the contract file. Any offer which is incomplete, conditional, obscure, or which is not in conformance with the specifications may be rejected or any such irregularities may be waived at the option of the Purchasing Agent provided they

do not affect the price, quality, quantity, or delivery schedule for the goods, services, or construction to be procured.

No offeror shall be permitted to alter, modify or amend its offer after the time fixed for submission, except as provided in Section 3-12 of this Policy.

No offer received after the time fixed for submission shall be opened or considered.

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

### 3-18. Approval of certain purchases required.

Except as provided for emergency purchases, all purchases in excess of \$5,000 shall be specifically approved by the County Administrator for the Board, or by the appropriate approving authority, prior to the issuance of a purchase order. Emergency purchases may be approved after the fact. The request for approval shall identify the method of price competition used in the procurement.

### 3-19. Contract requirements and legal review.

The terms and conditions of procurements in excess of \$100,000 shall be reviewed and approved by the County Attorney prior to solicitation. Advertisements for Formal Invitations for Bids (IFB) and Requests for Proposals (RFP) for procurement of construction or services in excess of \$100,000 shall be reviewed by the County Attorney prior to advertising. Contracts signed by all parties and containing, or incorporating by reference, all applicable terms and conditions shall be required for procurements of services or construction in excess of \$25,000. Such contracts and all amendments and changes thereto shall be approved as to form by the County Attorney.

### 3-20 . Decision of the administrator or public body final.

Any bidder or offeror submitting a proposal to the county subjects himself to the decision of the County as to the quality of what is offered, responsiveness of the bid or proposal, the responsibility of the bidder, and the qualifications of any offeror. The purchasing agent, administrator, or public body as the case may be, in their sole discretion, will evaluate bids or proposals and in all cases the decision made shall be final. Every offeror submitting a bid or proposal agrees to abide by the decisions of such officials and all the terms of this purchasing policy as a condition precedent to the submission of the bid or proposal. 3-21 . Freedom of Information Act.

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

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

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

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

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

### 3-22 . Illegal alien employment.

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

### 3-23. Drug-free workplace to be maintained by contractor; required contract provisions.

Every contract over \$10,000 shall include the following provisions:

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

For the purposes of this section, "drug-free workplace" means a site for the performance of work done in connection with a specific contract awarded to a contractor

in accordance with this policy, the employees of whom are prohibited from engaging in the unlawful manufacture, sale, distribution, dispensation, possession or use of any controlled substance or marijuana during the performance of the contract.

### 3-24. Foreign and domestic businesses authorized to transact business.

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

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

### 3-25. Debarment and suspension.

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

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

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

- (a) Conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract or in the performance of such contract or subcontract;
- (b) Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense of moral turpitude indicating a lack of business or

personal integrity or honesty which currently, seriously, and directly affects responsibility as a County offeror;

- (c) Conviction under state or federal antitrust statutes arising out of the submission of bids or proposals;
- (d) Violation of contract provisions of a character which is regarded by the Purchasing Agent to be so serious as to justify a debarment action including, but not limited to:
  - (1) Deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in a contract with the County; or
  - (2) A record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts.
- (e) Any other cause the Purchasing Agent determines to be so serious and compelling as to affect responsibility as a County contractor, including debarment by another governmental entity.

## Article IV. Disposition of Surplus Property.

### 4-1 . Sale of surplus property.

All using agencies shall, upon request, submit to the Purchasing Agent a report of all surplus, worn out, or obsolete items, which should be disposed of. The Purchasing Agent shall have the authority to transfer such surplus stock to other using agencies. All property not so transferred shall be exchanged, traded in on new items, salvaged, or sold as deemed appropriate by the Purchasing Agent.

In general, sales may be made at public auction, after prior advertisement in a newspaper of general circulation in the County, or sold on an appropriate web-site (at the sole discretion of the Purchasing Agent) to the highest bidder. Individual items may be scrapped, if in the opinion of the Purchasing Agent, the cost of storage and sale exceeds the value of the item. If the value of any individual item is estimated to exceed \$10,000, sealed bids shall be solicited by public notice inserted at least once in a newspaper of general circulation in the County at least ten (10) calendar days prior to the final date for the submission of sealed bids. Bids may also be solicited for the disposition of any surplus item if the Purchasing Agent determines it to be in the best interest of the County. The Board, upon the request of the Purchasing Agent, may make a special dispensation of any individual item or items if, in the opinion of the Board, such dispensation is in the public interest.

### 4-2 . Participation at county auctions.

County employees are prohibited from bidding on surplus property sold at auction (traditional auction or on-line) and prohibited from purchasing any surplus property whatever disposal method is used.

## APPENDICES

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## APPENDIX 1

### VIRGINIA CODE PROVISIONS APPLICABLE TO COUNTY PROCUREMENT.

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

**§ 2.2-4302.2 Process for competitive negotiation ... (Procurement of professional services over \$60,000).**

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

1. Issuance of a written Request for Proposal indicating in general terms that which is sought to be procured, specifying the factors that will be used in evaluating the proposal and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities, specifications or qualifications that will be required;
2. Public notice of the Request for Proposal at least 10 days prior to the date set for receipt of proposals by posting on the Department of General Services' central electronic procurement website or other appropriate websites. Additionally, public bodies may publish in a newspaper of general circulation in the area in which the contract is to be performed so as to provide reasonable notice to the maximum number of offerors that can be reasonably anticipated to submit proposals in response to the particular request. Posting on the Department of General Services' central electronic procurement website shall be required of any state public body. Local public bodies are encouraged to utilize the Department of General Services' central electronic procurement website to provide the public with centralized visibility and access to the Commonwealth's procurement opportunities. In addition, proposals may be solicited directly from potential contractors. Any additional solicitations shall include certified businesses selected from a list made available by the Department of Small Business and Supplier Diversity; and
3. For goods, nonprofessional services, and insurance, selection shall be made of two or more offerors deemed to be fully qualified and best suited among those submitting proposals, on the basis of the factors involved in the Request for Proposal, including price if so stated in the Request for Proposal. Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but need not be the sole or primary determining factor. After negotiations have been conducted with each offeror so selected, the public body shall select the offeror which, in its opinion, has made the best proposal and provides the best value, and shall award the contract to that offeror. When the terms and conditions of multiple awards are so provided in the Request for Proposal, awards may be made to more than one offeror. Should the public body determine in writing and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified than the others under consideration, a contract may be negotiated and awarded to that offeror; or

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

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

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

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

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

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

1. A state agency, as defined in § 2.2-4347, the sum of all projects performed in a one- year contract term shall not exceed \$1 million as may be determined by the Director of the Department of General Services;
2. Any locality or any authority, sanitation district, metropolitan planning organization or planning district commission with a population in excess of 80,000, or any city within Planning District 8, the sum of all projects performed in a one-year contract term shall not exceed \$5 million and those awarded for any airport as defined in § 5.1-1 and aviation transportation projects, the sum of all such projects shall not exceed \$1.5 million;
3. Architectural and engineering services for rail and public transportation projects by the Director of the Department of Rail and Public Transportation, the sum of all projects in a one-year contract term shall not exceed \$2 million. Such contract may be renewable for two additional one-year terms at the option of the Director;
4. Environmental, location, design, and inspection work regarding highways and bridges by the Commissioner of Highways, the initial contract term shall be limited to two years or when the cumulative total project fees reach \$5 million, whichever occurs first. Such contract may be renewable for two additional one-year terms at the option of the Commissioner, and the sum of all projects in each one-year contract term shall not exceed \$5 million; and
5. Job order contracting, the sum of all projects performed in a one-year contract term shall not exceed \$2 million.

