

Commonwealth of Virginia

Purchasing Manual for Institutions of Higher Education and their Vendors

The *Purchasing Manual for Institutions of Higher Education and their Vendors* specifies those policies which govern the purchasing processes at specifically designated publicly-funded colleges and universities who are eligible to be or are governed by *Subchapter 2 of the Restructured Higher Education Financial and Administrative Operations Act, § 23-38.88 et seq. of the Code of Virginia and Chapters 824 and 829, Acts of Assembly, 2008*. These policies are structured to support the mission of higher education and to comply with the principals of the *Virginia Public Procurement Act* and are in compliance with the individually adopted, “*Rules Governing Procurement of Goods, Services, Insurance, and Construction by a Public Institution of Higher Education of the Commonwealth of Virginia* (hereafter referred to as ‘*The Governing Rules*’, See *Appendix G*).

The Commonwealth is a national leader in excellence in higher education with a diverse group of institutions which satisfy higher education's missions--teaching, research, public service and patient care. In meeting this mission, institutions are also ethically and legally charged to be good stewards of our public funds.

The Governing Rules states that "competition be sought to the maximum feasible degree," and that "procurement procedures involve openness and administrative efficiency." It also states that "individual public bodies enjoy broad flexibility in fashioning details of such competition." Our institutions' missions and the General Assembly's charge as stated form the foundation for the Manual.

On this solid foundation, the Manual was constructed to meet several goals:

- Support the mission of higher education
- Maximize competition
- Comply with the *Code of Virginia*
- Present a clear, concise policy document which is specific to the purchasing departments of fully decentralized institutions of higher education
- Provide the flexibility to institutions to design their own small purchase procedures
- Provide information to vendors which seek to compete for the institutions' business
- Streamline policies to facilitate public and private sector cooperation
- Demonstrate higher education's commitment to ethics and fair business practices

Further, the Manual was written in an effort to create one comprehensive reference source for institutions and their vendors, thus reducing duplication of information and reproduction costs. Any information presented in other resources which govern institutions' specific expenditures, such as capital outlay are not included. Instead specific manuals or agencies are treated as resources.

The Manual, originally submitted in June 1995, was written under the authority of the *Appropriation Act of 1994, Section E 330*. It complied with the mandates of the Higher Education Decentralization Pilot Program, approved by the Secretary of Finance, in consultation with the Secretaries of Administration and Education and the Director of the State Council of Higher Education for Virginia. In 2005 and 2007, it was accepted by the Commonwealth of Virginia as the governing manual for those schools that were granted operational authority in

procurement through the *Restructured Higher Education Financial and Administrative Operations Act* and again in 2009 was accepted as the governing manual for all schools receiving operational authority in procurement through individual Memorandum of Understanding pursuant to *Chapters 824 and 829 Acts of Assembly of Virginia, 2008*.

It is in the spirit of stewardship, a greater mission, and support of the leadership of the Commonwealth, that this Manual is maintained and utilized by the following institutions of higher education:

College of William and Mary
George Mason University
James Madison University
Old Dominion University
Radford University

University of Virginia
Virginia Commonwealth University
Virginia Military Institute
Virginia Polytechnic Institute and State
University

The Manual was revised June 2009.
Further revisions are pending.

Key to Abbreviations

Institutions of Higher Education = Institutions

Purchasing Manual for Institutions of Higher Education and Their Vendors = The Manual

Virginia Public Procurement Act = VPPA

Rules Governing Procurement of Goods, Services, Insurance and Construction = The *Governing Rules*

Invitation for Bids = IFB

Request for Proposals = RFP

Department of General Services = DGS

Division of Purchases and Supply = DPS

Section 1 - Authority and Responsibilities

A. Introduction

The designated institutions of higher education are eligible to become or are currently governed through Management Agreements or Memorandum of Understanding authorized through the Restructured Higher Education Financial and Administrative Operations Act of 2004 and Chapters 824 and 829 of the Acts of Assembly, 2008 in the area of procurement. These institutions embrace the fundamental obligation to the general public to ensure that purchases are accomplished in accordance with the intent of the laws enacted by the Virginia General Assembly. The *Governing Rules* governs each institution's procurement of goods, services and insurance and states that:

To the end that the Institution shall obtain high quality goods and services at reasonable cost, that all procurement procedures be conducted in an open, fair and impartial manner with avoidance of any impropriety or appearance of impropriety, that all qualified vendors have access to the Institution's

business and that no offeror be arbitrarily or capriciously excluded, it is the intent of the governing body of the Institution that competition be sought to the maximum feasible degree, that procurement procedures involve openness and administrative efficiency, that individual public bodies enjoy broad flexibility in fashioning details of such competition, that the rules governing contract awards be made clear in advance of the competition, that specifications reflect the procurement needs of the purchasing body rather than being drawn to favor a particular vendor, and that the purchaser and vendor freely exchange information concerning what is sought to be procured and what is offered. The Institution may consider best value concepts when procuring goods and nonprofessional services, but not construction or professional services. Professional services will be procured using a qualification-based selection process. The criteria, factors, and basis for consideration of best value and the process for the consideration of best value shall be as stated in the procurement solicitation.

This statement highlights the use of competition to the maximum feasible degree. Conducted properly, competitive procurement responds to user needs, results in public confidence in the integrity of public purchasing, and provides fair access for the private sector to public sector business.

If there is to be a contract between an institution of higher education and a nongovernmental vendor, the *Governing Rules* and the regulations of the *Purchasing Manual for Institutions of Higher Education and Their Vendors* apply regardless of the source of funds by which the contract is to be paid or in the absence of any monetary consideration flowing to either party.

B. Authority and Responsibility

All purchases an institution makes shall be made in accordance with the *Governing Rules* and such rules and regulations as prescribed in this document. Any revision to the *Governing Rules* will be included as a change to the Manual. Institution presidents have the ultimate responsibility to ensure that the acquisition of goods and services is in compliance with the *Governing Rules*, executive orders, appropriations, other regulations, and the Manual.

C. Federal Grants

Restrictions on the use of funds are frequently imposed by the granting federal agency. If the federal grant or contract funds contain conditions that are in conflict with the *Governing Rules*, the institution must request and obtain a written determination from the Institution's President or designee that the acceptance of the grant or contract is in the public interest. Such determination shall state the specific provisions of the *Governing Rules* in conflict with the conditions of the grant or contract.

D. Authority to Sign Purchase Orders

The institution designates in writing those persons authorized to sign purchase orders. Dollar thresholds are established, as applicable, for each signatory authority. A copy of the written authorization must be on file in the institution's purchasing department.

E. Procurement Records and Checklist

The purchasing department awarding a contract or purchase order is responsible for maintaining all records relating to the procurement process. The file must be a complete record that tells the why, who, what, when, where and how of the procurement transaction.

F. Surplus Property

Each institution shall develop a policy and procedures for disposal of surplus materials. Such policy shall provide for the sale, environmentally-appropriate disposal, or recycling of surplus materials by the Institution and the retention of the resulting proceeds by the Institution.

The Federal Property and Administrative Act of 1949, as amended, is the basic authority for all functions of the Federal Surplus Property Program. The most recent major amendment was Public Law 94-519, effective October 17, 1977. On the federal level, the General Services Administration is responsible for administering the program in coordination with state agencies. In Virginia, Code Section 1.1-445.1, effective 1984, designated DPS to administer the program in conformance with the Act and approved State Plan of Operation.

Section 2 - Methods of Procurement - Goods and Services

A. Selection of Procurement Method

Purchases under \$50,000, shall be made in accordance with small purchase policies and procedures of each institution. If the purchase is over \$50,000, Institutions shall utilize Formal Sealed Bidding or Competitive Negotiations. Emergency, and Sole Source Procurement methods may be utilized where appropriate as authorized by the *Governing Rules*.

B. Small Dollar Purchases

The *Governing Rules* allow Institutions of Higher Education to establish and implement their own small dollar policies and procedures for purchases under \$50,000. The policies and procedures should encourage competition to the maximum feasible degree, provide fair access for vendors to small dollar purchases, and maintain flexibility to minimize administrative hardship for the private sector. Copies of these policies and procedures are available from each institution. Methods of procurement outlined in the Manual apply to purchases greater than \$50,000, unless noted. A model for small purchase procedures is included in the Manual as Appendix C.

C. Competitive Sealed Bidding and Invitation for Bids

1. Competitive Sealed Bidding

Competitive sealed bidding is used for procurements where clear and concise specifications can be written and price, responsiveness and responsibility are the basis of selection and award. In competitive sealed bidding the invitation for bid is the solicitation document/ tool used to list the purchase specifications or scope of work, all contractual terms and conditions and instructions to bidders.

2. Negotiation with Lowest Responsible Bidder

Bids are solicited based on developed bidders list based on commodity or services, either by direct solicitation or e-procurement for competitive sealed bids. Sealed bids are publicly opened and read aloud. As soon as practical, bids are evaluated and an award is made to the lowest responsive and responsible bidder. Any bidder who, despite being the apparent low bidder, is determined not to be a responsible bidder for a particular contract shall be notified in writing. (Refer to Section 5, "Protests, Disputes, and Remedies.")

Unless canceled or rejected, a responsive bid from the lowest responsible bidder shall be accepted as submitted except that if the bid from the lowest responsible bidder exceeds available funds, the institution may negotiate with the apparent low bidder to obtain a contract price within available funds; however, such negotiation may be undertaken only under conditions and procedures described in writing and approved by the institution prior to issuance of the IFB. "Available funds" are those budgeted by the institution for the requirement and designated as such prior to issuing the solicitation (*Governing Rules §15*).

3. Responsible Bidder

A responsible bidder is determined as a vendor which:

- is a regular dealer, supplier or an authorized dealer of the goods or services offered
- has the ability to comply with the required delivery or performance schedule, taking into consideration other business commitments
- has a satisfactory record of performance
- has a satisfactory record of integrity
- has the necessary facilities, organization, experience, technical skills, and financial resources to fulfill the terms of the purchase order or contract

4. Responsive Bidder

To be considered for an award, a bid must comply with the terms and conditions and specifications in the IFB. Failure to comply with the requirements set forth in the IFB may result in a bid being declared nonresponsive: for example, failure to sign a bid, or to return the required bid documents, substitution of vendor's terms, deletion of terms and conditions stated in the invitation for bids, failure to offer a product or service that meets the requirements of the invitation for bids, etc. may be grounds for this finding.

5. Multiple Awards

Unless otherwise specified in the solicitation institutions may, in their sole discretion, award a multi-line item procurement in whole or in part or on an individual line item basis or award the procurement to multiple vendors.

6. Alternate Bids

The institution's IFB must clearly state if the institutions will allow bidders to submit alternate bids or proposed approved equivalent products. If a bidder submits an alternate bid, it must clearly be identified as an alternate.

7. Informalities & Best Interest

The institution shall have the right to accept or reject any and all bids to waive informalities and to make awards in whole or in part and make awards in the best interest of the institution.

D. Competitive Negotiation and Request for Proposals

1. Competitive Negotiation

Competitive negotiation is a method for purchasing goods and services usually of a highly complex nature under which vendors are solicited by means of a request for proposals. The request for proposals includes all mandatory terms and conditions and is the tool used during the competitive negotiation process to describe in general terms what will be purchased, and to specify the criteria which will be used to evaluate proposals. Price may be considered but need not be the sole determining factor. A minimum of six vendors which appear to be qualified are normally solicited.

2. Ranking of Qualifications and Negotiations

In the competitive negotiation process, the institution reviews proposals according to selection criteria included in the RFP. Negotiations shall occur with two or more vendors deemed to be fully qualified and best suited among those submitting proposals. If only one vendor meets the requirements outlined in the specifications and terms and conditions or if one vendor is deemed to be clearly more highly qualified than the other vendors, then the purchasing department should describe in a written document why negotiations were conducted with only one vendor. This applies to the purchase of goods and nonprofessional services only.

3. Final Agreement

Any agreement reached as a result of negotiation must incorporate all agreements from negotiations into the written contract.

E. Sole Source

Upon a determination in writing that there is only one source practicably available, for that which is to be procured, a contract may be negotiated and awarded to that source without competitive sealed bidding or competitive negotiation. The writing shall document the basis for this determination. The institution shall issue a written notice stating that only one source was determined to be practicably available and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted in a designated public area or published in a newspaper of general circulation on the date the institution awards or announces its decision to award the contract, whichever occurs first (*Governing Rules* §5.E).

F. Emergency

An emergency is an occurrence of serious or urgent nature that demands immediate action. In case of an emergency, a contract may be awarded without competitive sealed bidding or competitive negotiation; however, such procurement shall be made with such competition as is practical under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The institution shall issue a written notice stating that the contract is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted in a designated public area or published in a newspaper of general circulation on the day the institution awards or announces its decision to award the contract, whichever occurs first, or as soon thereafter as is practicable (*Governing Rules* §5.F).

G. Reverse Auctioning

The purchase of goods or nonprofessional services, but not construction or professional services, may be made by reverse auctioning. However, bulk purchases of commodities used in road and

highway construction and maintenance, and aggregates shall not be made by reverse auctioning. (*Governing Rules §5.J*)

H. Preparing the Solicitation

Solicitations for purchases must convey to the reader, in a clear, concise and logical sequence, the information necessary to answer the basic questions of who, what, why, where, when and how. Terms and conditions must be written clearly and concisely, and express the intent of the institution. Terms and Conditions must be approved by the Office of the Attorney General.

The *Governing Rules*, requires public bodies to prominently display a nondiscrimination statement concerning faith-based organizations in all Invitations for Bid (IFB), Requests for Proposals (RFP), contracts, and purchase orders. To that end, the following statement must be used as applicable:

"This public body does not discriminate against faith-based organizations in accordance with the *Code of Virginia*, Section 2.2-4343.1, or against a bidder or offeror because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by state law relating to discrimination in employment (*Code of Virginia*, Section 2.2-4310.A)."

I. Specifications

Specifications are written to enhance competition, not to inhibit competition. These specification categories are listed in the preferred order of use:

(1) Generic (Performance and Design)

Buyers must analyze incoming requirements with a view towards soliciting the requirement on a generic specification basis. Under appropriate circumstances, performance specifications (setting forth the performance requirements), design specifications (setting forth the essential characteristics of the items solicited), or a qualified products list may be used.

(2) Brand Name or Equal

When it is determined to be impractical to develop a generic specification, a brand name may be used to convey the general style, type, character and quality of the article desired. Unless otherwise provided in the solicitation, the name of a certain brand, make or manufacturer does not restrict bidders to the specific brand or manufacturer named. Any article which the institution, in its sole discretion, determines to be the equal of that specified, considering quality, workmanship, economy of operation and suitability for the purpose intended, may be accepted (*Governing Rules §12.0*). When brand or manufacturers' names are specified, and one or more of these is known to be Virginia brands or manufacturers, those known to be Virginia brands or manufacturers are listed first before listing non-Virginia brands or manufacturers.

(3) Proprietary

A proprietary specification restricts the acceptable products to those of one manufacturer. Upon solicitation, every effort must be made to obtain full competition among the distributors which carry the manufacturer's product. The determination for the use of a proprietary specification must be made in advance and be included in the procurement file. It is appropriate to use a proprietary specification when the desired product:

- (a) must be compatible with or is an integral component of existing equipment or products
- (b) must be pre-qualified to support specific needs of a program

- (c) is covered by a patent or copyright
- (d) must yield absolute continuity of results - one with which a user has had extensive training and experience, and the use of any other similar piece of equipment would require considerable reorientation and training.

J. Vendor Assistance in Specification Preparation

No person who, for compensation, prepares an invitation to bid or request for proposal for or on behalf of a institution shall submit a bid or proposal for any portion of that procurement or disclose information concerning the procurement which is not available to the public. The institution shall permit this person to submit a bid or proposal only if the institution determines that the exclusion of the person would limit the number of potential qualified bidders or offerors, and not be in the best interest of the institution.

K. Comments or Questions Regarding Specifications

Every institution shall establish procedures whereby comments concerning specifications or other provisions in IFBs or RFPs can be received and considered prior to the time set for receipt of bids or proposals or award of the contract (*Governing Rules §13.0*).

L. Bonds

A bid bond, performance bond, or a payment bond may be required in a solicitation. When the institution requires a bid bond, it shall not exceed five percent of the amount bid. A bid bond, when specified, must accompany the bid. Performance bonds and payment bonds, if requested, must be in an amount at least equal to 100% of the accepted bid or proposal and should be filed 10 days prior to issuance of the purchase order or notice of award unless a written determination is made that it is in the best interests of the institution to grant an extension.

A certified check or cash escrow may be accepted in lieu of a bid, payment, or performance bond. If approved by the Attorney General, a bidder may furnish a personal bond, property bond, or bank or savings and loan association'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 offered affords protection to the institution equivalent to a corporate surety bond.

If a performance bond requirement is not stated in the solicitation and the institution later determines that a bond should be provided prior to the award of a contract, the contractor to whom the award will be made shall provide a performance bond, and the institution will pay the cost of the bond. For more information reference the(*Governing Rules §28*).

M. Term Contracts

Term contracts normally cover a 12 month period or cite a specific time for completion for the project or service. A solicitation for a multi-year contract, or one that includes an option on the part of the institution to renew the contract for an additional period, can be advantageous and should be considered. Multi-year programs are subject to the availability of funds, and each solicitation covering a multi-year period must contain an availability of funds clause. If price adjustments are to be permitted during the contract period, the conditions under which they are authorized must be specified in the original solicitation and resulting contract. Institutions should review all multi-year contracts at least annually to determine if the goods or services are still required, and if prices are fair and reasonable, based on the current market conditions, and if performance is satisfactory.

N. Public Notice and Response Time

When establishing a date and time for receipt of bids or proposals, institutions should allow time for vendors to adequately respond. Institutions must give public notice of the IFB or RFP at least 10 days prior to the date set for the receipt of bids or proposals. For an IFB, public notice is provided by posting in a designated public area, or publication in a newspaper of general circulation or both. For an RFP, public notice is provided by posting in a public area normally used for posting of public notices and by publication in a newspaper or newspapers of general circulation in the area in which the corresponding 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. For both RFPs and IFBs public notice shall be published on the Department of General Services' central electronic procurement website (<http://www.eva.state.va.us>) and other websites as deemed appropriate by the individual institutions. In addition, bids or proposals may be solicited directly from potential contractors. Any additional solicitations shall include businesses selected from a list made available by the Department of Minority Business Enterprises.

Additionally, public notice of sole source and emergency procurements be made by posting in a designated public area or published in a newspaper of general circulation on the day the institution awards or announces its decision to award the contract, whichever occurs first, or in the case of emergency procurements, as soon thereafter as is practicable. Sole source and emergency awards shall be published on the Department of General Services' central electronic procurement website (<http://www.eva.state.virginia.gov>) and other websites as deemed appropriate by the individual institutions.

O. Vendor Registration

Institutions should establish procedures for vendor registration. All Small, Minority Owned and Woman-owned Businesses who meet the definition established by the Code of Virginia as certifiable shall register for certification with the Commonwealth of Virginia Department of Minority Business Enterprises. (<http://dmbe.virginia.gov>)

P. Acceptance Period

Unless otherwise specified in the solicitation, bids and proposals are valid for 30 days from bid opening date.

Q. Prebid or Preproposal Conferences

Prebid or preproposal conferences provide an opportunity for the institution to emphasize and clarify critical aspects of solicitations, eliminate ambiguities or misunderstandings, and permit vendor input. Attendance at conferences or site visits may be optional or mandatory. When mandatory attendance is stipulated, only bids or proposals from those vendors represented will be accepted. Institutions should carefully consider whether it is absolutely necessary that vendors attend in order to understand the solicitation and submit a response to it, as mandatory conferences and site visits can reduce competition. Conferences should be scheduled to allow time for proper notification and vendor schedules. After the conference, the institution will issue an addendum to the solicitation if a modification to the solicitation is required as a result of the conference.

R. Amending or Withdrawing Bids or Proposals by Vendors

A vendor may amend or withdraw a bid or proposal if the institution receives such a request in writing before the due date and hour. The request must be signed by a person authorized to represent the person or vendor that submitted the bid or proposal.

Withdrawal of bids after the bid/proposal opening shall be due to the discretion of the Institution with the exception of Construction Bids. (*Governing Rules §23 A-F*).

S. Alterations to Bids or Proposals

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

T. Late Bids or Proposals

To be considered, bids or proposals must be received at the specific office location stipulated in the solicitation on or before the date and time designated on the solicitation. Vendors are responsible for the delivery of the bid or proposal and if using U.S. Mail or a delivery service should ensure that the bid or proposal is addressed properly. Bids received after the official time shall be rejected. . The official time used in receipt of responses shall be that time on the clock or automatic time stamp of the institution's purchasing department.

U. Cancellation or Rejection of Bids or Proposals

An IFB, RFP or any other solicitation may be canceled or rejected. The reasons for cancellation or rejection shall be made part of the contract file. The institution shall not cancel or reject an IFB, RFP or any other solicitation solely to avoid awarding a contract to a particular responsive and responsible bidder or offeror. (*Governing Rules §16*)

V. Mistakes in Bids or Withdrawals of Bids

1. Mistakes Discovered Before Opening

A bidder may correct mistakes discovered before the time and date set for receipt of bids by withdrawing and replacing or by correcting the bid.

2. Mistakes Discovered After Opening But Before Award

a. Informality

An informality is a minor defect or variation of a bid or proposal from the exact requirements of the invitation for bids, or the request for proposals, which does not affect the price, quality, quantity or delivery schedule for the goods, services or construction being purchased. The institution may, in its sole discretion, waive such informalities or permit the vendor to correct them, whichever procedure is in the best interest of the institution. Examples include the failure of a vendor to:

- (a) Return the number of signed bids or proposals required by the solicitation.
- (b) Sign the face of the bid or proposal in the space provided.
- (c) Acknowledge receipt of an addendum to the solicitation.

b. Judgment Errors

An institution may allow a vendor to withdraw a bid prior to award upon written request. Approval to withdraw a bid shall not be unreasonably withheld. However, if approval is given, the institution shall make no award to the vendor which withdrew its bid for a period of sixty calendar days. The vendor may not submit a replacement bid. This does not apply to construction bids. Withdrawal of construction bids is handled in accordance with the *Construction and Professional Services Manual*.

c. Non-Judgmental Errors

If the mistake and the intended correct bid are clearly evident on the face of the bid document, the bid shall be corrected to the intended correct bid and may not be withdrawn. Examples of mistakes that may be clearly evident on the face of the bid document are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors.

3. Withdrawal of Bids (*Governing Rules* §23)

- a. Institutions may establish procedures for the withdrawal of bids.
- b. If a bid is withdrawn the lowest remaining bid is be deemed to be the low bid.
- c. No bidder who is permitted to withdraw a bid shall, for compensation, supply any material or labor, or perform any subcontract or other work agreement for the person or vendor 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.
- d. No bid may be withdrawn when the result would be the awarding of the contract on another bid of the same bidder or of another bidder in which the ownership of the withdrawing bidder is more than five percent.

W. Denial of Withdrawal of Bid

If the institution denies the withdrawal of a bid it must notify the bidder in writing stating the reasons for its decision. The decision denying withdrawal of a bid is final unless the bidder appeals the decision within 10 days after receipt of the decision by invoking the appeals procedure or by instituting legal action as provided in the *Governing Rules* §48.

X. Unsolicited Proposals

Vendors are encouraged to submit unsolicited proposals offering new and innovative goods or services to institutions. However, all solicited and unsolicited proposals are submitted:

- at the risk of and expense of the offeror
- with no obligation on the part of the institution
- with no restriction on the institution's use of such ideas, proposals or the information contained therein

Unsolicited proposals shall be submitted in writing directly to the institution's central procurement office, which will establish a primary point of contact to coordinate the receipt and handling of unsolicited materials. Favorable evaluation by the institution does not in itself justify awarding a contract without providing for competition.

(Note: This policy applies only to goods and non-professional services, and not to construction or professional services.)

Y. Factors in Vendor Selection

1. Freight

Institutions may solicit bids on an FOB destination or FOB origin basis. Freight charges are used as a factor in award and should be clearly shown on all documentation of the procurement. By signing an IFB, bidders certify that the bid prices offered for FOB destination include only the actual freight rate costs at the lowest and best rate and are based upon the actual weight of the goods to be shipped. Freight charges are, therefore, established for each individual purchase. If a requirement is bid FOB origin, the vendor normally prepays the charges and adds the amount to the invoice. A copy of the freight bill should be attached to all invoices that include freight charges.

2. Nondiscrimination

In the solicitation, awarding or administration of purchase orders and contracts, no institution shall discriminate because of the race, religion, color, sex, disability, age, or national origin of the bidder, offeror, or vendor (*Governing Rules §9 and §36*). Agencies and institutions shall prominently display a nondiscrimination statement in all invitations for bid, requests for proposals, contracts, and purchase orders indicating that the public body does not discriminate against faith-based organizations.

3. Small, Women-owned, or Minority-owned Businesses

Institutions shall establish programs to facilitate the participation of small, women-owned, and minority (SWAM) businesses. These programs shall be established in writing and include cooperation with the Department of Minority Business Enterprise (DMBE), the United States Small Business Administrations, and other public or private agencies. Institutions shall submit annual progress reports on minority business procurements to the Department of Minority Business Enterprise (*Governing Rules §9*). Institutions will submit an annual SWAM Procurement Plan to DMBE and the Secretary of Education and Secretary of Administration. Institutions will comply with Appendix E, SWAM Procurement Programs. In the solicitation and awarding of purchase orders and contracts, institutions are encouraged to consider the use of small, women-owned, or minority-owned businesses.

4. Cash Discounts

Prompt payment discounts may be considered in determining the lowest responsive bidder.

5. Determination of Price Reasonableness

When competition is restricted, lacking, or the prices offered appear excessive, the institution is responsible for further analysis to determine if the prices are fair and reasonable. This applies for any sole source purchase, single response purchase, contract change and contract extension. The written documentation may be based on price analysis (comparison with prices previously paid, prices charged for functionally similar items, prices paid by other consumers, prices set forth in a public price list or commercial catalog, or state estimates) or through the analysis of price-to-unit variations, value analysis (make-or-buy study), or cost analysis. The written analysis must be supported by factual evidence in sufficient detail to demonstrate why the proposed price is deemed to be reasonable. If the institution determines that the prices offered are not fair and reasonable, then the

institution will either rebid to seek broader competition or use a revised specification or both. If it is a negotiated purchase, then the price should be negotiated to one that is fair and reasonable.

6. Contract Pricing Arrangements

Contracts may be awarded on a fixed price or cost reimbursement basis or on any other basis that is not prohibited. However, no public contract shall be awarded on the basis of cost plus a percentage of cost except in case of an emergency affecting the public health, safety or welfare and in the case of certain insurance policies as provided in the *Governing Rules §24*.

7. Taxes

a. Excise

The Commonwealth of Virginia is generally exempt from paying federal excise taxes except for air transportation, the cost of which is generally defined as any amount paid within the United States for transportation of any person by air. Certain vaccines require that an excise tax be paid by the purchasing activity.

b. State Sales

The Commonwealth of Virginia is generally exempt from paying Virginia's sales taxes on purchases of tangible personal property for its use or consumption. Requests for a Tax Exemption Certificate (Form ST-12).

c. Sales and Use Tax -- State Government and Political Subdivisions

Virginia's Sales and Use tax does not apply to sales of tangible personal property to the Commonwealth of Virginia or to its political subdivisions, for their use or consumption, if the purchases are pursuant to required official purchase orders to be paid for out of public funds. The tax applies when such sales are made without the required purchase orders and are not paid for out of public funds. No exemption is provided for state or local government employee purchases of meals or lodging whether purchases are pursuant to required official purchase orders or not. The following examples are offered to show that taxes apply to lodging and conference facilities under a variety of circumstances:

- **Hotels, motels, tourist camps, etc. Generally.** The tax applies to the sale or charge or any room or rooms, lodgings or accommodations furnished to transients by any hotel, motel, inn, tourist cabin, camping grounds, club or other similar place. The tax applies to all sales of tangible personal property by such business.
- **Charges in connection with accommodations.** Any additional charges made in connection with the rental of a room or other lodging or accommodations are deemed to be a part of the charge for the room and subject to the tax. For example, additional charges for movies, local telephone calls and similar services are subject to the tax. Toll charges for long-distance telephone calls are not subject to the tax.
- **Meals, lodging and other accommodations.** Charges for meals, catered events, lodging, and other accommodations, such as meeting or conference rooms, are subject to the tax when paid for by the state or local government or public institutions of learning, or employees of such, regardless of whether the purchases are made pursuant to required official purchase orders. Room setup charges in connection with the rental of rooms or conference rooms are also taxable. Setup charges not in connection with room rentals are not subject to the tax.

8. Preference for Virginia Products and Vendors (*Governing Rules §20*)

A. In the case of a tie bid, preference is given to goods and services produced in Virginia or provided by Virginia vendors, if such choice is available. Copies of tie bids resulting from competitive sealed bidding are forwarded to the Anti Trust Section of the Office of the Attorney General.

B. Whenever any bidder is a resident of any other State and such State under its laws allows a resident vendor of that state a preference, a like preference may be allowed to the lowest responsible bidder which is a resident of Virginia . Institutions contemplating an award wherein the price difference between a Virginia supplier and a non-Virginia low bidder is not very large should consult the National Institute of Governmental Purchasing Survey to determine whether the non-Virginia bidder's State has such a preference policy which could be reciprocally applied against that purchase, thereby permitting award to the Virginia supplier.

9. Preference for Virginia Coal Used in the Institution (*Governing Rules §21* :

In determining the award of any contract for coal to be purchased for use in the Institution with state funds, the Institution shall procure using competitive sealed bidding and shall award to the lowest responsive and responsible bidder offering coal mined in Virginia so long as its bid price is not more than 4 percent greater than the bid price of the lowest responsive and responsible bidder offering coal mined elsewhere.

10. Recycled Content (*Governing Rules §22*)

In determining the award of any contract for paper and paper products to be purchased for the institution's use, the institution shall use competitive sealed bidding and shall award to the lowest responsible bidder offering recycled paper and paper products of a quality suitable for the purpose intended so long as the bid price is not more than 10 percent greater than the bid price of the low responsive and responsible bidder offering a product that does not qualify as a paper or paper product which meets EPA Recommended Content Standards as defined in 40 C.F.R. Part 250 (*Governing Rules §22.A*).

In the case of a tie bid for goods after existing price preferences have been considered, preference is given to the bidder whose goods contain the greatest amount of recycled content (*Governing Rules §20.A*)).

11. Samples

There are situations when samples will be needed to verify quality levels or to test offered materials to determine conformance with the specifications stipulated in the bid solicitation. A request for samples must be clearly indicated in the bid solicitation. Samples should be properly labeled, stored, and controlled until no longer needed. Those not destroyed during testing should be returned to the vendor. If, after 60 days, the samples have not been picked up and vendors fail to provide disposition instructions, samples may be offered to the institution's departments for use or treated as surplus property. The file must be properly documented as to disposition of samples.

Z. Insurance

Whenever work is to be performed on State owned or leased facilities, the contractor is required to have insurance required by law and the institution's regulations to perform the type of work required. This includes Workers' Compensation, Employer's Liability, Commercial General Liability and Automobile Liability, and in certain types of programs Professional Liability/Errors and Omissions insurance coverage. In addition, for construction contracts, if any subcontractors are involved, subcontractors will also be required to have Workers'

Compensation Insurance in accordance with Sections 2.2-4332 and 65.2-800 et seq. of the *Code of Virginia*. Stipulated insurance must be obtained prior to contract award and be maintained during the entire term of the contract. An institution may require that the contractor provide the certificate of insurance prior to the provision of any goods and services or the commencement of any work.

AA. Drug-Free Workplace

Any contracted firm, its agents and employees are prohibited from manufacturing, distributing, dispensing, possessing, or using any unlawful or unauthorized drugs or alcohol while on State property. All public bodies must include in every contract worth over \$10,000 the following provisions: during the performance of the contract, the contractor agrees to

- (a) provide a drug-free workplace for the contractor's employees
- (b) post in conspicuous places 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 specify the actions that will be taken against employees for violations of such prohibition
- (c) state in all solicitations or advertisements for employees placed by or on behalf of the contractor that the contractor maintains a drug-free workplace
- (d) include the provisions of the foregoing clauses in every subcontract or purchase order of over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.

BB. Purchases from Cooperative State Contracts

Term contracts have been established by the University, the College and Cooperative Procurement Group, the Department of General Services' Division of Purchases and Supply and the Department of Information Technology. Term contract vendors offer favorable prices for a wide variety of goods and services from reliable vendors and should be regarded as the preferred procurement source to obtain more favorable prices through volume purchasing and to reduce procurement lead time and administrative effort. Written notices of contract awards are issued notifying institutions of the existence of such contracts.

With the exception of VITA contracts for telecommunications services, use of term contract sources is not mandatory, but it is strongly encouraged. Alternative commercial sources should not be selected based on personal preference. Rather, a business-related reason should exist for any decision to not use a term a contract. Examples include situations where the contract vendor does not offer the exact time or service required where more favorable price or delivery is available, or where better quality is available.

If any contract vendor does not meet performance expectations, it is important to advise the contracting officer of the situation so that appropriate action may be taken.

CC. Cooperative Procurement Among State Institutions

Any institution may participate in, sponsor, conduct, or administer a cooperative procurement agreement with one or more public bodies or agencies of the United States for the purpose of combining requirements to increase the efficiency or reduce administrative expenses in the acquisition of goods and services, other than professional services. Such purchases are made in accordance with the *Governing Rules* §6 and the Manual. The institution's IFB or RFP must state that the contract may be made available to other agencies for cooperative procurements.

Institutions will specifically endeavor to share contractual access and historic/prospective contract usage data with other institutions of higher education (to include four-year, two-year and community colleges). VASCUPP institutions will routinely share such data with other VASCUPP institutions when conducting cooperative procurements. VASCUPP institutions will routinely include a third-party access clause in their RFPs, IFBs and resulting contracts which will allow contractual access for other VASCUPP/higher education institutions and maximize the potential for advantageous terms, conditions, and pricing. The lead VASCUPP institution coordinating a cooperative procurement may also routinely choose to include access for: organizations (such as foundations) affiliated with their institution; and those counties, cities, or towns adjacent to their institution.

DD. Exceptions to Competitive Requirements

Competitive procedures may be waived under these circumstances (*Governing Rules §5: E-H*)

- (1) Selected categories of goods and services under \$50,000 as outlined in the institution's small purchase procedures
- (2) Purchases of used equipment under \$50,000
- (3) Purchases from governmental sources
- (4) Purchases under \$50,000 for testing or evaluation (limited to purchases of quantities considered necessary for complete and adequate testing)
- (5) Emergency purchases
- (6) Sole Source purchases

Section 3 - Procurements with Special Considerations

A. Information Technology

Any procurement valued at \$2,000,000 and above must be reviewed and approved in advance by the Virginia Information Technology Agency (VITA). Written approval of the VITA shall be obtained before any state agency contracts for telecommunications services from a non-governmental source.