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

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

1. A state agency as defined in § 2.2-4347, the project fee shall not exceed \$200,000, as may be determined by the Director of the Department of General Services;
2. Any locality or any authority or sanitation district with a population in excess of 80,000, or any city within Planning District 8, the project fee shall not exceed \$2 million; and
3. Job order contracting, the project fee shall not exceed \$400,000.

The limitations imposed upon single project fees pursuant to this subsection shall not apply to environmental, location, design, and inspection work regarding highways and bridges by the Commissioner of Highways or architectural and engineering services for rail and public transportation projects by the Director of the Department of Rail and Public Transportation.

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

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

**§ 2.2-4303. Methods of procurement. (C and D--)**

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

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

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

1. By the Commonwealth, its departments, agencies and institutions on a fixed price design-build basis or construction management basis under § 2.2-4306;
2. By any public body for the construction of highways and any draining, dredging, excavation, grading or similar work upon real property;

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

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

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

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

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

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

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

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

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

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

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

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

B. The contract shall be awarded to the fully qualified offeror who submits an acceptable proposal determined to be the best value in response to the Request for Proposal.

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

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

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

a. The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, or other basis prohibited by state law relating to discrimination in employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.

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

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

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

**§ 2.2-4315. Use of brand names.**

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

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

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

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

The application form used in such process shall set forth the criteria upon which the qualifications of prospective contractors will be evaluated. The application form shall request of prospective contractors only such information as is appropriate for an objective evaluation of all prospective contractors pursuant to such criteria. The form shall allow the prospective contractor seeking prequalification to request, by checking the appropriate box, that all information voluntarily submitted by the contractor pursuant to this subsection shall be considered a trade secret or proprietary information subject to the provisions of subsection D of § 2.2-4342.

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

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

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

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

1. The contractor does not have sufficient financial ability to perform the contract that would result from such procurement. If a bond is required to ensure performance of a contract, evidence that the contractor can acquire a surety bond from a corporation included on the United States Treasury list of acceptable surety corporations in the amount and type required by the public body shall be sufficient to establish the financial ability of the contractor to perform the contract resulting from such procurement;
2. The contractor does not have appropriate experience to perform the construction project in question;
3. The contractor or any officer, director or owner thereof has had judgments entered against him within the past ten years for the breach of contracts for governmental or nongovernmental construction, including, but not limited to, design-build or construction management;
4. The contractor has been in substantial noncompliance with the terms and conditions of prior construction contracts with a public body without good cause. If the public body has not contracted with a contractor in any prior construction contracts, the public body may deny prequalification if the contractor has been in substantial noncompliance with the terms and conditions of comparable construction contracts with another public body without good cause. A public body may not utilize this provision to deny prequalification unless the facts underlying such substantial noncompliance were documented in writing in the prior construction project file and such information relating thereto given to the contractor at that time, with the opportunity to respond;
5. The contractor or any officer, director, owner, project manager, procurement manager or chief financial official thereof has been convicted within the past ten years of a crime related to governmental or nongovernmental construction or contracting, including, but not limited to, a violation of (i) Article 6 (§ 2.2-4367 et seq.) of this chapter, (ii) the Virginia Governmental Frauds Act (§ 18.2-498.1 et seq.), (iii) Chapter 4.2 (§ 59.1-68.6 et seq.) of Title 59.1, or (iv) any substantially similar law of the United States or another state;

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

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

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

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

F. The provisions of subsections B, C, and D shall not apply to prequalification for contracts let under § 33.2-209, 33.2-214, or 33.2-221.

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

A. A bidder for a public construction contract, other than a contract for construction or maintenance of public highways, may withdraw his bid from consideration if the price bid was substantially lower than the other bids due solely to a mistake in the bid, provided the bid was submitted in good faith, and the mistake was a clerical mistake as opposed to a judgment mistake, and was actually due to an unintentional arithmetic error or an unintentional omission of a quantity of work, labor or material made directly in the compilation of a bid, which unintentional arithmetic error or unintentional omission can be clearly shown by objective evidence drawn from inspection of original work papers, documents and materials used in the preparation of the bid sought to be withdrawn.

If a bid contains both clerical and judgment mistakes, a bidder may withdraw his bid from consideration if the price bid would have been substantially lower than the other bids due solely to the clerical mistake, that was an unintentional arithmetic error or an unintentional omission of a quantity of work, labor or material made directly in the compilation of a bid that shall be clearly shown by objective evidence drawn from inspection of original work papers, documents and materials used in the preparation of the bid sought to be withdrawn.

B. One of the following procedures for withdrawal of a bid shall be selected by the public body and stated in the advertisement for bids:

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

2. Where the public body opens the bids one day following the time fixed for the submission of bids, the bidder shall submit to the public body or designated official his original work papers, documents and materials used in the preparation of the bid at or prior to the time fixed for the opening of bids. The work papers shall be delivered by the bidder in person or by registered mail. The bidder shall have two hours after the opening of bids within which to claim in writing any mistake as defined herein and withdraw his bid. The contract shall not be awarded by the public body until the two-hour period has elapsed.

Under these procedures, the mistake shall be proved only from the original work papers, documents and materials delivered as required herein. The work papers, documents and materials submitted by the bidder shall, at the bidder's request, be considered trade secrets or proprietary information subject to the conditions of subsection F of § 2.2-4342.

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

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

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

F. No bidder who is permitted to withdraw a bid shall, for compensation, supply any material or labor to or perform any subcontract or other work agreement for the person or firm to whom the contract is awarded or otherwise benefit, directly or indirectly, from the performance of the project for which the withdrawn bid was submitted.

G. The public body shall notify the bidder in writing within five business days of its decision regarding the bidder's request to withdraw its bid. If the public body denies the withdrawal of a bid under the provisions of this section, it shall state in such notice the reasons for its decision and award the contract to such bidder at the bid price, provided such bidder is a responsible and responsive bidder. At the same time that the notice is provided, the public body shall return all work papers and copies thereof that have been submitted by the bidder.

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

A. In any public contract for construction that provides for progress payments in installments based upon an estimated percentage of completion, the contractor shall be

paid at least ninety-five percent of the earned sum when payment is due, with no more than five percent being retained to ensure faithful performance of the contract. All amounts withheld may be included in the final payment.

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

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

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

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

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

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

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

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

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

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

1. Allows a public body to recover that portion of delay costs caused by the acts or omissions of the contractor, or its subcontractors, agents or employees;
2. Requires notice of any delay by the party claiming the delay;
3. Provides for liquidated damages for delay; or
4. Provides for arbitration or any other procedure designed to settle contract disputes.