Institutions are exempt from review and approval by the Chief Information Officer of the Commonwealth for procurements of information technology and telecommunications goods and services. Institutions may utilize federal General Service Agency ("GSA") contracts for procurement of information technology and telecommunication goods and services.

Information Technology Access Act

In accordance with Section 2.2-3504 of the *Code of Virginia*, the following clause apply to all information technology contracts:

NON-VISUAL ACCESS TO TECHNOLOGY: All information technology (the "Technology") which is purchased or upgraded by institutions of higher education shall comply with the following nonvisual access standards from the date of purchase or upgrade until the expiration of the contract:

- (i) effective, interactive control and use of the Technology shall be readily achievable by nonvisual means;

- (ii) the Technology equipped for nonvisual access shall be compatible with information technology used by other individuals with whom any blind or visually impaired user of the Technology interacts;
- (iii) nonvisual access technology shall be integrated into any networks used to share communications among employees, program participants or the public; and
- (iv) the technology for nonvisual access shall have the capability of providing equivalent access by nonvisual means to telecommunications or other interconnected network services used by persons who are not blind or visually impaired.

Compliance with the foregoing nonvisual access standards shall not be required if the head of the using agency, institution determines that (i) the Technology is not available with nonvisual access because the essential elements of the Technology are visual and (ii) nonvisual equivalence is not available.

Installation of hardware, software, or peripheral devices used for nonvisual access is not required when the Technology is being used exclusively by individuals who are not blind or visually impaired, but applications programs and underlying operating systems (including the format of the data) used for the manipulation and presentation of information shall permit the installation and effective use of nonvisual access software and peripheral devices.

If requested, the Contractor must provide a detailed explanation of how compliance with the foregoing nonvisual access standards is achieved and a validation of concept demonstration.

B. Conferences

As long as the procurement involves only the use of the facilities, the competitive requirements of the *Governing Rules* §37 and this manual do not apply. However, if the procurement includes the provision of catered meals, audio visual equipment, etc., and the value of these other included services exceeds the \$50,000 level for which competition is required, the entire procurement, including the use of the space, is purchased as a package based on its anticipated value.

In the event that there is a compelling reason for selecting a particular hotel or motel as the site for a conference, meeting, or training session, such as location or the only one that can provide the needed facilities during the time frame in which the event is to be held, the institution handles the procurement on a sole source basis. In this case, the use of non-competitive negotiation to secure the best price is required.

C. Construction

1. Capital Outlay Projects

The procurement of construction for Capital Outlay Projects Acquisition, construction or improvements related to property, plant or equipment (including plans), as defined in DPB's Budget Development Instructions, is governed by the rules of the *Construction and Professional Services Manual*, issued by the Department of General Services, Division of Engineering and Buildings.

Construction is defined as building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavation, grading or similar work upon real property (*Code of Virginia*, Section 2.2-4301). Construction is purchased by competitive sealed bidding. Competitive negotiation may be used if a determination is made in advance, and explained in writing that competitive sealed bidding is either

not practicable or not fiscally advantageous to the institution (*Code of Virginia*, Section 2.2-4303.C). Competitive negotiation may only be used specifically in these circumstances:

- (1) On a fixed price design-build basis or construction management basis under *Code of Virginia*, Section 2.2-4306.
- (2) For the alteration, repair, renovation, or demolition of buildings when the contract is not expected to cost more than \$500,000.
- (3) For the construction of highways and any draining, dredging, excavation, grading, or similar work on real property.

Nonprofessional services needed for construction or facilities maintenance, such as cost estimating, critical path method scheduling, construction inspections, roofing evaluations, and nondestructive testing, will be purchased under nonprofessional services guidelines.

Institutions should purchase construction, including but not limited to renovation, remodeling, demolition and repair work on buildings and other structures, which are not Capital Outlay Projects but which involve plans and specifications prepared by an architect or engineer, by using the same procedures and contract provisions of the *Construction and Professional Services Manual*. "Prepared by an architect or engineer," means that the information shown on the plans and specifications is of a technical nature requiring the knowledge, training and expertise of a person who practices architecture or engineering. It does not include work defined by a written description or "scope of work" neither accompanied by clarifying sketches nor does it include repair or replacement of equipment. It is recognized that staff architects and engineers are often utilized to prepare these sketches and scopes of work even though an engineer or architect is not required and others could provide this function. As a rule of thumb, if a staff architect or engineer were not available to do the work, would the institution have to employ an architect or engineer to prepare the bid documents for the work? If the answer is yes, then the project fits this criterion. Institutions purchase noncapital outlay construction in the same manner as nonprofessional services.

Systems necessary to make a building functional, such as heating, ventilation, air conditioning, electrical, elevators, or like systems are purchased in accordance with the *Construction and Professional Services Manual*. Equipment or furnishings, whether built-in or free standing, not acquired as part of a general construction contract and not requiring plans and specifications prepared by an architect or engineer, are purchased under the terms in the Manual.

At a minimum, a construction contractor will be required to provide insurance as required based on the type of construction service being performed. Contact the Department of General Services, Division of Risk Management for advice on the specific situation (804-786-5968).

Solicitations for construction contracts with an estimated cost of \$1,500 or more must contain a Contractor Registration clause.

2. Contractor License Requirements

Contractor Licensing and Registration. State statutes and regulatory agencies require that some contractors be properly registered and licensed, or hold a permit, prior to performing specific types of services. Among those services are the following:

Service

Regulatory Agency

Construction-Type	Department of Professional & Occupational Regulation
Pesticide Application	Department of Agriculture & Consumer Service
Asbestos Service	Department of Professional & Occupational Regulation
Security Service	Department of Criminal Justice Services
Treatment, Storage, Handling, Transportation, or Disposal of Hazardous Waste or Hazardous Radioactive Material	Department of Environmental Quality

It is the vendor's responsibility to comply with the rules and regulations issued by State regulatory agencies. The following statement should appear on the institution's solicitations for regulated services.

By my signature on this solicitation, I certify that this vendor or individual is properly licensed for providing the goods or services specified.

License # _____ Type _____

If a purchase of \$1,000 or more involves construction, removal, repair or improvement of any building or structure permanently annexed to real property or any other improvement to such real property, the contractor must possess one of the following licenses issued by the State Board for Contractors for the type of work involved (*Code of Virginia*, Sections 54.11103 and 54.11115).

Contractor License A (If the contract is \$120,000.00 or more or if the contractor does \$750,000 or more business in a 12-month period).

Contractor License B (\$7,500 \$120,000 or if the contractor does between \$150,000 and \$750,000 in business within a 12 month period; \$1,000 for electrical, plumbing, and HVAC work).

Contractor License C (\$1,000 \$7,500 or if the total value of work undertaken in a 12 month period does not exceed \$150,000). NOTE: Class C Contractors do not include electrical, plumbing, and heating, ventilation and air conditioning (HVAC) contractors.

The solicitation must state that the appropriate contractor license number must be furnished with the bid or proposal. If a contractor who is already licensed fails to submit the license number with the bid or proposal, the bid or proposal may still be considered if the contractor promptly submits the number upon the request of the purchasing office. An unlicensed vendor submitting a bid or offer when license is required is nonresponsive and is in violation of State law. Any buyer who knowingly receives or considers a response from an unlicensed vendor when a license is required is in violation of State law (*Code of Virginia*, Section 54.1-1115). Contractors must be licensed in the proper classification and specialty to perform the work required by the solicitation. If there is any question as to whether a licensed contractor is required for a specific procurement, call the State Board for Contractors for information or for policy interpretation (804-367-8511 or 804-367-2785).

D. Printing

1. CORPRINT, a Corrections industry, is a required source for certain types of printed materials (*Code of Virginia*, Section 53.147). Should CORPRINT not be able to fulfill the requirement, institutions must document the file, explaining why another vendor was used. Institutions are exempt from using CORPRINT if they operate in-house printing services.

2. Ownership of Artwork, Negatives, Etc. All artwork, negatives, dyes, overlays or similar material used to print a job is the institution's property and must be returned to the institution upon completion of the job. This should be clearly stated in all solicitations. Institutions should not process any invoice for payment until these items are returned. The institution may waive this requirement when it is not practical.

3. Copyright. No vendor may copyright any work produced for the institution without prior written consent.

4. Multi-Color Printing. Except for promotional publications and diplomas or where the use of color is essential to support the purpose of the publication, all printing must be one color. Examples of supporting the purpose of the publication are: maps, aeronautical charts, or pictures illustrating the difference between healthy tissue and diseased tissue or the use of color blocks or words on a form to highlight or separate critical areas. Multi-color printing may be used for promotional publications. A promotional publication is defined as a publication:

- produced for institutions with specific statutory authority to advertise or promote
- designated for specified audiences outside of government
- intended to yield significant benefit to the Commonwealth and are produced for use in a competitive environment which may require multiple colors and other special features

All printing requests not meeting the three conditions above must be accompanied by a letter justifying the use of multicolor printing. This applies to jobs produced in-house as well as outside purchases. The institution's President or Chancellor or his or her official designee must approve requests for multi-color printing.

E. Consultant Services

Consultants provide information, assistance, and guidance of a purely advisory nature, usually in the form of a report or other deliverables, setting forth alternative courses of action and recommendations based on the expertise possessed by the outside individual, vendor or organization. Such advice or assistance does not relieve the institution's management of responsibility for its final decision.

Before engaging an outside consultant the institution should first examine the possible use of State agencies:

Department of Human Resource Management -- personnel management, employee relations, training programs, job evaluations, compensation studies and workload evaluations.

Department of Accounts -- financial controls and internal audit programs.

Department of Planning and Budget -- analysis of alternatives, program review and evaluation, cost reduction programs and productivity improvement (*Code of Virginia*, Section 2.2-1501).

F. Individual Services

Contracting for the services of individuals should be treated the same as any other purchase. However, institutions contracting with individuals are cautioned that problems have arisen with the Federal Internal

Revenue Service concerning withholding and Social Security taxes when the individual performs under the supervision and control of the institution. An employer - employee relationship has been determined to exist in such cases, and subjects the institution to tax liability and employment obligations established by State law or gubernatorial policy. Purchasing departments should consult with their financial officers, human resources officers, and legal counsel to establish policies and procedures for the use of independent contractors.

G. Professional Services

Professional services must be obtained by competitive negotiation. The institution 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. Discussions include nonbinding estimates of total project costs. Proprietary information from competitive offerors shall not be disclosed to the public or to competitors. At the conclusion of discussions, on the basis of evaluation factors published in the RFP and all information developed in the selection process to this point, the institution 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 institution can be negotiated with 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 with a fair and reasonable price. Should the institution 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 (*Governing Rules §4.3A*).

State agency concurrence or approval for selected services may be required by reasons of law, regulations, directive, or appropriation. Such services and related agencies are as follows:

- Service Agency
- Accounting Dept. of Accounts
- (Coordination and Assistance)
- Architecture, Landscape Architecture, Department of General Services
- Professional Engineering and Land Surveying Division of Engineering and Buildings
- Law Attorney General's Office

1. Legal Services and Expert Witness

Institutions may enter into contracts without competition for legal services, provided that the pertinent provisions of Chapter 5 (Section 2.2-500 et seq.) of Title 2.2 remain applicable or for expert witnesses and other services associated with litigation or regulatory proceedings.

2. Construction Related Services

The procurement of Architectural, Landscape Architectural, Land Surveying, and Professional Engineering Services for Capital Outlay projects and similar projects not classified as Capital Outlay projects must be in accordance with the *Construction and Professional Services Manual*.

H. Nonprofessional Services (*as defined in Governing Rules §4*)

The term “nonprofessional services” means any services not specifically identified as professional services in the definition of professional services and includes small construction projects valued not over \$1 million; provided that subdivision 3 a of the definition of "competitive negotiation" in this section shall still apply to professional services for such small construction projects.

I. Special Approvals

Approval for certain services is required by law, regulation, directive or appropriation. Services requiring other State agencies' approval or concurrence are as follows:

Capital Outlay Related Services - Department of General Services/Division of Engineering and Buildings.

Banking and Bank-Related Cash Management Services - Department of the Treasury, Division of Cash Management and Investments.

Legal Services – Office of the Attorney General or appointed legal counsel.

J. Department of Corrections

Institutions must purchase articles and services produced or manufactured by State correctional facilities which are supported in whole or in part with State funds. Information on the goods and services available from Corrections is contained in the Virginia Correctional Enterprises catalog. Institutions submit purchase orders directly to Correctional Enterprises or VCE Partnership companies. Institutions with critical needs should contact the Correctional Enterprises, Customer Service, by phone (800) 823-2823 to discuss availability, delivery, etc. Written releases are granted if Corrections has nothing compatible with the requirement, or if it is unable to meet the delivery requirement. If desired by institutions, these releases may be given by facsimile transmission. Under the *Code of Virginia*, the Director of DGS/DPS may exempt purchasing from Correctional Enterprises when, in his/her opinion, an article produced or manufactured does not meet the reasonable requirements of the institution. In any case where the Director of DGS/DPS grants an exception, the Director submits a copy of the written justification for the exception to the Director of the Department of Corrections. Intentional violations of the requirement to purchase from Corrections, after notice from the Governor to desist, shall constitute malfeasance in office and shall subject those responsible for such violations to suspension or removal from office as provided for in the *Code of Virginia*, Sections 53.1-47, 53.1-48, and 53.1-51.

K. Nonprofit Sheltered Workshops of Virginia

Institutions may purchase goods and services from nonprofit sheltered workshops without competition if the goods or services (*Governing Rules* §37.1.b):

- (1) are within 10 percent of fair market value
- (2) are of acceptable quality
- (3) can be supplied within the time required
- (4) are not produced by inmates confined in State correctional institutions
- (5) are offered at a price which is fair and reasonable
- (6) are not produced by schools or workshops under the supervision of the Virginia Department of the Visually Handicapped

L. Rental, Lease, or Installment Purchase of Goods

Rental, lease, or installment purchase of materials, equipment or supplies is handled in the same manner as the purchase of goods.

M. Used Equipment

Used equipment costing no more than \$50,000 may be purchased using non-competitive negotiation upon a written determination that there is only one sole source practicably available for the used equipment. Used equipment is that which has been previously owned and used and if offered for sale under "where is, as is" conditions. It does not include demonstration or factory rebuilt items marketed through distributors.

Complete information describing the item must be provided to the purchasing departments, including the seller's price in writing. Prior to preparation of a purchase order, the purchasing department must obtain a written statement from a person who is technically knowledgeable of the type of equipment to be purchased, normally the end user, verifying the condition of the equipment, its future usefulness, and that its purchase would be in the best interest of the institution.

Section 4 - Contract Administration and Vendor Performance

With increased privatization and use of term contracts for administrative support within Higher Education, it is important for each institution to develop a methodology for active contract administration. Only through continual active involvement of contract administrators, working partnership with contracting officers, will the institutions contractual performance goals be achieved.

Contract administration begins with the signing or execution of a contract or purchase order. Its purpose is to assure that the contractor's total performance is in accordance with the terms and conditions of the contractual agreement. The integrity of the public purchasing system demands that goods or services be furnished as specified in the contract. Contract administration includes all actions taken by the institution relative to a specific contract after the award is made. A contract administrator is normally identified in each contract. Institutions should also assemble and maintain a master listing of all term contracts to include the base period and number of renewals.

A. Contract Modification Restriction

A contract awarded by the Institution may include provisions for modification of the contract during performance, but no fixed-price contract may be increased by more than 25 percent of the amount of the contract or \$50,000, whichever is greater, without the advance written approval of the Institution's president or his designee. In no event may the amount of any contract, without adequate consideration, be increased for any purpose, including, but not limited to, relief of an offeror from the consequences of an error in its bid or offer.

B. the Institution may extend the term of an existing contract for services to allow completion of any work undertaken but not completed during the original term of the contract. (*Governing Rules §8*)

B. Assignment of Contract

The contractor cannot assign a contract in whole or in part without the prior written consent of the institution.

C. Contract Renewal or Extension

A contract may contain a renewal clause describing the conditions under which a term contract may be renewed for a stipulated period of time. The decision to renew lies with the institution.

An institution may extend the term of an existing contract for services to allow completion of any work undertaken but not completed during the original term of the contract.

D. Special Types of Contracts

1. Requirements-Type Contracts

Requirements-type contracts (open-ended) have no fixed total dollar amount; rather, they are typically unit price based. They establish a framework under which goods or services are provided, but it is the degree of ordering activity against the contract that will ultimately determine its total value. Effective administration of open end contracts requires that the institution have the ability to determine the degree of activity against these contracts. This includes having the ability to capture and analyze usage information, where appropriate. Contract administrators should ensure that ordering activity is in compliance with the terms of the agreement. Contract expenditure activity and contractor performance should always be examined prior to the exercise of any renewal provision or resolicitation.

2. Time and Materials Contracts

Whenever an institution uses a cost reimbursement contract such as time and materials to acquire needed goods or services, the contract administrator should carefully analyze the invoice prior to providing approval for payment. Because there may be no incentive for contractors to contain costs, contract administrators have an obligation to verify the legitimacy and accuracy of any costs submitted for reimbursement. When a time and materials contract is used, the contract administrator should obtain, whenever feasible, a detailed cost estimate and evaluate the reasonableness of its cost elements before authorizing the work to be performed. If it is determined that the estimate is not reasonable or in accordance with the terms of the contract, negotiations or the solicitation of additional estimates should be considered.

During the actual work performance period, it is clearly in the institution's best interests to have an organized means to periodically monitor the work of the contractor and the conformance of the goods or materials being supplied. Contractors should come to expect such involvement by the institution as the norm rather than the exception.

3. Consultant Services

When the services of a consultant are utilized, especially when analysis and research are involved, and the contractor's performance is to culminate in a written report or other document (i.e., the deliverable), it is imperative that the contract administrator periodically check the contractor's performance and assure that it is progressing to the degree anticipated. If performance does not satisfy expectations, the institution may issue a "cure" notice with specific guidance on what must be done to adequately meet performance expectations. If the consultant's report or any deliverable is not acceptable, the institution does not pay the final invoice until an acceptable report is received. A written notice is issued to the consultant stating what must be done to satisfy the requirements of the contract.

4. Revenue Sharing Contracts

Institutions possess statutory authorization to generate revenue. Service contracts for the management of cash operations (e.g. food service, canteen or bookstore operations, etc.) allow institutions to share in the revenues these activities generate rather than require any expenditure of funds. Commissions are often based as a percentage of gross receipts, but many financial arrangements are possible. Institutions must be able to verify gross sales under agreements of this type. The contract administrator must assume responsibility for sound financial management of the contract performance. In addition, the disposition of any purchased capital equipment at termination and additions to real property during the term of the agreement must also be addressed in the contract.

E. Purchase Order, Authority, and Shipment

A purchase order is a document the institution uses to execute a purchase transaction with a contractor. The purchase order number must be shown on all bills of lading, packing slips, back orders, invoices, etc. The contractor's receipt of a purchase order authorizes shipment. For requirements-type contracts, the receipt of a notice of award establishing a contract does not authorize shipment. Shipment is authorized by the receipt of a purchase order written against the contract. Contractors which accept and deliver an order without a purchase order or number or other properly executed contract form do so at their own risk.

F. Purchase Order Changes

A purchase order change is used to correct errors, to add or delete small quantities of goods, or to make other minor adjustments in the original orders. It may also be used to cancel an order. A contractor which deviates from the requirements of a purchase order or contract prior to receipt of an authorized change order does so at its own risk. The authority to modify a contract resides with the institution's purchasing department exclusively unless the modification exceeds 25 percent or \$50,000 of the fixed price contract. ((*Governing Rules* §8)

G. Cancellation of Purchase Orders and Contracts

The institution's purchasing department may cancel purchase orders. The institution's purchasing department confirms all cancellations made by telephone, electronically, with a facsimile or written purchase change order which explains the basis of the cancellation.

Orders or contracts may be canceled without a contractor's consent as provided in under sections "Termination for Default" or "Termination for Convenience of the Commonwealth."

A contractor may request cancellation of any order and the institution will grant relief if the contractor is prevented from specific performance including timely delivery by an act of war, legal authority, act of God or other unavoidable causes not attributed to the contractor's fault or negligence. The burden of proof rests with the contractor. The institution reserves the right to cancel all contracts with any contractor which fails to perform for any one contract.

H. Delivery and Receipt of Goods

1. Delivery

Delivery must be made by the date or period specified in the purchase order or contract or the contractor may be considered to be in default. If a contractor cannot make delivery as specified under an existing purchase order or contract, the contractor must immediately notify the purchasing department. The contractor may offer a new delivery date; however, if it is not acceptable to the institution and delivery cannot be made as originally

specified, the contractor may be considered in default. Delivery by a contractor to a common carrier does not constitute delivery to the institution. Any claim for loss or damage incurred during delivery is between the contractor and the carrier. The institution accepts title only when goods are received and accepted regardless of the FOB point. Contractors should ensure they have been given a specific delivery location and must obtain a signed receipt for goods delivered.

2. Over shipments and Overruns

The institution's purchasing department has the authority to approve the acceptance of goods in excess of those specified on the purchase order or contract provided the acceptance of excess good or services is in accordance with Section 4A, "Contract Modification Restrictions."

3. Substitutions

Substitution is defined as delivery of an item that does not conform to the specifications of the purchase order or contract. Substitutions on purchase orders require the prior approval of the purchasing department. Any supplies delivered that do not meet specifications may be returned to the contractor at the contractor's expense. When a shipment or item is returned, the contractor must make immediate replacement with acceptable merchandise.

4. New, Used, Altered

All supplies and equipment furnished must be new and in first class condition unless the purchase order or contract specifies used items. Demonstration, previously rented or reconditioned items are not considered new. No equipment is acceptable if serial numbers or any other manufacturers' identifying labels or marks have been removed, obliterated, or changed.

5. Packaging

Unless otherwise specified in the solicitation, contractors must use new standard commercial packing and shipping containers. Shipping containers must be legibly marked or labeled on the outside with the commodity description and number, size, quantity, contract number, and agency purchase order number or purchase order number. A packing slip or invoice must accompany all shipments and must reference the purchase order number.

6. Receipt of Shipments

The institution checks shipments against the ordering document to assure quantities, units, etc., match. Required grading certificates, USDA stamps, or any other proofs of quality must precede or accompany the shipment.

7. Inspection

All materials, equipment, supplies, and services are subject to inspection and test. Items or services that do not meet specifications may be rejected. Failure to reject upon receipt, however, does not relieve the contractor of liability for latent or hidden defects subsequently revealed when goods are put to use or tested. If latent defects are found, the contractor is responsible for replacing the defective goods within the delivery time originally stated in the solicitation and is liable for any resulting expenses the institution incurs.

8. Lost or Damaged Shipments

The receiving institution will note all apparent damages in transit on the freight bill and will notify the contractor. Discovery of concealed damage or loss must be reported by the receiving institution to the carrier and the contractor within seven days of receipt. The contractor must make immediate replacement of the damaged or lost merchandise or be in default of the contract. It is the contractor's responsibility to file a claim against the carrier. If damage is to a small quantity, with the purchasing department's approval, the contractor may deduct the amount of damage or loss from its invoice in lieu of replacement.

I. Complaints on Vendor's Goods or Services

The institution's purchasing department shall report differences between the contract and subsequent performance to the contractor on a Complaint to State Vendor form. Failure to respond within 10 days may result in removal from the institution's and/or State's vendors' List. Complaints or discrepancies on contractor performance should be reported as they occur. These reports are necessary in order for the institution and DPS to develop contractor history, evaluate contractor performance, and, if required, to take appropriate action.

J. Inspection, Acceptance, and Rejection of Goods or Services

Institution's purchasing department or designee is responsible for inspecting and accepting goods or services purchased. Inspection is the close and critical examination of goods or services delivered to determine conformance with applicable contract requirements or specifications.

Rejection of goods or services is the responsibility of the institution whenever the goods or services do not meet contract requirements.

K. Termination for Default, Default Actions, Notice to Cure

A contractor may be considered in default if it fails to perform in accordance with the terms of the purchase order or contract. These factors should be considered prior to taking any default action.

- (1) The specific reasons for the failure.
- (2) The period of time needed to obtain the goods or services from other sources compared to the time that delivery or performance could be accomplished by the delinquent contractor. If a contractor fails to perform, the institution should notify the contractor and try to reach a satisfactory solution. If the matter cannot be resolved, the institution may issue a Complaint to State Vendor Form. If the matter is still not resolved a "Notice to Cure" may follow. The notice may be given either orally or in writing advising the contractor that nondelivery or nonperformance is a breach of contract and, if the deficiency is not corrected within a specified number of days, the institution will terminate the contract for default and hold the contractor liable for any excess costs. When the notice to cure is given orally, it should be confirmed in writing when warranted, i.e., complex agreements or concern about willingness of the contractor to voluntarily comply. Upon the expiration of the time period, if a satisfactory resolution has not been reached, the institution sends the contractor a Termination for Default Letter and takes repurchase action by awarding to the next lowest bidder or re-soliciting bids. If the repurchase results in increased costs to the institution, the institution invoices the original contractor for the excess costs. Until the excess costs repayment has been received, the contractor may be removed from the institution's contractor list. Concurrently, the institution notifies DPS. If repayment has not been made by the end of the specified period of time, collection action may be taken under the institution's approved debt collection policy. In addition, concurrent action to debar the defaulted contractor can be initiated. Contractors shall not be liable for any excess cost if the failure to perform arises out of any act of war, order of legal authority, strikes, act of God, or other

unavoidable causes not attributed to their fault or negligence. Failure of a contractor's source to deliver is generally not considered to be an unavoidable cause.

L. Termination for Convenience

A purchase order or contract may be terminated for the institution's convenience by notifying the contractor. This notice specifies the extent to which performance under the purchase order or contract is terminated, and the date of termination. If the date of termination is not practical, the contractor immediately notifies the institution. The contractor and institution seek to establish a mutually acceptable date. If an agreement cannot be reached, the institution, in its sole discretion, establishes a date.

If the purchase order or contract is for items being produced exclusively for the use of the institution, and the contractor must secure raw materials from other sources, the contractor must not order additional materials or services except as may be necessary for completion of any portion of the work which was not terminated. The institution may direct the delivery of the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of the work, or direct the contractor to sell them, subject to the institution's approval as to price. The contractor may, with the institution's approval, retain them, and apply a credit to the claim. The contractor must complete performance on any part of the purchase order or contract which was not terminated.

The contractor must submit any termination claim within 120 days after receipt of the notice of termination, unless the institution allows an extension of this period. The purchasing department will determine the information required in the claim.

M. Debarment

Debarment action may be taken by the institution to exclude individuals or vendors from contracting with the institution for particular types of goods or nonprofessional services for specified periods of time. Debarment does not relieve the vendor of responsibility for existing obligations. (*Governing Rules §18*)

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

1. Causes for Debarment

The debarring official can debar an individual or vendor without judicial determination for any of these reasons:

- (a) Breach (including anticipatory breach) of contract with an institution.
- (b) Sale or attempted sale to an institution of items or services which are required to be purchased under another contract, when the vendor knew or had reason to know that the items or services are required to be purchased under that contract.
- (c) Statement of an unwillingness or inability to honor a binding bid. A mere request to withdraw a bid, which does not otherwise state an unwillingness or inability to perform, is not a cause for debarment.
- (d) Falsifying or misrepresentation of manufacturer's specifications in order to appear responsive to a solicitation.
- (e) Conferring or offering to confer any gift, gratuity, favor, or advantage, present or future, upon any employee of an institution who exercises any "official responsibility" for a procurement transaction

It is not necessary that the employee accept the offer, or that the offer be made with intent to influence the employee in an official act. Offers of any discounts or privileges not available to all State employees are considered to be offering an advantage.

- (f) Failure to disclose a condition constituting a conflict of interest by any officer, director, owner, or partner of the vendor awarded the contract or purchase order.
- (g) Any cause indicating that the individual or vendor is not a responsible vendor.
- (h) A determination by the institution that a vendor has used abusive or obscene language or behaved in a threatening manner toward institutional personnel.
- (i) Sale, under non-emergency conditions, of building materials, supplies, or equipment for any building or structure constructed by or for the institution by an independent vendor employed to furnish architectural or engineering services, but not construction for such building or structure or from any partnership, association or corporation in which such architect or engineer has a personal interest
- (j) Sale of goods or services to the institution when such sale is prohibited by any debarment then in effect.
- (k) Conviction of any criminal offense involving public contracting. Examples include, but are not limited to, bribery (*Code of Virginia*, Section 18.2-447) and knowingly making a false statement in regard to collusion on a solicitation (*Code of Virginia*, Section 18.2498.4). Conviction for any of the above of any officer, director, owner, partner, agent, or related business entity of a vendor constitutes grounds for the removal of the vendor.
- (l) Court judgment finding a violation of either Federal or State antitrust laws.
- (m) Conviction of any offenses indicating a lack of moral or business integrity.
- (n) Any other activity which is so serious as to justify debarment.

If the debarring official finds that the cause for debarment reflects on the vendor's traits or tendencies only with regard to certain goods or services, the debarment may apply only to such goods or services. Otherwise the debarment applies to all goods and services within the purview of the debarring institution. The debarring official shall be the chief procurement officer or other individuals as designated by the institution.

2. Ineligibility or Disqualification of Manufacturer

Should any manufacturer commit any of the acts described under causes for debarment, bids offering material, equipment, or supplies manufactured by that vendor may be rejected even though the bid is submitted by a vendor in good standing.

3. Debarment Period

Debarment is for a period of one year, except that debarment for reasons k., l., m., and n. may be for up to three years. Debarment commences upon notification of debarment, or if later, upon expiration of any existing debarments.

The debarring official may lift or suspend at any time the debarment if it is in the best interest of the institution. A debarred individual or vendor can apply for reinstatement at any time in writing to the debarring official citing actions taken to remedy the reason for debarment or to prevent recurrence of the situation that caused the debarment action. Examples of actions the debarring official may take into consideration include, but are not limited to:

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

4. Debarment Notification and Appeal Procedure

An individual or vendor being debarred must be notified in writing. The notice must state the reasons for the action taken. This decision is final, unless the bidder, offeror, or vendor appeals the decision as provided for in *Governing Rules* §54 or institutes legal action as provided for in the *Governing Rules* §54. See Manual Section 5, "Remedies, Protests and Disputes" for additional information.

N. Billings and Invoices

Contractors must render invoices submitted to the institution at the "Bill to" address specified on the purchase order. Failure to send the invoice to the specified "Bill to" address could delay payment at no fault to the institution. Invoices must reference the institution's corresponding purchase order number, vendor taxpayer ID number, and details of goods or services shipped consistent with the original order. Failure to supply this information could result in the institution returning the invoice to the vendor unpaid. Prompt payment with cash discounts will be taken if offered and payment is made within the prescribed time frame. Time will be computed from the date of delivery or performance or from the date a correct invoice is received, whichever is later.

1. Invoice Processing

Invoice processing is performed in accordance with the rules and regulations set forth by the Department of Accounts. To maintain good contractor relationships and a competitive environment, invoices are processed promptly. When a large purchase requires performance over an extended period of time, institutions may agree to make a payment on a predetermined schedule.

2. Purchasing and Accounts Payable Cooperation

Institutions are encouraged to develop a memorandum of understanding between Purchasing and Accounts Payable. These memoranda of understanding should establish a clear framework for an effective discrepancy resolution process, so contractor payments are not delayed.

Institutions are encouraged to promote a "zero overrun" tolerance policy when dealing with invoice price discrepancies. Invoice price discrepancies should be approved by the institution's purchasing department prior to payment of the additional amount. Institutions must recognize the tradeoff between the additional amount charged and the administrative costs required to contest that amount with action taken accordingly. In such cases the institution shall establish the amount or % of cost overrun that is acceptable. Considerable attention needs to be directed in this regard to assure that neither the integrity of the bidding process is compromised, nor the standing of bidders altered.

3. Partial Payments

Institutions may initiate partial payments when portions of the goods have been received in good condition and have been properly invoiced by the contractor.

4. Vendor Payment Assistance

Contractors should contact the Accounts Payable Department of the institution for assistance with payment of invoices.

5. Prompt Payment of Bills (*Governing Rules §42*)

Every institution that acquires goods or services or conducts any other type of contractual business with nongovernmental, privately owned enterprises shall promptly pay for goods and services by the required payment date. Payment is deemed to have been made when offset proceedings have been instituted, as authorized under the Virginia Debt Collection Act (*Governing Rules §42*). Date of postmark is deemed to be date payment is made.

(a) "**Payment date**" means either (a) the date on which payment is due under the terms of a contract for provision of goods or services, or (b) if such date has not been established by contract, thirty days after receipt of a proper invoice by the institution for the amount of payment due, or thirty days after receipt of the goods or services, whichever is later.

(b) "**Subcontractor**" means any entity that has a contract to supply labor or materials to the contractor to which the contract was awarded, or to any subcontractor in the performance of the work provided for in such contract.

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

In instances where there is a defect or impropriety in an invoice or in the goods or services received, the institution must notify the contractor within 15 days of the defect or impropriety if such defect or impropriety would prevent payment by the payment date.

Interest accrues, at the rate determined, on all amounts owed by an institution to a contractor which remain unpaid after seven days following the payment date, except where a contract provides for a different rate of interest, or for the payment of interest in a different manner. The rate of interest charged an institution is the base rate on corporate loans (prime rate) at large United States money center commercial banks as reported daily in the *Wall Street Journal*. Whenever a split prime rate is published, the lower of the two rates is to be used. However, in no event shall the rate of interest charged exceed the rate of interest established under the *Code of Virginia*, Section 58.1-1812.

No interest penalty shall be charged when payment is delayed because of disagreement between an institution and a contractor regarding the quantity, quality or time of delivery of goods or services or the accuracy of any invoice received for such goods or services.

No interest penalty must be paid to any debtor on any payment, or portion thereof, withheld pursuant to the Comptroller's Debt Setoff Program, as authorized by the Virginia Debt Collection Act (*Governing Rules §42*), commencing with the date the payment is withheld. If, as a result of an error, a payment or portion thereof is withheld, and it is determined that at the time of setoff no debt was owed to the Commonwealth, then interest accrues at the established rate on amounts withheld which remain unpaid after seven days following the payment date.

Contractors submitting invoices for interest due from an institution must include, as a minimum:

- (1) Original purchase order number or contract number
- (2) Envelope bearing postmark of the date payment was made. Where the envelope is not available, interest will be computed from the second business day after date of issue of the check.
- (3) Original invoice number and date
- (4) Date of publication of the issue of the *Wall Street Journal* upon which the interest rate is based

The payment date for items in disagreement is 30 days after the resolution of such disagreement.