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

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

**§ 2.2-4336. Bid bonds.**

A. Except in cases of emergency, all bids or proposals for nontransportation-related construction contracts in excess of \$500,000 or transportation-related projects authorized under Article 2 (§ 33.2-208 et seq.) of Chapter 2 of Title 33.2 that are in excess of \$250,000 and partially or wholly funded by the Commonwealth shall be accompanied by a bid bond from a surety company selected by the bidder that is

authorized to do business in Virginia, as a guarantee that if the contract is awarded to the bidder, he will enter into the contract for the work mentioned in the bid. The amount of the bid bond shall not exceed five percent of the amount bid.

B. For nontransportation-related construction contracts in excess of \$100,000 but less than \$500,000, where the bid bond requirements are waived, prospective contractors shall be prequalified for each individual project in accordance with § 2.2-4317.

C. No forfeiture under a bid bond shall exceed the lesser of (i) the difference between the bid for which the bond was written and the next low bid, or (ii) the face amount of the bid bond.

D. Nothing in this section shall preclude a public body from requiring bid bonds to accompany bids or proposals for construction contracts anticipated to be less than \$500,000 for nontransportation-related projects or \$250,000 for transportation-related projects authorized under Article 2 (§ 33.2-208 et seq.) of Chapter 2 of Title 33.2 and partially or wholly funded by the Commonwealth.

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

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

1. A performance bond in the sum of the contract amount conditioned upon the faithful performance of the contract in strict conformity with the plans, specifications and conditions of the contract. For transportation-related projects authorized under Article 2 (§ 33.2-208 et seq.) of Chapter 2 of Title 33.2, such bond shall be in a form and amount satisfactory to the public body.

2. A payment bond in the sum of the contract amount. The bond shall be for the protection of claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded, or to any subcontractors, in furtherance of the work provided for in the contract, and shall be conditioned upon the prompt payment for all materials furnished or labor supplied or performed in the furtherance of the work. For transportation-related projects authorized under Article 2 (§ 33.2-208 et seq.) of Chapter 2 of Title 33.2 and partially or wholly funded by the Commonwealth, such bond shall be in a form and amount satisfactory to the public body.

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

B. For nontransportation-related construction contracts in excess of \$100,000 but less than \$500,000, where the bid bond requirements are waived, prospective contractors shall be prequalified for each individual project in accordance with § 2.2-4317.

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

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

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

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

G. Nothing in this section shall preclude the contractor from requiring each subcontractor to furnish a payment bond with surety thereon in the sum of the full amount of the contract with such subcontractor conditioned upon the payment to all persons who have and fulfill contracts that are directly with the subcontractor for performing labor and furnishing materials in the prosecution of the work provided for in the subcontract.

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

**§ 2.2-4338. Alternative forms of security.**

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

B. If approved by the Attorney General in the case of state agencies, or the attorney for the political subdivision in the case of political subdivisions, a bidder may furnish a personal bond, property bond, or bank or savings institution's letter of credit on certain designated funds in the face amount required for the bid, payment, or

performance bond. Approval shall be granted only upon a determination that the alternative form of security proffered affords protection to the public body equivalent to a corporate surety's bond.

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

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

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

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

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

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

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

F. Consistent with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193, funds provided for expenditure pursuant to contracts with

public bodies shall not be spent for religious worship, instruction, or proselytizing; however, this prohibition shall not apply to expenditures pursuant to contracts, if any, for the services of chaplains.

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

H. If an individual, who applies for or receives goods, services, or disbursements provided pursuant to a contract between a public body and a faith-based organization, objects to the religious character of the faith-based organization from which the individual receives or would receive the goods, services, or disbursements, the public body shall offer the individual, within a reasonable period of time after the date of his objection, access to equivalent goods, services, or disbursements from an alternative provider.

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

#### **§ 2.2-4367. Purpose.**

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

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

#### **§ 2.2-4368. Definitions.**

As used in this article:

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

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

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

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

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

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

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

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

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

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

the public body, or a public official if designated by the public body, or both, prior to commencement of employment by that bidder, offeror or contractor.

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

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

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

**§ 2.2-4372. Kickbacks.**

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

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

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

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

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

No person who, for compensation, prepares an invitation to bid or request for proposal for or on behalf of a public body shall (i) submit a bid or proposal for that procurement or any portion thereof or (ii) disclose to any bidder or offeror information concerning the procurement that is not available to the public. However, a public body may permit such

person to submit a bid or proposal for that procurement or any portion thereof if the public body determines that the exclusion of the person would limit the number of potential qualified bidders or offerors in a manner contrary to the best interests of the public body.

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

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

B. No building materials, supplies or equipment for any building or structure constructed by or for a public body shall be sold by or purchased from any person who has provided or is currently providing design services specifying a sole source for such materials, supplies or equipment to be used in the building or structure to the independent contractor employed by the public body to furnish architectural or engineering services in which such person has a personal interest as defined in § 2.2-3101.

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

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

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

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

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

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

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

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

## APPENDIX 2

### PUBLIC-PRIVATE EDUCATION FACILITIES AND INFRASTRUCTURE ACT PROCUREMENT GUIDELINES

#### 1. General Provisions

##### (a) Application

- (1) In order for a project to come under the PPEA (the Act), it must meet the definition of a "qualifying project" as defined in the applicable Act as (i) any education facility, including, but not limited to a school building, any functionally related and subordinate facility and land to a school building (including any stadium or other facility primarily used for school events), and any depreciable property provided for use in a school facility that is operated as part of the public school system or as an institution of higher education; (ii) any building or facility that meets a public purpose and is developed or operated by or for any public entity; (iii) any improvements, together with equipment, necessary to enhance public safety and security of buildings to be principally used by a public entity; (iv) utility and telecommunications and other communications infrastructure; (v) a recreational facility; (vi) technology infrastructure, including, but not limited to, telecommunications, automated data processing, word processing and management information systems, and related information, equipment, goods and services; or (vii) any improvements necessary or desirable to any unimproved locally- or state-owned real estate.
- (2) The Act establishes requirements that the County must adhere to when reviewing and approving proposals received pursuant to the PPEA. In addition, the Act specifies the criteria that must be used to select a proposal and the contents of the comprehensive agreement detailing the relationship between the County and the private entity. Any proposal received or solicited by the County pursuant to the PPEA will be reviewed in accordance with the provisions of the applicable Act and these guidelines as they may apply. Further definitions of terms under the Act and these guidelines are found in Attachment 3.

- (3) The County has adopted these guidelines by resolution of the County Board of Supervisors dated September 24, 2018. These guidelines apply to all procurements under the PPEA where the County is the “responsible public entity” or where the County is the “affected local jurisdiction” within the meaning of Virginia Code § 56-575.1. For purposes of these guidelines, unless otherwise indicated, “Board” means the Board of Supervisors of King William County as applicable, “County Administrator” means the King William

County Administrator, as applicable, and “County” means the King William County Board of Supervisors and entities governed by the King William County Purchasing Policy, as applicable. If these guidelines and the PPEA conflict, the terms of the PPEA shall control.

- (4) The County Administrator is authorized to designate a working group to be responsible for evaluating proposals and negotiating the comprehensive agreement.
- (5) The individual designated by the County Administrator to serve as the point of contact for implementation of procedures, to receive proposals submitted under the PPEA and to respond to inquiries regarding the PPEA or these guidelines shall be the Purchasing Agent.
- (6) These guidelines may only be revised by an amendment adopted by the County Board of Supervisors.
- (7) The County Administrator shall have overall responsibility and be the primary contact for implementation of these guidelines.

- (b) Severability -If any provision of these guidelines or any application thereof is held invalid, such invalidity shall not affect other provisions or applications of these guidelines which can be given effect without the invalid provision or application, and to this end the provisions hereof are declared to be severable.

## 2. Proposals

### (a) Proposal Submission

- (1) A proposal under the Act may be either solicited by the County or delivered by a private entity on an unsolicited basis. Proposers may be required to follow a two-part proposal submission process consisting of a conceptual phase and a detailed phase, as described herein.
- (2) The Act allows private entities to include innovative financing methods, including the imposition of user fees or service payments, in a proposal.

Such financing arrangements may include the issuance of debt instruments, equity or other securities or obligations.

- (3) Proposals should be prepared simply and economically, following the format provided herein and providing a concise description of the Proposer's capabilities to complete the proposed qualifying project and the benefits to be derived from the project by the County. Project benefits to be considered are those occurring during the construction, renovation, expansion or improvement phase and during the life cycle of the project. Proposals also should include a comprehensive scope of work and a financial plan for the project, containing enough detail to allow an analysis by the County of the financial feasibility of the proposed project. The County may, at any time, require the Proposer to provide additional information and clarification to the submission.

- (b) Affected Local Jurisdictions - The term "affected local jurisdiction" means any county, city or town in which all or a portion of a qualifying project is located. Any private entity requesting approval from or submitting a conceptual or detailed proposal to the County must provide any other affected jurisdiction with a copy of the private entity's request or proposal by certified mail, express delivery or hand delivery within five (5) business days of submission of the proposal to the County. Evidence of the delivery of the proposal to any other affected local jurisdiction shall be provided to the County within five (5) business days of such delivery. Any affected jurisdiction shall have 60 days from the receipt of the request or proposal to submit written comments to the County and to indicate whether the proposed qualifying project is compatible with the (i) jurisdiction's comprehensive plan, (ii) jurisdiction's infrastructure development plans, and (iii) jurisdiction's capital improvements budget or other government spending plan. Comments received within the 60-day period shall be given consideration by the County, and no negative inference shall be drawn from the absence of comment by an affected jurisdiction. The County may begin or continue its evaluation of any such proposal during the 60-day period for the receipt of comments from other affected local jurisdictions.

- (1) Proposal Review Fee

For unsolicited proposals and unsolicited competing proposals, the County will require an initial processing fee of \$5,000 with an additional proposal fee of \$10,000 to be charged should the project proceed beyond the initial review. The initial processing fee shall be submitted with the initial proposal or competing proposal. The County will refund any portion of fees paid in excess of its direct costs which include, but are not limited to, all staff costs, and outside consultants, financial advisors, engineers and attorney's fees, associated with evaluating the proposal. In the event either the initial processing fee of \$5,000 or the additional proposal fee of \$10,000 is insufficient to cover all of the direct costs incurred by the County, the Proposer shall pay such additional direct costs incurred by the County in reviewing the proposal.

(c) Freedom of Information Act

- (1) Generally, proposal documents submitted by private entities are subject to the Virginia Freedom of Information Act (“FOIA”). In accordance with § 2.2-3705.6(11) of FOIA, such documents are releasable if requested, except to the extent that they relate to (i) confidential proprietary information submitted to the County under a promise of confidentiality or (ii) memoranda, working papers or other records related to proposals if making public such records would adversely affect the financial interest of the County or the private entity or the bargaining position of either party.
- (2) Subsection 56-575.4 (G) of the PPEA imposes an obligation on the County and any affected jurisdiction to protect confidential proprietary information submitted by a private entity or operator pursuant to 2.2-3705.6 (11). When the private entity requests that the County not disclose information, the private entity must (i) invoke the exclusion when the data or materials are submitted to the County or before such submission, (ii) identify the data and materials for which protection from disclosure is sought, and (iii) state why the exclusion from disclosure is necessary. A private entity may request and receive a determination from the County as to the anticipated scope of protection prior to submitting the proposal. The County is authorized and obligated to protect only confidential proprietary information, and thus will not protect any portion of a proposal from disclosure if the entire proposal has been designated confidential by the Proposer without reasonably differentiating between the proprietary and non-proprietary information contained therein.

Upon receipt of a request that designated portions of a proposal be protected from disclosure as confidential and proprietary, the County shall determine whether such protection is appropriate under applicable law and, if appropriate, the scope of such appropriate protection, and shall communicate its determination to the Proposer. If the determination regarding protection or the scope thereof differs from the Proposer’s request, then the County will accord the Proposer a reasonable opportunity to clarify and justify its request. Upon a final determination by the County to accord less protection than requested by the Proposer, the Proposer will be accorded an opportunity to withdraw its proposal. A proposal so withdrawn should be treated in the same manner as a proposal not accepted for publication and conceptual-phase consideration as provided below.

- (d) Use of Public Funds - Virginia constitutional and statutory requirements and County ordinances and policies as they apply to appropriation and expenditure of public funds apply to any comprehensive agreement entered into under the Act. Accordingly, the processes and procedural requirements associated with the expenditure or obligation of public funds shall be incorporated into planning for any PPEA project or projects.

- (e) Posting of Proposals - Proposals (solicited or unsolicited) submitted in accordance with the requirements herein shall be posted by the County within ten (10) business days after acceptance of such proposals by the Board. Posting shall be on the County's website for a minimum of ten (10) calendar days, and by publication, in a newspaper of general circulation in the area in which the contract is to be performed with a summary of the proposal(s) and the location where copies of the proposal(s) are available for inspection. A copy of the proposal(s) shall also be made available for public inspection in the Finance Department.
- (f) Applicability of Other Laws - Nothing in the PPEA shall affect the duty of the County to comply with all other applicable laws not in conflict with the PPEA. The applicability of the Virginia Public Procurement Act (the "VPPA") is as set forth in the PPEA.
- (g) Decision to Accept and Consider Unsolicited Proposal; Notice
- (1) Upon receipt of any unsolicited proposal or group of proposals and payment of the required fee by the Proposer or Proposers, the County will determine whether to accept the unsolicited proposal for publication and conceptual-phase consideration. If the County determines not to accept the proposal and not to proceed to publication and conceptual-phase consideration, it should return the proposal, together with all fees and accompanying documentation, to the Proposer(s).
  - (2) If the County chooses to accept an unsolicited proposal for conceptual-phase consideration, it shall post a notice within ten (10) working days in a public area regularly used by the County for posting of public notices for a period of not less than 45 days. The County shall also publish the same notice in one or more newspapers or periodicals of general circulation in the County to notify any parties that may be interested in submitting competing unsolicited proposals. Interested parties shall have 45 days from the date the notice is published to submit competing unsolicited proposals. The notice shall state that the County:
    - (i) has received and accepted an unsolicited proposal under the PPEA,
    - (ii) intends to evaluate the proposal,
    - (iii) may negotiate a comprehensive agreement with the Proposer based on the proposal, and
    - (iv) will accept for simultaneous consideration any competing proposals that comply with the guidelines adopted by the County and the PPEA.The notice also shall summarize the proposed qualifying project or projects, and identify their proposed locations.
  - (3) One copy of accepted unsolicited proposal(s) shall be made available for public inspection in the Finance Department in accordance with the provisions of §2 (e) above.