Utility tariffs prescribed by the Commonwealth Corporation Commission are exempt from the prompt payment of bills.

6. Payment Requirements - All Contracts

All contracts the institution awards require that contractors take these actions.

(1) Within seven days after the receipt of payment for the work performed:

- (a) pay the subcontractor within seven days for the proportionate share of the total payment received from the institution attributable to the work performed by the subcontractor under that contract; or
- (b) notify the institution and subcontractor within seven days, in writing, of its intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.

(2) If an individual contractor, provide social security number in order to receive payment.

(3) If a proprietorship, partnership or corporation provide Federal employer identification number.

(4) Pay interest to subcontractors on all amounts owed by the contractor that remain unpaid after seven days following receipt by the contractor of payment from the institution for work performed by the subcontractor under that contract, except for amounts withheld as allowed by prior notification.

(5) Accrue interest at no more than the rate of one percent per month.

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

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

7. Payment by Electronic Funds Transfer

Institutions disburse payments to contractors via paper checks. In addition, payments can be made to selected contractors through the Commonwealth's Financial Disbursement System using Electronic Data Interchange (EDI) and its connectivity to the Automated Clearing House (ACH) network. For information relating to benefits of using EDI and the eligibility criteria, contact the Department of Accounts (804) 225-3164.

Contractors which qualify for EDI will be paid in accordance with the Prompt Payment Act of Virginia which requires payment within 30 days of invoice or receipt of goods or services date, whichever is later, or by the terms and conditions established under contractual agreements with the institution. Each party must bear the respective fees and other charges assessed by its designated bank(s) and third party service providers for EDI payments.

Section 5 - Remedies, Protests, and Disputes

A. Ineligibility (*Governing Rules §47*)

A. Any bidder, offeror or contractor refused permission to participate, or disqualified from participation, in public contracts to be issued by the Institution shall be notified in writing. Prior to the issuance of a written determination of disqualification or ineligibility, the Institution shall:

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

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

If the evaluation reveals that the bidder, offeror or contractor should be allowed permission to participate in the public contract, the Institution shall cancel the proposed disqualification action. If the evaluation reveals that the bidder should be refused permission to participate, or disqualified from participation, in the public contract, the Institution shall so notify the bidder, offeror or contractor. The notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within 10 days after receipt of the notice by invoking administrative procedures meeting the standards of §55 of the *Governing Rules*, if available, or in the alternative by instituting legal action as provided in §54 of the *Governing Rules*.

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

B. Appeal of Denial of Withdrawal of Bid (*Governing Rules §48*)

A decision denying withdrawal of bid shall be final and conclusive unless the bidder appeals the decision within 10 days after receipt of the decision by invoking administrative procedures meeting the standards of the *Code of Virginia*, Section 2.2-4365, if available, or in the alternative by instituting legal action as provided in the *Code of Virginia*, Section 2.2-4364.

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

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

C. Determination of Non-responsibility (*Governing Rules §49*)

Following public opening and announcement of bids received on an Invitation to Bid, the institution shall evaluate the bids in accordance with the definition of "competitive sealed bidding." At the same time, the

institution shall determine whether the apparent low bidder is responsible. If the institution so determines, then it may proceed with an award in accordance with the definition of "competitive sealed bidding" as defined in the *Governing Rules §49*. If the institution determines that the apparent low bidder is not responsible, it shall proceed as follows.

1. Prior to the issuance of a written determination of nonresponsibility, the institution shall:

- (a) Notify the apparent low bidder in writing of the results of the evaluation;
- (b) Disclose the factual support for the determination;
- (c) Allow the apparent low bidder an opportunity to inspect any documents which relate to the determination, if so requested by the bidder within five business days after receipt of the notice.

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

3. Such notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within 10 days after the receipt of the notice by invoking administrative procedures or by instituting legal action as provided in the VPPA.

4. This shall not apply to procurements involving the prequalification of bidders and the rights of any potential bidders under such prequalification to appeal a decision that such bidders are not responsible.

If, upon appeal it is determined that the decision of the public body was not an honest exercise of discretion, but rather was arbitrary or capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid, and the award of the contract in question has not been made, the sole relief shall be a finding that the bidder is a responsible bidder for the contract in question or directed award or both. If it is determined that the decision of the public body was not an honest exercise of discretion, but rather was arbitrary or capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms of the Invitation to Bid, and an award of the contract has been made, the relief shall be as set forth in the *Governing Rules §50.B*.

A bidder contesting a determination that he is not a responsible bidder for a particular contract shall proceed under this section, and may not protest the award or proposed award under the *Governing Rules §49.C*.

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

D. Protest of Award or Decision to Award (*Governing Rules §50*)

Any bidder or offeror, who desires to protest the award or decision to award a contract, shall submit the protest in writing to the Institution, or an official designated by the Institution, no later than 10 days after the award or the announcement of the decision to award, whichever occurs first. Public notice of the award or the announcement of the decision to award shall be given by the Institution in the manner prescribed in the terms or conditions of the Invitation to Bid or Request for Proposal. Any potential bidder or offeror on a contract negotiated on a sole source or emergency basis who desires to protest the award or decision to award such

contract shall submit the protest in the same manner no later than 10 days after posting or publication of the notice of such contract as provided in §5 of the *Governing Rules*. However, if the protest of any actual or potential bidder or offeror depends in whole or in part upon information contained in public records pertaining to the procurement transaction that are subject to inspection under §34 of the *Governing Rules*, then the time within which the protest shall be submitted shall expire 10 days after those records are available for inspection by such bidder or offeror under §34, or at such later time as provided in this section. No protest shall lie for a claim that the selected bidder or offeror is not a responsible bidder or offeror. The written protest shall include the basis for the protest and the relief sought. The Institution or designated official shall issue a decision in writing within 10 days stating the reasons for the action taken. This decision shall be final unless the bidder or offeror appeals within 10 days of receipt of the written decision by invoking administrative procedures meeting the standards of §55 of the *Governing Rules*, if available, or in the alternative by instituting legal action as provided in §54. Nothing in this subsection shall be construed to permit a bidder to challenge the validity of the terms or conditions of the Invitation to Bid or Request for Proposal. The use of Alternative Dispute Resolution (ADR) shall constitute an administrative appeal procedure meeting the standards of §55 of the *Governing Rules*.

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

Where the Institution, an official designated by it, or an appeals board determines, after a hearing held following reasonable notice to all bidders, that there is probable cause to believe that a decision to award was based on fraud or corruption or on an act in violation of the *Governing Rules*, the Institution, designated official or appeals board may enjoin the award of the contract to a particular bidder.

E. Effect of Appeal Upon Contract (*Governing Rules* §51)

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

F. Stay of an Award During Protest (*Governing Rules* §52)

An award need not be delayed for the period allowed a bidder or offeror to protest, but in the event of a timely protest as provided in § 50 of the *Governing Rules*, or the filing of a timely legal action as provided in § 54, no further action to award the contract shall be taken unless there is a written determination that proceeding without delay is necessary to protect the public interest or unless the bid or offer would expire

G. Contractual Disputes (*Governing Rules* §53)

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

B. The Institution shall include in its contracts a procedure for consideration of contractual claims. Such procedure, which may be contained in the contract or may be specifically incorporated into the contract by reference and made available to the contractor, shall establish a time limit for a final decision in writing by the Institution. If the Institution has established administrative procedures meeting the standards of § 55 of the *Governing Rules*, such procedures shall be contained in the contract or specifically incorporated in the contract by reference and made available to the contractor. The Institution may require the submission of contractual claims pursuant to any contract to Alternative Dispute Resolution (ADR) as an administrative procedure.

C. A contractor may not invoke administrative procedures meeting the standards of § 55 of the *Governing Rules*, if available, or institute legal action as provided in § 54, prior to receipt of the Institution's decision on the claim, unless the Institution fails to render such decision within the time specified in the contract.

D. The decision of the Institution shall be final and conclusive unless the contractor appeals within six months of the date of the final decision on the claim by the Institution by invoking administrative procedures meeting the standards of § 55 of the *Governing Rules*, if available, or in the alternative by instituting legal action as provided in § 54.

H. Legal Actions (*Governing Rules* §54)

A. A bidder or offeror, actual or prospective, who is refused permission or disqualified from participation in bidding or competitive negotiation, or who is determined not to be a responsible bidder or offeror for a particular contract, may bring an action in the appropriate circuit court challenging that decision, which shall be reversed only if the petitioner establishes that the decision was not

- (i) an honest exercise of discretion, but rather was arbitrary or capricious;
- (ii) in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid; or
- (iii) in the case of denial of prequalification, based upon the criteria for denial of prequalification set forth in subsection B of § 14 of the *Governing Rules*.

In the event the apparent low bidder, having been previously determined by the Institution to be not responsible in accordance with § 4 of the *Governing Rules*, is found by the court to be a responsible bidder, the court may direct the Institution to award the contract to such bidder in accordance with the requirements of this section and the Invitation to Bid.

B. A bidder denied withdrawal of a bid under § 23 of the *Governing Rules* may bring an action in the appropriate circuit court challenging that decision, which shall be reversed only if the bidder establishes that the decision of the Institution was not

- (i) an honest exercise of discretion, but rather was arbitrary or capricious or
- (ii) in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid.

C. A bidder, offeror or contractor, or a potential bidder or offeror on a contract negotiated on a sole source or emergency basis in the manner provided in § 5 of the *Governing Rules*, whose protest of an award or decision to award under § 50 of the *Governing Rules* is denied, may bring an action in the appropriate circuit court challenging a proposed award or the award of a contract, which shall be reversed only if the petitioner establishes that the proposed award or the award is not:

- (i) an honest exercise of discretion, but rather is arbitrary or capricious or
- (ii) in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms and conditions of the Invitation to Bid or Request for Proposal.

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

E. A contractor may bring an action involving a contract dispute with the Institution in the appropriate circuit court. Notwithstanding any other provision of law, the Comptroller shall not be named as a defendant in any action brought pursuant to the *Governing Rules* or § [33.1-387](#) of the Code of Virginia, except for disputes involving contracts of the Office of the Comptroller or the Department of Accounts.

F. A bidder, offeror or contractor need not utilize administrative procedures meeting the standards of § 55 of the *Governing Rules*, if available, but if those procedures are invoked by the bidder, offeror or contractor, the procedures shall be exhausted prior to instituting legal action concerning the same procurement transaction unless the Institution agrees otherwise.

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

I. Administrative Appeals Procedure (*Governing Rules* §55)

A. The Institution may establish an administrative procedure for hearing:

- (i) protests of a decision to award or an award,
- (ii) appeals from refusals to allow withdrawal of bids,
- (iii) appeals from disqualifications and determinations of nonresponsibility, and
- (iv) appeals from decisions on disputes arising during the performance of a contract, or
- (v) any of these. Such administrative procedure may include the use of Alternative Dispute Resolution (ADR) or shall provide for a hearing before a disinterested person or panel, and the opportunity to present pertinent information and the issuance of a written decision containing findings of fact. The disinterested person or panel shall not be an employee of the governmental entity against whom the claim has been filed. The findings of fact shall be final and conclusive and shall not be set aside unless the same are:
 - (a) fraudulent, arbitrary or capricious;
 - (b) so grossly erroneous as to imply bad faith; or
 - (c) in the case of denial of prequalification, the findings were not based upon the criteria for denial of prequalification set forth in subsection B of § 14 of the *Governing Rules*.

No determination on an issue of law shall be final if appropriate legal action is instituted in a timely manner. The Institution may seek advice and input from the Alternative Dispute Resolution Council in establishing an Alternative Dispute Resolution (ADR) procedure.

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

J. Alternative Disputes Resolution (*Governing Rules* § 56)

The Institution may enter into agreements to submit disputes arising from contracts entered into pursuant to the *Governing Rules* to arbitration and utilize mediation and other alternative dispute resolution procedures. However, such procedures shall be nonbinding and subject to § [2.2-514](#) of the Code of Virginia, as applicable.

Section 6 - Ethics, Conflict of Interests, and Freedom of Information

A. Standards of Conduct (*Governing Rules §57*)

Because of the extraordinary trust and responsibility exercised by public officials conducting procurement transactions and because of the legitimate expectations by the public that this trust and responsibility be exercised properly, laws of the Commonwealth dictate a higher standard of conduct for procurement officials than for public employees generally. Procurement officials and contractors must be cognizant of these laws which include the Virginia Public Procurement Act, the State and Local Government Conflict of Interests Act, and the Virginia Governmental Frauds Act. All employees having official responsibility for procurement transactions must conduct business with contractors in a manner above reproach in every respect.

No State employee having official responsibility for procurement transactions:

- (1) 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 (*Code of Virginia*, Section 2.2-4371); or
- (2) shall accept employment from any bidder, offeror or vendor with whom the employee dealt in an official capacity concerning procurement transactions for a period of one year from the cessation of employment by the State unless the employee or former employee provides written notification to the president of the institution prior to commencement of employment by that bidder, offeror or vendor (*Code of Virginia*, Section 2.2-4370).

Further, all personnel having official responsibility for procurement transactions shall be knowledgeable about the provisions of Article 6, Sections 2.2-4367 through 2.2-4377, the *Code of Virginia*, entitled "Ethics in Public Contracting." "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 the same to contain any false, fictitious or fraudulent statement or entry" (*Code of Virginia*, Section 2.2-4376). "Willful violation of any provision of this article shall constitute a Class 1 misdemeanor. Upon conviction, any public employee, in addition to any other fine or penalty provided by law, shall forfeit his employment (*Code of Virginia*, Section 2.2-4377). Institutions "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" (*Code of Virginia*, Section 2.2-4375).

Most institutions in the Commonwealth are also members of the National Association of Educational Buyers. The institution, by their membership, agrees to adhere to the NAEB Code of Ethics adopted July 1, 1985. (See Appendix D.)

B. Vendor Seminars

Employees having official responsibility for procurement transactions may attend vendor sponsored seminars or trade shows where they will benefit from receiving product information and learning of new techniques and product or service trends. Employees may accept food, drinks and giveaway items offered to all participants at these functions.

C. Documentation of Files and Public Access to Procurement Records

A complete file must be maintained in one place for each purchase transaction, containing all the information necessary to understand the why, who, what, when, where and how of the transaction.

D. Bid and Proposal Inspection

Institutions must give bidders an opportunity to inspect bid records within a reasonable time after opening and evaluation of bids, but prior to award, except in the event the institution decides to reject all bids or offers and rebid (*Code of Virginia*, Section 2.2-4342).

Institutions must provide the opportunity for the inspection of proposal records within a reasonable time after the evaluation and negotiations of proposals are completed but prior to award, except in the event that the institutions decide not to accept any of the proposals and resolicit.

E. Virginia Freedom of Information Act

Records are open to the public in accordance with the Virginia Freedom of Information Act, except as provided in the *Code of Virginia*, Section 2.2-4342.

- (1) Cost estimates relating to a proposed procurement transaction prepared by or for an institution are not open to public inspection (*Code of Virginia*, Section 2.2-4342.B).
- (2) Bids and proposal records are open to the public after award.
- (3) Any inspection of procurement records is subject to reasonable restrictions to ensure the security and integrity of the records.
- (4) Trade secrets or proprietary information submitted for a procurement transaction is not subject to public disclosure under the Virginia Freedom of Information Act; however, the bidder or offeror must invoke the protection of Section 2.2-4342, *Code of Virginia* prior to or upon submission of the data or other materials, and must identify the data or other materials to be protected and state the reasons why protection is necessary. It is an institution's responsibility to establish and enforce procedures to protect vendor proprietary information with the same degree of protection that would be provided for confidential information of the institution.
- (5) To protect the institution and its employees from possible claims for damages due to the improper release of information, institutions must not release any information that a bidder, offeror or vendor has claimed to be a trade secret or proprietary information, unless ordered to do so by a court of competent jurisdiction. If a party seeking information disagrees with the designation of it as proprietary or a trade secret, the party seeking the information should be advised that it will have to obtain a court order and be requested to name as a defendant in the suit the bidder, offeror or vendor which designated the information as well as the institution.

Appendix A -- Resources

Commonwealth of Virginia Construction and Professional Services Manual, Revised December 31, 1993. Division of Engineering and Buildings, Department of General Services, 805 East Broad Street, Richmond, Virginia 23219.

Note: The *Construction and Professional Services Manual* governs all capital outlay purchases for decentralized institutions of higher education, and is in addition to the *Purchasing Manual for Institutions of Higher Education and their Vendors*.

Commonwealth of Virginia Vendor's Manual: A Vendor's Guide on How to do Business With the Commonwealth of Virginia Revised December 1998. Division of Purchases and Supply, Department of General Services, 805 East Broad Street, P.O. Box 1199, Richmond, Virginia 23219-1199.

Rules Governing Procurement of Goods, Services, Insurance, and Construction by a Public Institution of Higher Education of the Commonwealth of Virginia Governed by Subchapter 3 of the Restructured Higher Education Financial and Administrative Operations Act, Chapter 4.10 (§ [23-38.88](#) et seq.) of Title 23 of the Code of Virginia

Note: *Agency Procurement and Surplus Property Manual and Appendices* (September 1998). Commonwealth of Virginia. Department of General Services, Division of Purchases and Supply, 805 East Broad Street, Richmond, Virginia 23219. APSPM is required by Section 2.2-1111 *Code of Virginia* and includes policies and procedures which govern procurement and surplus property activities for agencies and institutions of the Commonwealth. The *Commonwealth of Virginia Purchasing Manual for Institutions of Higher Education and their Vendors* for designated institutions of higher education is permitted under an administrative decentralization pilot program.