### 3. Solicited Proposals

- (a) The County may solicit proposals from private entities to develop, acquire, design, construct, improve, renovate, expand, equip, maintain or operate qualifying projects or qualifying transportation facilities. The County may use a two-part process consisting of an initial conceptual phase and a detailed phase. The County will set forth in the solicitation the format and supporting information that is required to be submitted, consistent with the provisions of the applicable Act.
- (b) The solicitation will specify, but not necessarily be limited to, information and documents that must accompany each proposal and the factors that will be used in evaluating the submitted proposals. The solicitation will be posted in such public areas as are normally used for posting of the County's notices, including the County's website. The solicitation will also contain or incorporate by reference other applicable terms and conditions, including any unique capabilities or qualifications that will be required of the private entities submitting proposals. Pre-proposal conferences may be held as deemed appropriate by the County.

### 4. Unsolicited Proposals

- (a) The PPEA permits the County to receive and evaluate unsolicited proposals from private entities to acquire, design, construct, improve, renovate, expand, equip, maintain, or operate a qualifying project. The County may publicize its needs and may encourage or notify interested parties to submit proposals subject to the terms and conditions of the PPEA. When such proposals are received without issuance of a solicitation, the proposal shall be treated as an unsolicited proposal.
- (b) Proposals should be prepared simply and economically, following the format provided herein and providing a concise description of the Proposer's capabilities to complete the proposed qualifying project and the benefits to be derived from the project by the County. Project benefits to be considered are those occurring during the construction, renovation, expansion or improvement phase and during the life cycle of the project. Proposals also should include a comprehensive scope of work and a financial plan for the project, containing enough detail to allow an analysis by the County of the financial feasibility of the proposed project. The County may, at any time, require the Proposer to provide additional information and clarification to the submission.

### 5. PPEA Proposal Preparation and Submission (Unsolicited and Solicited)

- (a) Format for Submissions at the Conceptual Stage

The County will require that all proposals (both solicited and unsolicited) at the conceptual stage contain the following information in the following format plus such other information as the County may reasonably request to complete its review or to comply with the requirements of the PPEA:

- (1) Completion and inclusion of a Proposer's Certification which is found as Attachment 1 to these guidelines
- (2) Qualifications and Experience
  - (i) Identify the legal structure of the firm or consortium of firms making the proposal. Identify the organizational structure for the project, the management approach and how each partner and major subcontractor in the structure fits into the overall team
  - (ii) Describe the experience of the firm or consortium of firms making the proposal, the key principals and project managers involved in the proposed project including experience with projects of comparable size and complexity, including prior experience bringing similar projects to completion on budget and in compliance with design, land use, service and other standards. Describe the length of time in business, business experience, public sector experience and other engagements of the firm or consortium of firms. Include the identity of any firms that will provide design, construction and completion guarantees and warranties and a description of such guarantees and warranties.
  - (iii) Provide the names, prior experience, addresses, telephone numbers and email addresses of persons within the firm or consortium of firms who will be directly involved in the project or who may be contacted for further information,
  - (iv) Provide a current or most recently audited financial statement of the firm or firms and each partner with an equity interest of twenty percent or greater.
  - (v) Identify any persons known to the Proposer who would be obligated to disqualify themselves from participation in any transaction arising from or in connection to the project pursuant to The Virginia State and Local Government Conflict of Interest Act, Chapter 31 (§ 2.2-3100 et seq.) of Title 2.2.
- (3) Project Characteristics
  - (i) Provide a description of the project, including the conceptual design. Describe the proposed project in sufficient detail so that type and intent of the project, the location, and the communities that may be affected are clearly identified.

- (ii) Identify and fully describe any work to be performed by the County or any other public entity.
  - (iii) Include a list of all federal, state and local permits and approvals required for the project and a schedule for obtaining such permits and approvals.
  - (iv) Identify any anticipated adverse social, economic, environmental and transportation impacts of the project measured against the County's comprehensive land use plan and applicable ordinances and design standards. Specify the strategies or actions to mitigate known impacts of the project.
  - (v) Identify the projected positive social, economic, environmental and transportation impacts of the project measured against the County's comprehensive land use plan and applicable ordinances and design standards.
  - (vi) Identify the proposed schedule for the work on the project, including sufficient time for the County's review and the estimated time for completion.
  - (vii) Propose allocation of risk and liability, and assurances for timely completion of the project.
  - (viii) State assumptions related to ownership, legal liability, law enforcement and operation of the project and the existence of any restrictions on the County's use of the project.
  - (ix) Provide information relative to phased openings of the proposed project.
- (4) Project Financing
- (i) Provide a preliminary estimate and estimating methodology of the cost of the work by phase, segment, or both.
  - (ii) Submit a plan for the development, financing and operation of the project showing the anticipated schedule on which funds will be required. Describe the anticipated costs of and proposed sources and uses for such funds, including any anticipated debt service costs. The operational plan should include appropriate staffing levels and associated costs based upon the County's adopted operational standards.
  - (iii) Include a list and discussion of assumptions underlying all major elements of the plan.

- (iv) Identify the proposed risk factors and methods for dealing with these factors. Describe methods and remedies associated with any financial default.
- (v) Identify any local, state or federal resources that the Proposer contemplates requesting for the project along with an anticipated schedule of resource requirements. Describe the total commitment, if any, expected from governmental sources and the timing of any anticipated commitment, both one-time and on-going.
- (vi) Identify the need, if any, for the County to provide either its general obligation or moral obligation backing. The underlying assumptions should address this need and/or state that the credit would be via a "Service Agreement", for example. Any debt issuance should be expected to receive an investment grade rating from a nationally recognized statistical rating agency. If the natural rating is not investment grade, the County may require the use of credit enhancements.
- (vii) Outline what impact, if any, a drop in interest rates would have on the ultimate annual project cost. Indicate if there is a method to refinance for cost savings or, conversely, if the firm is to receive the sole or primary benefit of this potential.
- (viii) Outline the financial penalties, if any, that would result should the County wish to terminate a project early or restructure the cash flows for some reason of its own choosing. The firm should be specific on this point.
- (ix) Provide a breakout of the fees to any underwriting firm(s) and the type of obligation the firm(s) are using with a financing component. Be specific as to tax-exempt, taxable, floating rate, fixed rate, etc.

## 5. Project Benefit and Compatibility

- (i) Identify who will benefit from the project, how they will benefit and how the project will benefit the County and the overall community.
- (ii) Identify any anticipated public support or opposition, as well as any anticipated government support or opposition (including that in any affected jurisdiction), for the project.
- (iii) Explain the strategy and plans, including the anticipated timeline that will be carried out to involve and inform the general public, business community, and governmental agencies in areas affected by the project.
- (iv) Describe any anticipated significant benefits to the community and the County, including anticipated benefits to the economic, social,

environmental, transportation, etc., condition of the County and whether the project is critical to attracting or maintaining competitive industries and businesses to the County.

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

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

(b) Format for Submissions at the Detailed Stage - If the County decides to proceed to the detailed phase of review with one or more proposals, the following information should be provided by the private entity unless waived by the County:

1. A topographical map (1:2,000 or other appropriate scale) depicting the location of the proposed project or facility.
2. A list of public utility facilities, if any, that will be crossed by the qualifying project and a statement of the plans of the Proposer to accommodate such crossings.
3. Information relating to the current plans for development of facilities to be used by a public entity that are similar to the qualifying project being proposed by the private entity, if any, of each affected jurisdiction.
4. A statement and strategy setting out the plans for securing all necessary property and/or easements. The statement must include the names and addresses, if known, of the current owners of the subject property as well as a list of any property the Proposer intends to request the County or affected jurisdiction to condemn.
5. A detailed listing of all firms, along with their relevant experience and abilities, that will provide specific design, construction and completion guarantees and warranties, and a brief description of such guarantees and warranties along with a record of any prior defaults for performance.
6. A total life-cycle cost, including maintenance, specifying methodology and assumptions of the project or projects including major building systems (e.g., electrical, mechanical, etc.), and the proposed project start date. Include anticipated commitment of all parties; equity, debt, and other financing mechanisms; and a schedule of project revenues and project costs. The lifecycle cost analysis should include, but not be limited to, a detailed analysis of the projected return, rate of return, or both, expected useful life of facility and estimated annual operating expenses using County adopted service levels and standards.

7. A detailed discussion of assumptions about user fees or rates, lease payments and other service payments, and the methodology and circumstances for changes, and usage of the projects over the useful life of the projects.
8. Identification of any known government support or opposition, or general public support or opposition for the project. Government or public support should be demonstrated through resolution of official bodies, minutes of meetings, letters, or other official communications.
9. Demonstration of consistency with appropriate County and/or affected jurisdiction comprehensive plans (including related environmental, land use and facility standards ordinances, where applicable), infrastructure development plans, transportation plans, the capital improvement plan and capital budget, or indication of the steps required for acceptance into such plans.
10. Explanation of how the proposed project would impact the County's or affected jurisdiction's development plans.
11. Identification of any known conflicts of interest or other factors that may impact the County's consideration of the proposal, including the identification of any persons known to the Proposer who would be obligated to disqualify themselves from participation in any transaction arising from or in connection to the project pursuant to The Virginia State and Local Government Conflict of Interest Act, Chapter 31 (§ 2.2-3100 et seq.) of Title 2.2.
12. Additional material and information as the County may reasonably request.

## 6. Proposal Evaluation and Section Criteria

### (a) Initial Review at the Conceptual Stage

1. Only proposals complying with the requirements of the PPEA that contain sufficient information for a meaningful evaluation and that are provided in an appropriate format will be considered by the County for further review at the conceptual stage.
2. The County will determine at this initial stage of review whether it will proceed using:
  - i. Standard "competitive sealed bidding" procurement procedures consistent with the VPPA; or

- ii. Procedures developed by the County that are consistent with procurement of other than professional services through "competitive negotiation" as the term is defined in § 2.2-4301 of the Code of Virginia. The County may proceed using competitive negotiation procedures only if it makes a written determination that doing so is likely to be advantageous to the County and the public based upon either (1) the probable scope, complexity or urgency of need, or (2) the risk sharing, added value, increase in funding or economic benefit from the project would otherwise not be available.
3. After reviewing the original proposal(s) submitted during the appropriate notice period(s), the County may determine:

- i. not to proceed further with any proposal (solicited or unsolicited),
- ii. to proceed to the detailed phase of review with the original unsolicited proposal,
- iii. to proceed to the detailed phase with a competing unsolicited proposal, or
- iv. to proceed to the detailed phase with one or more solicited or unsolicited proposals.

(b) In evaluating any request for proposal, the County may rely upon internal staff reports or the advice of outside advisors or consultants. Some or all of the following items, along with the specified information required herein, shall be considered in the evaluation and selection of PPEA proposals. The County, however, reserves and retains the right to reject any request for proposal at any time for any reason whatsoever.

#### 1. Qualifications and Experience

Factors to be considered in either phase of the County's review to determine whether the Proposer possesses the requisite qualifications and experience may include, but are not necessarily limited to:

- i. Experience with similar projects;
- ii. Demonstration of ability to perform work;
- iii. Leadership structure;
- iv. Project manager's experience;

- v. Management approach;
- vi. Financial condition; and
- vii. Project ownership.

## 2. Project Characteristics

Factors to be considered in determining the project characteristics may include, along with the specified information required herein, but are not necessarily limited to, the following:

- i. Project definition;
- ii. Proposed project schedule;
- iii. Operation of the project;
- iv. Technology; technical feasibility;
- v. Conformity to State, County or affected jurisdiction laws, regulations, and standards;
- vi. Environmental impacts;
- vii. Condemnation impacts;
- viii. State and local permits; and
- ix. Maintenance of the project.

## 3. Project Financing

Factors to be considered in determining whether the proposed project financing allows adequate access to the necessary capital to finance the project may include, along with the specified information required herein, but are not necessarily limited to, the following:

- i. Cost and cost benefit to the County;
- ii. Financing and the impact on the debt or debt burden of the County;
- iii. Financial plan including default implications;
- iv. Estimated cost; including debt source, operating costs, etc.; and

- v. Life-cycle cost analysis.

#### 4. Project Benefit and Compatibility

Factors to be considered in determining the proposed project's compatibility with the County's, affected jurisdiction's or regional comprehensive or development plans may include, along with the specified information required herein, but are not necessarily limited to, the following:

- i. Community benefits;
- ii. Community support or opposition, or both;
- iii. Public involvement strategy;
- iv. Compatibility with existing and planned facilities;
- v. Compatibility with County, regional, and state economic development efforts; and
- vi. Compatibility with the land use and/or transportation plans of the County and/or those of any affected jurisdiction.

#### 7. Comprehensive and Interim Agreements

- (a) At least thirty days prior to entering into an interim or comprehensive agreement a public hearing must be held on the proposals. The County shall give notice of such hearing by posting on County website and in a newspaper of general circulation in the area where the contract is to be performed, a summary of the proposed agreements and the location where copies of the proposals and proposed agreement are available for public inspection. The Notice shall be provided at least ten (10) days prior to the date of the public hearing.
- (b) Prior to acquiring, designing, constructing, improving, renovating, expanding, equipping, maintaining, or operating the qualifying project, the selected Proposer shall enter into a Comprehensive Agreement with the County. Each contract shall define the rights and obligations of the County and the selected Proposer with regard to the project.
- (c) The terms of the Comprehensive Agreement shall be tailored to address the specifics of the project and shall include but not be limited to:
  - 1. The delivery of maintenance, performance and payment bonds or letters of credit in connection with any acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, or

operation of the qualifying project; in a form and amount satisfactory to the County and on a form provided by the County.