Appendix B -- Definitions

Appeal

Action taken by a bidder, offeror (actual or prospective) or by a vendor to seek a hearing before a disinterested person or panel or in an appropriate circuit court challenging a decision in accordance with *Governing Rules* § 55.

Best Value

The overall combination of quality, price, and various elements of required services that are in total optimal relative to a public body's needs. *Governing Rules* § 3).

Bid

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

Bid Bond

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

Bidder

One who submits a competitively priced offer in response to an Invitation for Bids.

Blanket Purchase Agreement (BPA)

An arrangement under which a purchaser contracts with a vendor to provide the purchaser's requirements for an item(s) or a service, on an as-required and over-the-counter basis. Properly prepared, such an arrangement sets a limit on the period of time it is valid and the maximum amount of money which may be spent at one time or within a specified period and specifically identifies these persons authorized to accept goods.

Competitive Bidding

The offer of vendor bids by individuals or vendors competing for a contract, privilege, or right to supply specified services or goods.

Competitive Sealed Bid

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

Competitive Negotiation

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

Confirming Purchase Order

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

Consideration

Something of value given for a promise to make the promise binding. One of the essential elements of a legal contract.

Construction

Construction shall mean building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavation, grading or similar work upon real property.
(*Governing Rules §4*)

Construction Management Contract

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

Consulting Services

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

Contract

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

Contract Administration

The management of all facets of a contract to assure the vendor's total performance is in accordance with the contractual commitments and that the obligations of the vendor under the terms and conditions of the contract are fulfilled, including receiving, inspection and authorization for payment.

Contract, Cost-Plus-A-Fixed-Fee

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

Contract, Cost-Plus-A-Percentage-Of-Cost

A form of contract which provides for a fee or profit at a specified percentage of the vendor's actual cost of accomplishing the work. Except in case of emergency affecting the public health, safety or welfare and for some insurance contracts, no public contract shall be awarded on the basis of cost plus a percentage of cost (Governing Rules § 24).

Contract, Fixed Price

A contract which provides for a vendor price under which a vendor bears the full risk for profit or loss.

Contract, Fixed Price With Escalation/De-escalation

A fixed price type of contract that provides for the upward and downward revision of the stated contract price upon the occurrence of certain contingencies (such as fluctuations in material costs and labor rates) specifically defined in the contract.

Contract, Requirements Type

(Open-end contracts) A form of contract covering long-term requirements used when the total quantity required cannot be definitely fixed, but can be stated as an estimate or within maximum and minimum limits, with deliveries on demand. Such contracts are usually for one year or more in duration.

Contract, Service

A contract for work to be performed by an independent vendor wherein the service rendered does not consist primarily of the acquisition of equipment or materials, or the rental of equipment, materials and supplies.

Contract, Time and Material

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

Contract Officer, Purchase Officer, Buyer

An **employee of the institution** whose primary assignment is purchasing goods or services.

Contractor

An individual or vendor which has entered into an agreement to provide goods or services to the Commonwealth.

CORPRINT

Department of Corrections, Industrial Enterprises, Printing Facilities.

Cure Notice

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

Debarment

An action taken to exclude individuals or vendors from contracting with institutions for particular goods or nonprofessional services for specified periods of time (*Governing Rules §18*).

Default

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

Design-build Contract

Means a contract between an institution and another party in which the party contracting with the institution agrees to both design and build the structure, roadway or other item specified in the contract.

Design Specification

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

Designated Public Area

An area that is available to the public during normal business hours and is the area designated by an agency for the posting of procurement solicitations and notices.

Drug-Free Workplace

A drug-free workplace is a site for the performance of work done in connection with a specific contract awarded to a contractor in accordance with the Virginia Public Procurement Act, the employees of who 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.

Emergency

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

Ethics

Pertaining to or relative to moral action, conduct, motive or character; as ethical emotion; professionally right or befitting; conforming to professional standards of conduct. The *Virginia Public Procurement Act* covers "Ethics in Public Contracting" (*Governing Rules §57*).

Evaluation of Bids

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

General Terms and Conditions

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

Goods

Material, equipment, supplies, printing, and automated data processing hardware and software (*Governing Rules §4*).

Hardware/Software Contract List

A list of hardware and software items which have been competitively bid. The list reflects the approved vendor and item cost and provides an expeditious method of obtaining miscellaneous, small, frequently purchased items. The list eliminates repetitive bidding for these items to satisfy multiple requests, and provides significant discounts on single item purchases. The presence of an item on the contract list does

not in any way indicate the Commonwealth's endorsement of the item, nor is it an indication of suitability for a given function.

Informality

A minor defect or variation of a bid or proposal from the exact requirements of the invitation for bids, or the request for proposals, which does not affect the price, quality, quantity, or delivery schedule for the goods, services or construction being procured (*Governing Rules §4*).

Inspection

Examination and testing of goods and services to determine whether the goods and services furnished conform to contract requirements, an important component of contract administration.

Invitation for Bids (IFB)

A document, containing or incorporating by reference the specifications or scope of work and all contractual terms and conditions that is used to solicit written bids for a specific requirement for goods or nonprofessional services.

Late Bid or Proposal

A bid or proposal which is received at the place designated in the invitation for bids or request for proposals after the deadline established by the solicitation.

Latent Defect

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

Liquidated Damages

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

Multiple Award

The award of contracts to more than one bidder. When a solicitation in its terms and conditions so provides, awards may be made to more than one vendor (*Governing Rules §4*). Appropriate in situations where the award of a single contract would be impractical and awards are limited to the least number of suppliers necessary to satisfy program requirements.

Negotiation

A bargaining process between two or more parties, each with its own viewpoints and objectives, seeking to reach a mutually satisfactory agreement on, or settlement of, a matter of common concern.

Non-Competitive Negotiation

The process of arriving at an agreement through discussion and compromise when only one source is practically available.

Nonprofessional Services

Any services not specifically identified as professional services in the definition of professional services within *Governing Rules §4* and includes small construction projects valued not over \$1 million; provided that subdivision 3 a of the *Governing Rules §4* which stipulate a definition of "competitive negotiation" shall still apply to professional services for such small construction projects.

Notice of Award

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

Notice of Intent to Award

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

Offeror

A person who makes an offer in response to a request for proposals.

Payment Bond, For Labor and Material

A bond required of a vendor to assure fulfillment of the vendor's obligation to pay all persons supplying labor or materials in the performance of the work provided for in the contract.

Performance Bond

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

Performance Specification

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

Potential Bidder or Offeror

A person who, at the time the Institution negotiates and awards or proposes to award a contract, is engaged in the sale or lease of goods, or the sale of services, insurance or construction, of the type to be procured under the contract, and who at such time is eligible and qualified in all respects to perform that contract, and who would have been eligible and qualified to submit a bid or proposal had the contract been procured through competitive sealed bidding or competitive negotiation (Governing Rules §4) .

Prebid or Preproposal Conference

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

Prequalification

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

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

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

Procurement

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

Professional Services

Work performed by an independent contractor within the scope of the practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law, dentistry, medicine, optometry, pharmacy or professional engineering. (*Governing Rules §4*).

Proposal

An offer made by one party to another as a basis for negotiations for entering into a contract.

Proprietary Specification

One that restricts the acceptable products or services to those of one manufacturer or vendor. A common example would be a specification by brand name which **excludes** consideration of proposed "equals".

Although all sole source specifications are proprietary, all proprietary specifications are not sole source. Proprietary items may be available from several distributors through competitive bidding.

Protest

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

Public Bid Opening

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

Public Posting

The display of procurement notices in an area or on a board designated and regularly used for that purpose that is available to the public during nor

Purchase Order

A document the institutions use to execute a purchase transaction with a vendor. It serves as notice to a vendor that an award has been made and that performance can be initiated under the terms and conditions of the contract.

Regular Dealer

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

Request for Proposals (RFP)

All documents, whether attached or incorporated by reference, utilized for soliciting proposals; the RFP procedure requires negotiation with offerors (to include prices) as distinguished from competitive bidding when using an invitation for bids (*Governing Rules §4*).

Responsible Bidder or Offeror

A person or vendor who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability which will assure good faith performance, and who has been prequalified, if required (*Governing Rules §4*).

Responsive Bidder

A person or vendor who has submitted a bid which conforms in all material respects to the Invitation for Bids (*Governing Rules §4*).

Reverse Auctioning

A procurement method wherein bidders are invited to bid on specified goods or nonprofessional services through real-time electronic bidding, with the award being made to the lowest responsive and responsible bidder. During the bidding process, bidders' prices are revealed and bidders shall have the opportunity to modify their bid prices for the duration of the time period established for bid opening. The purchase of goods or nonprofessional services, but not construction or professional services, may be made by reverse auctioning.

Sealed Bid

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

Services

Services means any work performed by an independent vendor wherein the service rendered does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials and supplies (*Governing Rules §4*).

Sheltered Workshops

A work-oriented rehabilitative facility with a controlled working environment and individual goals which utilizes work experience and related services for assisting the handicapped person to progress toward normal living and a productive vocational status (*Governing Rules §4*).

Software

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

Sole Source

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

Solicitation

An invitation for bids (IFB), a request for proposals (RFP), telephone calls, or any other document issued by the Commonwealth to obtain bids or proposals for the purpose of entering into a contract.

Special Terms and Conditions

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

Spot Purchase

A one-time purchase made in the open market. If it is under \$50,000 it will be made in accordance with the applicable small purchase procedures. If it is \$50,000 or more it will be made by soliciting sealed bids or proposals or by an exception authorized by law.

Surplus Property

Property which is in excess of the needs of an agency and which is not required for its foreseeable need. The property may be used or new, but possesses some usefulness for the purpose for which it was

intended or for some other purpose. It includes scrap, which is material that is damaged, defective, or deteriorated to the extent that it has no value except for its basic material content.

Technical Proposal

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

Technical Specifications

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

Term Contracting

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

Termination For Convenience

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

Termination For Default

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

Unsealed Bid

An unsealed written offer conveyed by letter, telegraph or other means. The bids are normally opened and recorded when received.

Unsolicited Proposal

Proposal received that is not in response to any institutionally initiated solicitation or program.

Used Equipment

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

Vendor

One who sells goods or services.

Appendix C

Model for Small Purchase Procedures for Specified Institutions of Higher Education

Note: These procedures may vary from institution to institution

These small purchase procedures are general guidelines which the specified institutions of higher education may use to develop their own procedures. Vendors should check with each institution for their individual procedures. Small purchase procedures apply to purchase of goods and services up to \$50,000.

General

The use of the DPS contracts is preferred.

The following sources are optional:

- Office of Graphic Communications (OGC).
- Virginia Distribution Center (formerly Central Warehouse).
- VITA hardware/software and related services.
- VITA telecommunications equipment/goods.

Procurement Methods

Single Quotation:

- Purchases where the estimated cost of the goods or services does not exceed \$5,000 may be made upon receipt of one written or telephone quotation.
- Whenever there is reason to believe a single quotation is not a fair and reasonable price, additional competition should be sought.

Four Solicitations for Quotes (or eVa Quick-Quote):

- When the estimated cost of goods or services is between the applicable single quote limit and \$50,000, written quotes from four (4) valid sources (required over \$30,000) or telephone quotations from four (4) valid sources (up to \$30,000) shall be solicited (including a minimum of two (2) minority-owned or women-owned businesses provided there is sufficient registration). Use of eVA QuickQuote shall meet the needs of informal solicitations and compliance with number of sources and minority and woman-owned businesses. If fewer than the required number of total sources and/or minority-owned or women-owned businesses are solicited, the reasons must be documented and approved by the Director, University Purchasing prior to contract award.
- If telephone bids are solicited (up to \$30,000), a record shall be kept of the company name, vendor contact person providing the quote, date quote was provided, vendor telephone number, shipping terms, delivery date, description of the required goods or services, and the quoted prices. Such documentation relative to the telephone bids must be maintained in the procurement file. Written quotes shall be included in the procurement file. The award shall be made to the lowest responsive and responsible bidder. Companies should be solicited on a rotational basis to ensure opportunities to a wide vendor base.

Four Solicitations for Proposals:

- When the estimated cost of goods or services is between the applicable single quote limit and \$50,000 solicit proposals from four (4) valid sources (including at least two minority-owned or women-owned businesses - provided there is sufficient registration).). Use of eVA QuickQuote shall meet the needs of informal solicitations and compliance with number of sources and minority and woman-owned businesses.

- The solicitation should be concise and include a description of what is being sought. It should stipulate the information requested from the Offeror for evaluation purposes. Also, any specific terms and conditions related to the procurement should be incorporated.
- In lieu of an evaluation committee, the buyer or end user may solely evaluate and rank proposals.
- Proposals may be evaluated and ranked based on its overall merits. Evaluation criteria and associated weights are not required. The evaluator(s) must rank each proposal based upon their independent review of the offer.
- Negotiations may be conducted with the top ranked firm(s), but it is not a requirement. Consideration should be given to the value added through negotiations.
- A written summary evaluation document must be submitted by the evaluator(s) which provides rationale for the selection of firm(s) and a recommendation to award.
- Public posting is not required.

Sole Source Procurement

A sole source procurement is authorized when there is only one source practicably available for the goods or services required. Competition is not available in a sole source situation; thus distinguishing it from a proprietary purchase where the product required is manufactured by only one company, but is sold through distributors and competition between them can be obtained. Sole source justification based solely on a single vendor's capability to deliver in the least amount of time is not appropriate since availability alone is not a valid basis for determining a sole source procurement.

- **Written Determination.** A written determination documenting that there is only one source practicably available for that, which is to be procured, must be included in the procurement file. The writing shall document the basis for the determination. Public posting is not required.
- **Negotiating a Contract.** After the sole source has been documented, a contract may be negotiated and awarded without competition. In making sole source procurement, it is the buyer's responsibility to negotiate a contract that is in the best interest of the University. The buyer should carefully research the product or services and determine in writing what is a fair and reasonable price. Negotiations can be conducted on adding terms and conditions favorable to the University and deleting or changing terms that are one-sided in favor of the contractor. It is important to know the market and the contractor's situation in regard to the market. In noncompetitive negotiations - one must be exceptionally well prepared and negotiate to the extent that is practicable.
- **Documentation.** The sole source documentation must contain the following information:
 - Explain why this is the only product or service that can meet the needs of the purchasing agency.
 - Explain why this vendor is the only practicably available source from which to obtain this product or service.
 - Explain why the price is considered reasonable.
 - Describe the efforts that were made to conduct a non-competitive negotiation to get the best possible price for the taxpayers.
- **Approval and Reporting.** Sole source procurements exceeding \$10,000 must be approved by the Director, University Purchasing. All sole source procurements exceeding \$10,000 must be submitted to the Secretary of Education on a quarterly basis for review.

Emergency Procurement Procedures

An emergency is an occurrence of a serious and urgent nature that demands immediate action. Emergency procedures may be utilized only to purchase that which is necessary to cover the emergency. Subsequent requirements shall be obtained using normal purchasing procedures. The potential loss of funds at the end of a fiscal year is not considered to be an emergency.

- The nature of the emergency determines what pre-award action may be taken:
 - For an emergency purchase required to protect personal safety or property, efforts should be directed to finding a source and authorizing the contractor to proceed. This does not relieve the university from negotiating a fair and reasonable price and subsequently documenting the procurement action taken.
 - For other types of emergencies, competition should be sought to the extent practicable. Verification of the vendor's: 1) qualifications 2) insurance coverage, if applicable, 3) warranty, and 4) any other data pertinent to the procurement may be obtained.
- As soon as practicable, after directing the contractor to proceed, a confirming purchase order should be prepared. Care should be taken to include in detail any agreement, including price, made orally with the contractor.
- Prepare a written determination for signature by the Purchasing Director or designated representative indicating the nature of the emergency, the reason for selection of the particular contractor and include such determination with the file.
- Issue confirming purchase order.

Reverse Auctioneering -add language

Demand Payments (Exceptions to Normal Competitive Requirements)

Competition normally is either not practicable or available for purchase of the following goods or services up to \$50,000.

- Books, printed materials, reprints and subscription (e.g., print or electronic), videocassettes and slide presentations when only available from the publisher/producer. File documentation to include verification of exclusivity. Requires approval by a Buyer Manager.
- Academic/research consulting services. Requires approval by Director, University Purchasing.
- Alcohol purchased from Alcohol Beverage Control stores.
- Honoraria, entertainment (speakers, lecturers, musicians, performing artists).
- Royalties and film rentals when only available from the producer or protected distributors. File documentation to include verification of exclusivity. Requires approval by a Buyer Manager.
- Membership dues. Memberships to social organizations require approval by Director, University Purchasing.
- Writers.
- Artists.
- Photographers (other than graduation and yearbook photographers).
- Advertisements in newspapers, magazines, journals, radio or television.
- Utility charges.
- Conference facilities (to include conference support and related lodging and meals) only when the use of a specific facility is directed by an outside donor, sponsor or organization. Requires approval by Director, University Purchasing.
- Accreditation fees.
- Academic testing services.
- Transplants, related transplant services, and implants.
- Pass-through-procurements. (Examples include contracting for alumni functions for which the institution is reimbursed by the alumni and materials purchased for students by a faculty member using State funds and for which the students fully reimburse the institution). Requires approval by Director, University Purchasing.
- Televised or radio programs (e.g., athletic events, televised conferences, etc.) whereby specific stations are selected because of market demographics. Requires approval by a Buyer Manager.

- Fees associated with participation in intercollegiate athletic tournaments and events including team lodging, registration and game guarantees for all athletic events.
- Referees, officials and umpires for intercollegiate athletic events.
- Pharmacies participating in pharmacy student in-service programs wherein all qualifying facilities are eligible.
- Recipients of awards from the Alzheimer's & Related Diseases Research Award Fund administered by the Virginia Center on Aging wherein the requirements are clearly advertised and proposals are evaluated in accordance with published guidelines. Requires approval by a Buyer Manager.

Price - Reasonableness Determinations

When competition is restricted or lacking or the prices offered appear excessive, the procuring agent is responsible for further analysis to determine in writing if the prices are fair and reasonable. This applies to sole source, single response, contract changes/modifications, contract extensions, and contract renewals.

Appendix D -- NAEB Code of Ethics

- Give first consideration to the objectives and policies of my institution.
- Strive to obtain the maximum value for each dollar of expenditure.
- Decline personal gifts or gratuities.
- Grant all competitive suppliers equal consideration insofar as State or federal statute and institutional policy permit.
- Conduct business with potential and current suppliers in an atmosphere of good faith, devoid of intentional misrepresentation.
- Demand honesty in sales representation whether offered through the medium of a verbal or written statement, an advertisement, or a sample of the product.
- Receive consent of originator of proprietary ideas and designs before using them for competitive purchasing purposes.
- Make every reasonable effort to negotiate an equitable and mutually agreeable settlement of any controversy with a supplier; and/or be willing to submit any major controversies to arbitration or other third party review, insofar as the established policies of my institution permit.
- Accord a prompt and courteous reception insofar as conditions permit to all who call on legitimate business missions.
- Cooperate with trade, industrial and professional associations, and with governmental and private agencies for the purposes of promoting and developing sound business methods.
- Foster fair, ethical and legal trade practices.
- Counsel and cooperate with NAEB members and promote a spirit of unity and a keen interest in professional growth among them.

National Association of Educational Buyers -- Adopted July 1, 1985

Appendix E -- SWAM Procurement Programs

The documents contained in this Appendix are to be used by Institutions in their efforts to establish, develop, and conduct programs to facilitate the participation of small, women-owned, and minority (SWAM) businesses:

- [July 2004 Memo from Governor's Chief of Staff regarding SWAM Procurement](#)
- [Cover letter from the Director of Minority Business Enterprise regarding the SWAM Program](#)
- [Guidelines \(including description\) for the development of the SWAM Procurement Plan](#)
- [Draft letter that may be used by your agency to inform your vendors of the certification requirement of the SWAM Program](#)
- [Outline of the information needed in the development of the agency or SWAM Procurement Plan](#)
- [Appendix A](#) (Program Options to Facilitate SWAM Participation)

Return to the [Beginning of Manual](#) or to the [Table of Contents](#)

Appendix F

Restructured Higher Education Financial and Administrative Operations Act

These institutions have entered into Management Agreements with the Commonwealth of Virginia in compliance with the Restructured Higher Education Financial and Administrative Operations Act of 2005:

- College of William and Mary
- University of Virginia
- Virginia Polytechnic Institute and State University
- Virginia Commonwealth University
- James Madison University

As a part of the Management Agreement, a "Rules" document has been created which addresses procurement procedures at the three institutions. As a general rule, these institutions are not governed by the administrative regulation from state agencies, the Virginia Public Procurement Act (VPPA) or other Legislation, unless specifically named in Legislation as a participant. A full text copy of the *Governing Rules* is available in Appendix G.

The institutions listed above will continue to comply with the provisions of the Manual unless noted to the contrary below:

Management Agreement Overview -- (effective July 1, 2006)

Procurement and Surplus Property

- Continues delegation of a core set of locally administered policies and procedures to govern procurement.
- Clarifies that these institutions are exempt from VITA procurement regulations.
- Validates that state contracts are optional for use in all areas except telecommunications services which remain mandatory.
- Major differences between the *Governing Rules*, the VPPA, and provisions of the Manual:
 - Increases bid, performance and payment bond requirements from \$100,000 to \$1,000,000.
 - Provides additional optional flexibility to deal with capital projects valued under \$1 million (renovations).

- Exempts from review and approval by the Chief Information Officer of the Commonwealth the procurement of information technology and telecommunications goods and services, and use of federal General Services Agency ("GSA") contracts.
- Removes requirement for advance written determination for use of competitive negotiation when competitive sealed bidding is not practicable or not fiscally advantageous.
- Allows for multiple awards of term contracts in procurement of professional services.
 - Allows for architectural or professional services (A/E) contracts to be for multiple projects. The dollar sum of the projects in one contract term shall be established in the RFP. Any unused amounts from any contract term may be carried forward.
- Establishes the small purchase level at \$50,000 for goods, professional and non-professional services. Individual institutional small purchase procedures will apply to transactions expected to be below \$50,000.
- Streamlines the competitive negotiations (RFP) process for goods and non-professional services.
- Exempts from competition several transaction categories (e.g. speakers and performing artists, memberships and association dues, conference facilities and services, etc.).
- Lifts approval requirements to participate in cooperative contracts.
- Makes purchase from Virginia Industries for the Blind ("VIB") optional.
- Enacts a Memorandum of Agreement that defines scope and expectations of electronic procurement systems operated by the state and the institution and connected by interface or integration (applies to University of Virginia and Virginia Tech only).
- Provides institution-level authority for disposition of surplus personal property.
- Allows retention of all proceeds at the institution from sale of recycling and surplus property.
- Provides for the institution to adopt a small, woman-owned and minority-owned (SWAM) business plan that is consistent with the Commonwealth's SWAM program.

Appendix G

Governing Rules

Rules Governing Procurement of Goods, Services, Insurance, and Construction
by a Public Institution of Higher Education of the Commonwealth of Virginia
Governed by Subchapter 3 of the
Restructured Higher Education Financial and Administrative Operations Act,
Chapter 4.10 (§ [23-38.88](#) et seq.) of Title 23 of the Code of Virginia

In accordance with the provisions of the Restructured Higher Education Financial and Administrative Operations Act (the Act), Chapter 4.10 (§ [23-38.88](#) et seq.) of Title 23 of the Code of Virginia, and in particular § [23-38.110](#) of the Act, the governing body of a public institution of higher education of the Commonwealth of Virginia that has entered into a Memorandum of Understanding with the Commonwealth pursuant to Subchapter 3 of the Act has adopted the following Rules Governing Procurement of Goods, Services, Insurance, and Construction to govern the procurement of goods, services, insurance, and construction by the Institution:

§ 1. Purpose.

The purpose of these Rules is to enunciate the public policies pertaining to procurement of goods, services, insurance, and construction by the Institution from nongovernmental sources, to include governmental procurement that may or may not result in monetary consideration for either party. These Rules shall apply whether the consideration is monetary or nonmonetary and regardless of whether the Institution, the contractor, or some third party is providing the consideration.

§ 2. Scope of Procurement Authority.

Subject to these Rules, and the Institution's continued substantial compliance with the terms and conditions of its Management Agreement with the Commonwealth pursuant to subdivision D 4 of § [23-38.88](#) and the requirements of Chapter 4.10 of the Act, the Institution shall have and shall be authorized to have and exercise all of the authority relating to procurement of goods, services, insurance, and construction, including but not limited to capital outlay-related procurement and information technology-related procurement, that Institutions are authorized to exercise pursuant to Subchapter 3 of the Restructuring Act.

§ 3. Competition is the Priority.

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

§ 4. Definitions.

As used in these Rules:

"Affiliate" means an individual or business that controls, is controlled by, or is under common control with another individual or business. A person controls an entity if the person owns, directly or indirectly, more than 10 percent of the voting securities of the entity. For the purposes of this definition "voting security" means a security that (i) confers upon the holder the right to vote for the election of members of the board of directors or similar governing body of the business or (ii) is convertible into, or entitles the holder to receive, upon its exercise, a security that confers such a right to vote. A general partnership interest shall be deemed to be a voting security.

"Best value," as predetermined in the solicitation, means the overall combination of quality, price, and various elements of required services that in total are optimal relative to the Institution's needs.

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

"Competitive negotiation" is a method of contractor selection that includes 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 the proposal and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities or qualifications that will be required of the contractor.
2. Public notice of the Request for Proposal at least 10 days prior to the date set for receipt of proposals by publication in a newspaper or newspapers of general circulation in the area in which the contract is to be performed so as to provide reasonable notice to the maximum number of offerors that can be reasonably anticipated to submit proposals in response to the particular request. Public notice also shall be published on the Department of General Services' central electronic procurement website and may be published on other appropriate websites. In addition, proposals may be solicited directly from potential contractors.
3. a. Procurement of professional services. The procurement of professional services for capital projects shall be conducted using a qualification-based selection process. The Institution 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. The Request for Proposal

shall not, however, request that offerors furnish estimates of man-hours or costs for services. At the discussion stage, the Institution may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of price for services. Proprietary information from competing offerors shall not be disclosed to the public or to competitors. 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 Institution 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 Institution 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. Should the Institution 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.

A contract for architectural or professional engineering services relating to construction projects may be negotiated by the Institution for multiple projects provided (i) the projects require similar experience and expertise, and (ii) the nature of the projects is clearly identified in the Request for Proposal. Under such contract, (a) the fair and reasonable prices, as negotiated, shall be used in determining the cost of each project performed; (b) the sum of all projects performed in one contract term shall be as set in the Request for Proposal; and (c) the project fee of any single project shall not exceed the term limit as set in the Request for Proposal. Any unused amounts from any contract term may be carried forward. Competitive negotiations for such contracts may result in awards to more than one offeror provided the Request for Proposal stated the potential for a multi-vendor award.

Multiphase professional services contracts satisfactory and advantageous to the Institution for environmental, location, design and inspection work regarding construction of infrastructure projects may be negotiated and awarded based on qualifications at a fair and reasonable price for the first phase only, when completion of the earlier phases is necessary to provide information critical to the negotiation of a fair and reasonable price for succeeding phases. Prior to the procurement of any such contract, the Institution shall state the anticipated intended total scope of the project and determine in writing that the nature of the work is such that the best interests of such Institution require awarding the contract.

b. Procurement of other than professional services. Selection shall be made of two or more offerors deemed to be fully qualified and best suited among those submitting proposals, on the basis of the factors involved in the Request for Proposal, including price if so stated in the Request for Proposal. Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but need not be the sole determining factor. After negotiations have been conducted with each offeror so selected, the Institution shall select the offeror which, in its opinion, has made the best proposal, and shall award the contract to that offeror. When the terms and conditions of multiple awards are so provided in the Request for Proposal, awards may be made to more than one offeror. Should the Institution determine in writing and in its sole discretion that only one offeror has made the best proposal, a contract may be negotiated and awarded to that offeror.

"Competitive sealed bidding" is a method of contractor selection, other than for professional services, which includes the following elements:

1. Issuance of a written Invitation to Bid containing or incorporating by reference the specifications and contractual terms and conditions applicable to the procurement. Unless the Institution has provided for prequalification of bidders, the Invitation to Bid shall include a statement of any requisite qualifications of potential contractors. When it is impractical to prepare initially a purchase description to support an award based on prices, an Invitation to Bid may be issued requesting the submission of unpriced offers to be followed by an Invitation to Bid limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.
2. Public notice of the Invitation to Bid at least 10 days prior to the date set for receipt of bids by publication on the Department of General Services' central electronic procurement website. Public notice also may be

published in a newspaper of general circulation or on other appropriate websites, or both. In addition, bids may be solicited directly from potential contractors. Any additional solicitations shall include businesses selected from a list made available by the Department of Minority Business Enterprise.

3. Public opening and announcement of all bids received.

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

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

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

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

"Covered Institution" or "Institution" means, on and after the effective date of the initial management agreement with the Commonwealth of Virginia, a public institution of higher education of the Commonwealth that has entered into a management agreement with the Commonwealth to be governed by the provisions of Subchapter 3 of the Restructuring Act.

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

"Goods" means all material, equipment, supplies, and printing, including information technology and telecommunications goods such as automated data processing hardware and software.

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

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

"Nonprofessional services" means any services not specifically identified as professional services in the definition of professional services and includes small construction projects valued not over \$1 million; provided that subdivision 3 a of the definition of "competitive negotiation" in this section shall still apply to professional services for such small construction projects.

"Potential bidder or offeror" for the purposes of §§ 50 and 54 of these Rules means a person who, at the time the Institution negotiates and awards or proposes to award a contract, is engaged in the sale or lease of goods, or the sale of services, insurance or construction, of the type to be procured under the contract, and who at such time is eligible and qualified in all respects to perform that contract, and who would have been eligible and qualified to submit a bid or proposal had the contract been procured through competitive sealed bidding or competitive negotiation.

"Professional services" means work performed by an independent contractor within the scope of the practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law, dentistry, medicine, optometry, pharmacy or professional engineering.

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

"Public contract" means an agreement between the Institution and a nongovernmental source that is enforceable in a court of law.

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

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

"Restructuring Act" or "Act" means the Restructured Higher Education Financial and Administrative Operations Act, Chapter 4.10 (§ 23-38.88 et seq.) of Title 23 of the Code of Virginia.

"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.

"Rules" means these Rules Governing Procurement of Goods, Services, Insurance, and Construction adopted by the governing body of the Covered Institution.

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

"Sheltered workshop" means a work-oriented rehabilitative facility with a controlled working environment and individual goals that utilizes work experience and related services for assisting the handicapped person to progress toward normal living and a productive vocational status.

§ 5. Methods of procurement.

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

B. Professional services shall be procured by competitive negotiation. Qualification-based selection shall be used for design services.

C. Goods, services, or insurance may be procured by competitive negotiation.

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 Institution 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 Institution on a fixed price design-build basis or construction management basis under § 7;
2. By the Institution for the construction, alteration, repair, renovation or demolition of buildings; or
3. By the Institution for the construction of highways and any draining, dredging, excavation, grading or similar work upon real property.

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

This notice shall be posted in a designated public area, which may be the Department of General Services' website for the Commonwealth's central electronic procurement system, or published in a newspaper of general circulation on the day the Institution awards or announces its decision to award the contract, whichever occurs first. Public notice shall also be published on the Department of General Services' website for the Commonwealth's central electronic procurement system and may be published on other appropriate websites.

F. In case of emergency, a contract may be awarded without competitive sealed bidding or competitive negotiation; however, such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The Institution shall issue a written notice stating that the contract is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted in a designated public area, which may be the Department of General Services' website for the Commonwealth's central

electronic procurement system, or published in a newspaper of general circulation on the day the Institution awards or announces its decision to award the contract, whichever occurs first, or as soon thereafter as is practicable. Public notice may also be published on the Department of General Services' website for the Commonwealth's central electronic procurement system and other appropriate websites.

G. The Institution may establish purchase procedures, if adopted in writing, not requiring competitive sealed bids or competitive negotiation for single or term contracts for goods and services other than professional services if the aggregate or the sum of all phases is not expected to exceed \$50,000; however, such small purchase procedures shall provide for competition wherever practicable.

H. The Institution may establish purchase procedures, if adopted in writing, not requiring competitive negotiation for single or term contracts for professional services if the aggregate or the sum of all phases is not expected to exceed \$50,000; however such small purchase procedures shall provide for competition wherever practicable.

I. Upon a determination made in advance by the Institution and set forth in writing that the purchase of goods, products or commodities from a public auction sale is in the best interests of the public, such items may be purchased at the auction, including online public auctions. The writing shall document the basis for this determination.

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

§ 6. Cooperative procurement.

A. In circumstances where the Institution determines and documents that statewide contracts for goods and services, including information technology and telecommunications goods and services, do not provide goods and services to the Institution that meet its business goals and objectives, the Institution is authorized to participate in, sponsor, conduct, or administer a cooperative procurement arrangement on behalf of or in conjunction with public bodies, public or private health or educational institutions, other public or private organizations or entities, including public-private partnerships, charitable organizations, health care provider alliances or purchasing organizations or entities, or with public agencies or institutions or group purchasing organizations of the several states, territories of the United States, or the District of Columbia, for the purpose of combining requirements to effect cost savings or reduce administrative expense in any acquisition of goods and services, other than professional services. The Institution may purchase from any authority, department, agency, institution, city, county, town, or other political subdivision of the Commonwealth's contract even if it did not participate in the request for proposal or invitation to bid, if the request for proposal or invitation to bid specified that the procurement was being conducted on behalf of other public bodies. In such instances, deviation from the procurement procedures set forth in these Rules and the administrative policies and procedures established to implement these Rules shall be permitted. Notwithstanding all of the above, use of cooperative contracts shall conform to the business requirements of the Commonwealth's electronic procurement system, including the requirement for payment of applicable fees. Nothing herein shall prohibit the payment by direct or indirect means of any administrative fee that will allow for participation in any such arrangement.

B. In circumstances where statewide contracts for goods and services, including information technology and telecommunications goods and services, do not provide goods and services to meet the Institution's business goals and objectives, and as authorized by the United States Congress and consistent with applicable federal regulations, and provided the terms of the contract permit such purchases:

1. The Institution may purchase goods and nonprofessional services, from a United States General Services Administration contract or a contract awarded by any other agency of the United States government; and
2. The Institution may purchase telecommunications and information technology goods and nonprofessional services from a United States General Services Administration contract or a contract awarded by any other agency of the United States government.