2. The review and approval of plans and specifications for the qualifying project by the County;
3. The rights of the County to inspect the qualifying project to ensure compliance with the contract;
4. The maintenance of a policy or policies of liability insurance or selfinsurance reasonably sufficient to insure coverage of the project and the tort liability to the public and employees and to enable the continued operation of the qualifying project;
5. The monitoring of the practices of the operator by the County to ensure proper maintenance, safety, use and management of the qualifying project;
6. The terms under which the operator will reimburse the County for services provided;
7. The policy and procedures that will govern the rights and responsibilities of the County and the operator in the event that the contract is terminated or there is a material default by the operator including the conditions governing assumption of the duties and responsibilities of the operator by the County and the transfer or purchase of property or other interests of the operator by the County;
8. The terms under which the operator will file appropriate financial statements on a periodic basis.
9. The mechanism by which user fees, lease payments, or service payments, if any, may be established from time to time upon agreement of the parties. Any payments or fees shall be the same for persons using the facility under like conditions and that will not materially discourage use of the qualifying project;
  - i. A copy of any service contract shall be filed with the County.
  - ii. A schedule of the current user fees or lease payments shall be made available by the operator to any member of the public upon request.
  - iii. Classifications according to reasonable categories for assessment of user fees may be made.
10. The terms and conditions under which the County will contribute financial resources, if any, for the qualifying project; and

11. Other requirements of the PPEA or provisions that the County determines serve the public purpose of the PPEA.

(d) Prior to or in connection with the negotiation of the comprehensive agreement, the County may enter into an interim agreement with the private entity proposing the development or operation of the qualifying project. The scope of an interim agreement may include, but is not limited to:

1. Project planning and development;
2. Design and engineering;
3. Environmental analysis and mitigation;
4. Survey;
5. Ascertaining the availability of financing for the proposed facility through financial and revenue analysis;
6. Establishing a process and timing of the negotiation of the comprehensive agreement; and
7. Any other provisions related to any aspect of the development or operation of a qualifying project that the parties may deem appropriate prior to the execution of a comprehensive agreement.

(e) Once negotiations have concluded, the following shall occur:

1. The County shall make the proposed agreement available on the County website and in the offices of the Finance Department for at least 10 business days prior to the public hearing to be held by the County.
2. At least thirty days prior to entering into an interim or comprehensive agreement a public hearing must be held on the proposals. Such hearing may coincide with a regularly scheduled meeting of the County Board of Supervisors; comments may be submitted to the County at any time during the notice period and prior to the public hearing. After the public hearing and the end of the public comment period, no additional posting shall be required based on any public comment received.
3. The proposed agreement shall be posted in the following manner:
  - i. On the County website.
  - ii. In addition to the posting requirements, a copy of the proposals shall be made available for public inspection in the Finance office.

Trade secrets, financial records, or other records of the private entity excluded from disclosure under the provisions of subdivision 11 of §2.2-3705.6 shall not be required to be posted, except as otherwise agreed to by the County and the private entity.

- iii. Any studies and analyses considered by the County in its review of a proposal shall be disclosed at some point prior to the execution of an interim or comprehensive agreement.
  - iv. Once an interim agreement or a comprehensive agreement has been entered into, the County shall make procurement records available for public inspection, upon request.
  - v. Such procurement records shall include documents protected from disclosure during the negotiation phase on the basis that the release of such documents.
- (f) Any comprehensive agreement, interim agreement, and any amendments thereto shall first be approved by the Board of Supervisors and then executed in writing by persons having the authority to do so. For a mixed project involving both public schools and other facilities, the Board of Supervisors and School Board, may in their discretion, both enter into the same comprehensive agreement with the operator for the entire mixed project, with their respective responsibilities delineated in the agreement.
- (g) As required by Va. Code § 56-575.9.F., when the County enters into an agreement pursuant to the PPEA, a copy should be submitted to the Auditor of Public Accounts within 30 days thereafter at the following address:

Auditor of Public Accounts  
P.O. Box 1295 Richmond, VA 23218

The copy should be sent by certified-mail, return receipt requested, with a copy of the forwarding letter and return-receipt kept in the procurement file.

#### 8. Protests of PPEA Procurements:

The following are the exclusive procedures for contesting or challenging (protesting) (a) the terms or conditions of any solicitation of proposals by the County pursuant to the PPEA, (b) non-selection of a PPEA proposal for further consideration, and (c) the selection of any PPEA proposal for entry into an Interim and/or Comprehensive agreement or the entry into an Interim and/or Comprehensive agreement under the PPEA:

- (a) Any protest to any term or condition of a solicitation must be made in writing and delivered to the County Administrator so it is received by the County Administrator

before proposals are due under the solicitation. Any protest not received in this manner shall be deemed to be waived.

- (b) A protest of a County decision not to select a PPEA proposal for further consideration may only be made by the entity who submitted the proposal at issue. A protest of a County decision to select a PPEA proposal for entry into an agreement or to enter into an agreement may only be made by an entity who submitted a proposal for the procurement at issue and who was reasonably likely to have its proposal accepted but for the County's decision. Protests shall only be granted if (1) the protester has complied fully with this paragraph 8 and there has been a violation of law, these guidelines, or mandatory terms of the solicitation that clearly prejudiced the protestor in a material way, or (2) a statute requires voiding of the decision.
- (c) Any entity desiring to protest a County decision not to select a PPEA proposal for further consideration, to select a PPEA proposal for entry into an agreement, or to enter into an agreement shall submit the protest in writing and deliver it so that it is received by the County Administrator not later than 10 business days after announcement of the decision. Any protest not received in this manner shall be deemed to be waived.
- (d) The County Administrator shall issue a written decision on a protest within 10 days of its receipt by the County Administrator.
- (e) If the protest is denied, the protester may only appeal the denial or otherwise contest or challenge the procurement by then filing suit in the Circuit Court for King William County and serving the County with such suit within 10 days of such denial. Otherwise, the protester's right to appeal the denial or to otherwise contest or challenge the procurement shall be deemed to be waived.
- (f) The exclusive relief allowed if a protest is granted is to void the decision being protested. Under no circumstances will any monetary relief be allowed.
- (g) Strictly following these procedures shall be a mandatory prerequisite for any challenge of any nature to a decision by the County relating to terms and conditions of a PPEA solicitation, non-selection of a PPEA proposal for further consideration, selection of a PPEA proposal, or entry into an interim and/or comprehensive agreement. A failure to follow all these procedures strictly shall constitute a waiver of any right to challenge judicially a County decision (a) as to terms or conditions in a PPEA solicitation, (b) not to select a PPEA proposal for further consideration, (c) to select a PPEA proposal, or (d) to enter into an interim and/or comprehensive agreement.

## 9. NOTICE AND POSTING REQUIREMENTS.

See Attachment 2 for an outline of these requirements and the associated timelines.

ATTACHMENT 1 TO PPEA GUIDELINES

**Proposer's  
Certification**

Proposer's Name: \_\_\_\_\_

Proposer's Address

Telephone No.: \_\_\_\_\_

\_\_\_\_\_ Facsimile No.: \_\_\_\_\_

\_\_\_\_\_ E-mail Address: \_\_\_\_\_

Proposer's:

Proposer's or Proposer's Contractor's Virginia Class A General Contractor's License  
Number

\_\_\_\_\_

Proposer's or Proposer's Architects and Engineers Virginia Registration Numbers:

\_\_\_\_\_

After first being placed under oath, I hereby certify that I have authority to submit this proposal on behalf of the Proposer whose name appears above, that I am a principal of the Proposer, that the Proposer hereby agrees to all of the terms and conditions in the King William County PPEA guidelines, as amended, that neither the Proposer nor any member of its team or their principals is currently suspended or debarred from public contracting by any federal, state or local government entity, that I have taken reasonable steps to ascertain the accuracy of all the information contained in this proposal and this certification, and that the information in this proposal and certification is accurate to the best of my knowledge or information and belief.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed/Typed Name

---

Title (Principal of Proposer)

Commonwealth of Virginia :

: to wit

County/City \_\_\_\_\_ of :

On date, (same name as above) appeared before me, and after satisfying me of his/her identity and after being placed under oath, swore to the truthfulness of the above statement.

\_\_\_\_\_  
Notary Public

My commission expires: \_

(If applicable) the Proposer acknowledges receipt of the following addenda:

Addendum No.:	Dated:

ATTACHMENT 2 TO PPEA GUIDELINES

**NOTICE AND POSTING REQUIREMENTS**

<b>Requirement</b>	<b>Responsible Party</b>	<b>Unsolicited</b>	<b>Solicited</b>
Provide any affected jurisdiction with a copy of proposal within five (5) business days of proposal to County	Private Entity		
Any affected jurisdiction shall have sixty (60) days from receipt of proposal to provide comments to the County	Other affected jurisdictions		
County may begin or continue evaluation during the sixty (60) day review period	County		
Post proposals within ten (10) business days of acceptance	County		
Posting shall continue for ten (10) business days	County		
Posting shall continue for not less than forty-five (45) days	County		
Competing Proposals may be submitted within the forty-five (45) day posting window	Private Entities		
Provide ten (10) day notice of public hearing required for entering into agreement	County		
Public hearing must be held at least thirty (30) days prior to entering into a comprehensive or interim agreement	County		

Summary:

Acceptance of unsolicited proposals will generally require a minimum of 150 days from receipt of proposal to signature of interim or comprehensive agreement. This estimate does **not** include time required for review and evaluation of proposals.

Solicited proposals will generally require a minimum of 60 days from date of issuance of RFP to signature of interim or comprehensive agreement. This estimate does **not** include time required for creation of RFP, posting and distribution of RFP, receipt of proposals, review and evaluation of proposals.

## ATTACHMENT 3 TO PPEA GUIDELINES

### **Terms and Definitions**

"Affected jurisdiction" means any county, city, or town in which all or a portion of a qualifying project is located.

"Appropriating body" means the body responsible for appropriating or authorizing funding to pay for a qualifying project.

"Comprehensive agreement" means the comprehensive agreement between the private entity and the responsible public entity that is required prior to the development or operation of a qualifying project.

"Conceptual stage" means the initial phase of project evaluation when the public entity makes a determination whether the proposed project serves a public purpose, meets the criteria for a qualifying project, assesses the qualifications and experience of a private entity Proposer, reviews the project for financial feasibility, and warrants further pursuit.

"Cost-benefit analysis" means an analysis that weighs expected costs against expected benefits in order to choose the best option. For example, a city manager may compare the costs and benefits of constructing a new office building to those of renovating and maintaining an existing structure in order to select the most financially advantageous option.

"Detailed stage" means the second phase of project evaluation where the public entity has completed the conceptual stage and accepted the proposal and may request additional information regarding a proposed project prior to entering into competitive negotiations with one or more private entities to develop an interim or comprehensive agreement.

"Develop" or "development" means to plan, design, develop, finance, lease, acquire, install, construct, or expand.

"Interim agreement" means an agreement between a private entity and a responsible public entity that provides for phasing of the development or operation, or both, of a qualifying project. Such phases may include, but are not limited to, design, planning, engineering, environmental analysis and mitigation, financial and revenue analysis, or any other phase of the project that constitutes activity on any part of the qualifying project.

"Lease payment" means any form of payment, including a land lease, by a public entity to the private entity for the use of a qualifying project.

"Lifecycle cost analysis" means an analysis that calculates cost of an asset over its entire life span and includes the cost of planning, constructing, operating, maintaining, replacing, and when applicable, salvaging the asset. Although one proposal may have a lower initial construction cost, it may not have the lowest lifecycle cost once maintenance, replacement, and salvage value is considered. Public-Private Education Facilities and Infrastructure Act of 2002, as amended Commonwealth of Virginia Procedures Revised January 17, 2008 -29-

"Material default" means any default by the private entity in the performance of its duties that jeopardizes adequate service to the public from a qualifying project.

"Operate" means to finance, maintain, improve, equip, modify, repair, or operate.

"Opportunity cost" means the cost of passing up another choice when making a decision or the increase in costs due to delays in making a decision.

"Private entity" means any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, nonprofit entity, or other business entity.

"Public entity" means the Commonwealth and any agency or authority thereof, any county, city or town and any other political subdivision of the Commonwealth, any public body politic and corporate, or any regional entity that serves a public purpose.

"Qualifying project" means (i) any education facility, including, but not limited to a school building, any functionally related and subordinate facility and land of a school building (including any stadium or other facility primarily used for school events), and any depreciable property provided for use in a school facility that is operated as part of the public school system or as an institution of higher education; (ii) any building or facility that meets a public purpose and is developed or operated by or for any public entity; (iii) any improvements, together with equipment, necessary to enhance public safety and security of buildings to be principally used by a public entity; (iv) utility and telecommunications and other communications infrastructure; (v) a recreational facility; (vi) technology infrastructure and services, including, but not limited to, telecommunications, automated data processing, word processing and management information systems, and related information, equipment, goods and services; (vii) any technology, equipment, or infrastructure designed to deploy wireless broadband services to schools, businesses, or residential areas; or (viii) any improvements necessary or desirable to any unimproved locally- or state-owned real estate.

"Responsible public entity" means a public entity that has the power to develop or operate the applicable qualifying project.

"Revenues" means all revenues, income, earnings, user fees, lease payments, or other service payments arising out of or in connection with supporting the development or operation of a qualifying project, including without limitation, money received as grants or otherwise from the United States of America, from any public entity, or from any agency or instrumentality of the foregoing in aid of such facility.

"Service contract" means a contract entered into between a public entity and the private entity pursuant to § 56-575.5. Public-Private Education Facilities and Infrastructure Act of 2002, as amended Commonwealth of Virginia Procedures Revised January 17, 2008.

"Service payments" means payments to the private entity of a qualifying project pursuant to a service contract.

"State" means the Commonwealth of Virginia.

"User fees" mean the rates, fees, or other charges imposed by the private entity of a qualifying project for use of all or a portion of such qualifying project pursuant to the comprehensive agreement pursuant to § 56-575.9.