§ 7. Design-build or construction management contracts authorized.

A. Notwithstanding any other provisions of law, the Institution may enter into contracts on a fixed price design-build basis or construction management basis in accordance with the provisions of this section.

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

§ 8. Modification of the contract.

A. A contract awarded by the Institution may include provisions for modification of the contract during performance, but no fixed-price contract may be increased by more than 25 percent of the amount of the contract or \$50,000, whichever is greater, without the advance written approval of the Institution's president or his designee. In no event may the amount of any contract, without adequate consideration, be increased for any purpose, including, but not limited to, relief of an offeror from the consequences of an error in its bid or offer.

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

C. Nothing in this section shall prevent the Institution from placing greater restrictions on contract modifications.

§ 9. Discrimination prohibited; participation of small, women- and minority-owned business.

A. In the solicitation or awarding of contracts, the Institution shall not discriminate against a bidder or offeror because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by state law relating to discrimination in employment. Whenever solicitations are made, the Institution shall include businesses selected from a list made available by the Department of Minority Business Enterprise.

B. The Institution shall establish programs consistent with this section to facilitate the participation of small businesses and businesses owned by women and minorities in procurement transactions. The programs established shall be in writing and shall include cooperation with the Department of Minority Business Enterprise, the United States Small Business Administration, and other public or private agencies. The Institution shall submit annual progress reports on minority business procurement to the Department of Minority Business Enterprise.

C. Whenever there exists (i) a rational basis for small business enhancement or (ii) a persuasive analysis that documents a statistically significant disparity between the availability and utilization of women- and minority-owned businesses, the Governor is by law authorized and encouraged to require the Institution to implement appropriate enhancement or remedial measures consistent with prevailing law.

D. In the solicitation or awarding of contracts, the Institution shall not discriminate against a bidder or offeror because the bidder or offeror employs ex-offenders unless it has made a written determination that employing ex-offenders on the specific contract is not in its best interest.

§ 10. Employment discrimination by contractor prohibited; required contract provisions.

The Institution 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.

§ 11. Drug-free workplace to be maintained by contractor; required contract provisions.

The Institution shall include in every contract over \$10,000 the following provisions:

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

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

§ 12. 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 Institution 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.

§ 13. Comments concerning specifications.

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

§ 14. Prequalification generally; prequalification for construction.

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

B. Any prequalification of prospective contractors for construction by the Institution shall be pursuant to a prequalification process for construction projects adopted by the Institution. 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 § 34 of these Rules.

In all instances in which the Institution 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 Institution shall advise in writing each contractor who submitted an application whether that contractor has been prequalified. In the event that a contractor is denied prequalification, the written notification to the contractor shall state the reasons for the denial of prequalification and the factual basis of such reasons.

A decision by the Institution denying prequalification under the provisions of this subsection shall be final and conclusive unless the contractor appeals the decision as provided in § 54 of these Rules.

C. The Institution may deny prequalification to any contractor only if the Institution 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 Institution 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 10 years for the breach of contracts for governmental or nongovernmental construction, including, but not limited to, design-build or construction management;
4. The contractor has been in substantial noncompliance with the terms and conditions of prior construction contracts with the Institution without good cause. If the Institution has not contracted with a contractor in any prior construction contracts, the Institution may deny prequalification if the contractor has been in substantial noncompliance with the terms and conditions of comparable construction contracts with another public body without good cause. The Institution 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 10 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 Chapter 43 of Title 2.2 of the Code of Virginia, (ii) the Virginia Governmental Frauds Act (§ [18.2-498.1](#) et seq.) of the Code of Virginia, (iii) Chapter 4.2 (§ [59.1-68.6](#) et seq.) of Title 59.1 of the Code of Virginia, or (iv) any substantially similar law of the United States or another state;
6. The contractor or any officer, director or owner thereof is currently debarred pursuant to an established debarment procedure from bidding or contracting by any public body, agency of another state or agency of the federal government;
7. The contractor failed to provide to the Institution in a timely manner any information requested by the Institution relevant to subdivisions 1 through 6 of this subsection.

§ 15. Negotiation with lowest responsible bidder.

Unless canceled or rejected, a responsive bid from the lowest responsible bidder shall be accepted as submitted, except that if the bid from the lowest responsible bidder exceeds available funds, the Institution may negotiate with the apparent low bidder to obtain a contract price within available funds. However, the negotiation may be undertaken only under conditions and procedures described in writing and approved by the Institution prior to issuance of the Invitation to Bid and summarized therein.

§ 16. Cancellation, rejection of bids; waiver of informalities.

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

B. The Institution may waive informalities in bids.

§ 17. Exclusion of insurance bids prohibited.

Notwithstanding any other provision of law, no insurer licensed to transact the business of insurance in the Commonwealth or approved to issue surplus lines insurance in the Commonwealth shall be excluded from presenting an insurance bid proposal to the Institution in response to a request for proposal or an invitation to bid. Nothing in this section shall preclude the Institution from debarring a prospective insurer pursuant to § 18.

§ 18. Debarment.

Prospective contractors may be debarred from contracting for particular types of supplies, services, insurance or construction, for specified periods of time. Any debarment procedure shall be established in writing by the Institution. Any debarment procedure may provide for debarment on the basis of a contractor's unsatisfactory performance for the Institution.

§ 19. Purchase programs for recycled goods; Institution responsibilities.

A. The Institution may implement a purchase program for recycled goods and may coordinate its efforts so as to achieve the goals and objectives set forth in §§ [10.1-1425.6](#), [10.1-1425.7](#), and [10.1-1425.8](#) of the Code of Virginia, and §§ 20 and 22 of these Rules.

B. The Department of Environmental Quality, with advice from the Virginia Recycling Markets Development Council, shall advise the Institution concerning the designation of recycled goods.

§ 20. Preference for Virginia products with recycled content and for Virginia firms.

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

B. Whenever any bidder is a resident of any other state and such state under its laws allows a resident contractor of that state a preference, a like preference may be allowed by the Institution to the lowest responsive and responsible bidder who is a resident of Virginia.

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

§ 21. Preference for Virginia coal used in the Institution.

In determining the award of any contract for coal to be purchased for use in the Institution with state funds, the Institution shall procure using competitive sealed bidding and shall award to the lowest responsive and responsible bidder offering coal mined in Virginia so long as its bid price is not more than 4 percent greater than the bid price of the lowest responsive and responsible bidder offering coal mined elsewhere.

§ 22. Preference for recycled paper and paper products used by the Institution.

A. In determining the award of any contract for paper and paper products to be purchased for use by the Institution, it shall competitively procure recycled paper and paper products of a quality suitable for the purpose intended, so long as the price is not more than 10 percent greater than the price of the lowest responsive and responsible bidder or offeror offering a product that does not qualify under subsection B.

B. For purposes of this section, recycled paper and paper products means any paper or paper products meeting the EPA Recommended Content Standards as defined in 40 C.F.R. Part 247.

§ 23. 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. One of the following procedures for withdrawal of a bid shall be selected by the Institution and stated in the advertisement for bids: (i) 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 (ii) the bidder shall submit to the Institution or designated official his original work papers, documents and materials used in the preparation of the bid within one day after the date fixed for submission of bids. The work papers shall be delivered by the bidder in person or by registered mail at or prior to the time fixed for the opening of bids. In either instance, the work papers, documents and materials may be considered as trade secrets or proprietary information subject to the conditions of subsection F of § 34 of these Rules. The bids shall be opened one day following the time fixed by the Institution for the submission of bids. Thereafter,

the bidder shall have two hours after the opening of bids within which to claim in writing any mistake as defined herein and withdraw his bid. The contract shall not be awarded by the Institution until the two-hour period has elapsed. The mistake shall be proved only from the original work papers, documents and materials delivered as required herein.

B. The Institution may establish procedures for the withdrawal of bids for other than construction contracts.

C. 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 5 percent.

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

E. 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.

F. If the Institution denies the withdrawal of a bid under the provisions of this section, it shall notify the bidder in writing stating the reasons for its decision and award the contract to such bidder at the bid price, provided such bidder is a responsible and responsive bidder.

§ 24. Contract Pricing Arrangements.

A. Public contracts may be awarded on a fixed price or cost reimbursement basis, or on any other basis that is not prohibited by these Rules.

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

C. A policy or contract of insurance or prepaid coverage having a premium computed on the basis of claims paid or incurred, plus the insurance carrier's administrative costs and retention stated in whole or part as a percentage of such claims, shall not be prohibited by this section.

§ 25. Workers' compensation requirements for construction contractors and subcontractors.

A. No contractor shall perform any work on a construction project of the Institution unless he (i) has obtained, and continues to maintain for the duration of the work, workers' compensation coverage required pursuant to the provisions of Chapter 8 (§ [65.2-800](#) et seq.) of Title 65.2 of the Code of Virginia, and (ii) provides prior to the award of contract, on a form furnished by the Institution, evidence of such coverage.

B. The Department of General Services shall provide the form to the Institution. Failure of the Institution to provide the form prior to the award of contract shall waive the requirements of clause (ii) of subsection A.

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

§ 26. Retainage on construction contracts.

A. In any contract issued by the Institution for construction that provides for progress payments in installments based upon an estimated percentage of completion, the contractor shall be paid at least 95 percent of the earned sum when payment is due, with no more than 5 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.

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

A. Any provision contained in any public construction contract of the Institution 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 Institution, 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 awarded by the Institution that:

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

C. A contractor making a claim against the Institution for costs or damages due to the alleged delaying of the contractor in the performance of its work under any public construction contract of the Institution shall be liable to the Institution and shall pay it for a percentage of all costs incurred by the Institution 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. If the Institution denies 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 for the Institution, it 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 Institution shall be equal to the percentage of the contractor's total delay claim for which the Institution's denial is determined through litigation or arbitration to have been made in bad faith.

§ 28. Bid bonds.

A. Except in cases of emergency, all bids or proposals for construction contracts in excess of \$1 million 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 5 percent of the amount bid.

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

C. Nothing in this section shall preclude the Institution from requiring bid bonds to accompany bids or proposals for construction contracts anticipated to be less than \$1 million.

§ 29. Performance and payment bonds.

A. Upon the award by the Institution of any (i) public construction contract exceeding \$1 million awarded to any prime contractor or (ii) public construction contract exceeding \$1 million 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 by the Institution, the contractor shall furnish to the Institution the following bonds:

1. Except for transportation-related projects, 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, such bond shall be in a form and amount satisfactory to the Institution.

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.

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

C. The bonds shall be payable to the Commonwealth of Virginia naming also the Institution.

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

E. Nothing in this section shall preclude the Institution from requiring payment or performance bonds for construction contracts below \$1 million.

F. 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.

§ 30. Alternative forms of security.

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

B. If approved by the Institution's General Counsel or his equivalent, a bidder may furnish to the Institution 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 Institution equivalent to a corporate surety's bond.

§ 31. Bonds on other than construction contracts.

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

§ 32. Action on performance bond.

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

§ 33. Actions on payment bonds; waiver of right to sue.

A. Subject to the provisions of subsection B, any claimant who has performed labor or furnished material in accordance with the contract documents in furtherance of the work provided in any contract for which a payment bond has been given, and who has not been paid in full before the expiration of 90 days after the day on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment, may bring an action on the payment bond to recover any amount due him for the labor or material. The obligee named in the bond need not be named a party to the action.

B. Any claimant who has a direct contractual relationship with any subcontractor but who has no contractual relationship, express or implied, with the contractor, may bring an action on the contractor's payment bond only if he has given written notice to the contractor within 180 days from the day on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment, stating with substantial accuracy the amount claimed and the name of the person for whom the work was performed or to whom the material was furnished. Notice to the contractor shall be served by registered or certified mail, postage prepaid, in an envelope addressed to such contractor at any place where his office is regularly maintained for the transaction of business. Claims for sums withheld as retainages with respect to labor performed or materials furnished, shall not be subject to the time limitations stated in this subsection.

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

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

§ 34. Public inspection of certain records.

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

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

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

D. Any competitive negotiation offeror, upon request, shall be afforded the opportunity to inspect proposal records within a reasonable time after the evaluation and negotiations of proposals are completed but prior to

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

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

F. Trade secrets or proprietary information submitted by a bidder, offeror or contractor in connection with a procurement transaction or prequalification application submitted pursuant to subsection B of § 14 shall not be subject to the Virginia Freedom of Information Act (§ [2.2-3700](#) et seq.); however, the bidder, offeror or contractor shall (i) invoke the protections of this section prior to or upon submission of the data or other materials, (ii) identify the data or other materials to be protected, and (iii) state the reasons why protection is necessary.

§ 35. Exemption for certain transactions.

A. The provisions of these Rules shall not apply to:

1. The selection of services related to the management and investment of the Institution's endowment funds, endowment income, or gifts pursuant to § [23-76.1](#). However, selection of these services shall be governed by the Uniform Management of Institutional Funds Act (§ [55-268.1](#) et seq.) as required by § [23-76.1](#).

2. The purchase of items for resale at retail bookstores and similar retail outlets operated by the Institution. However, such purchase procedures shall provide for competition where practicable.

3. Procurement of any construction or planning and design services for construction by the Institution when (i) the planning, design or construction is \$50,000 or less or (ii) the Institution is obligated to conform to procurement procedures that are established by federal statutes or regulations, whether or not those federal procedures are in conformance with the provisions of these Rules.

4. The purchase of goods and services by the Institution when such purchases are made under a remedial plan established by the Governor pursuant to subsection C of § 9 of these Rules.

B. Where a procurement transaction involves the expenditure of federal assistance or contract funds, the receipt of which is conditioned upon compliance with mandatory requirements in federal laws or regulations not in conformance with the provisions of these Rules, the Institution may comply with such federal requirements, notwithstanding the provisions of these Rules, only upon the written determination of the Institution's President or his designee that acceptance of the grant or contract funds under the applicable conditions is in the public interest. Such determination shall state the specific provision of these Rules in conflict with the conditions of the grant or contract.

§ 36. Permitted contracts with certain religious organizations; purpose; limitations.

A. The Opportunity Reconciliation Act of 1996, P.L. [104-193](#), authorizes 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. The Institution, 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. The Institution shall ensure that all invitations to bid, requests for proposals, contracts, and purchase orders prominently display a nondiscrimination statement indicating that it does not discriminate against faith-based organizations.

E. A faith-based organization contracting with the Institution (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 Institution. 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 sectarian 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. (§ 2000e-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 the Institution 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 Institution 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 Institution shall provide to each individual who applies for or receives goods, services, or disbursements provided pursuant to a contract between the Institution and a faith-based organization a notice in bold face type that states: "Neither the Institution'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."

§ 37. Exemptions from competition for certain transactions.

The Institution may enter into contracts without competition, as that term is described in subsections A through J of § 5 (Methods of procurement) of these Rules, for:

1. The purchase of goods or services that are produced or performed by or related to:
 - a. Persons, or in schools or workshops, under the supervision of the Virginia Department for the Blind and Vision Impaired;
 - b. Nonprofit sheltered workshops or other nonprofit organizations that offer transitional or supported employment services serving the handicapped;
 - c. Private educational institutions; or
 - d. Other public educational institutions.
2. Speakers and performing artists;
3. Memberships and Association dues;
4. Sponsored research grant sub-awards and contract sub-awards, not to include the purchase of goods or services by the Institution;
5. Group travel in foreign countries;
6. Conference facilities and services;
7. Participation in intercollegiate athletic tournaments and events including team travel and lodging, registration and tournament fees;
8. Royalties; or
9. The purchase of legal services, provided that the Office of the Attorney General has been consulted, or expert witnesses or other services associated with litigation or regulatory proceedings.

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

The Institution may enter into contracts for insurance or electric utility service without competitive sealed bidding or competitive negotiation if purchased through an association of which the Institution is a member if

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

§ 39. Definitions.

As used in §§ 39 through 46, unless the context requires a different meaning:

"Contractor" means the entity that has a direct contract with the Institution.

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

"Payment date" means either (i) the date on which payment is due under the terms of a contract for provision of goods or services; or (ii) if such date has not been established by contract, (a) 30 days after receipt of a proper invoice by the Institution or its agent or (b) 30 days after receipt of the goods or services by the Institution.

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

§ 40. Exemptions.

The provisions of §§ 39 through 46 shall not apply to the late payment provisions contained in any public utility tariffs prescribed by the State Corporation Commission.

§ 41. Retainage to remain valid.

Notwithstanding the provisions of §§ 39 through 46, the provisions of § 26 relating to retainage shall remain valid.

§ 42. Prompt payment of bills by the Institution.

A. The Institution shall promptly pay for the completely delivered goods or services by the required payment date.

Payment shall be deemed to have been made when offset proceedings have been instituted, as authorized under the Virginia Debt Collection Act (§ [2.2-4800](#) et seq.).

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

§ 43. Defect or impropriety in the invoice or goods and/or services received.

In instances where there is a defect or impropriety in an invoice or in the goods or services received, the Institution shall notify the supplier of the defect or impropriety, if the defect or impropriety would prevent payment by the payment date. The notice shall be sent within 15 days after receipt of the invoice or the goods or services.

§ 44. Date of postmark deemed to be date payment is made.

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

§ 45. Payment clauses to be included in contracts.

Any contract awarded by the Institution shall include:

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

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

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

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

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

4. An interest rate clause stating, "Unless otherwise provided under the terms of this contract, interest shall accrue at the rate of 1 percent per month."

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

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

§ 46. Interest penalty; exceptions.

A. Interest shall accrue, at the rate determined pursuant to subsection B, on all amounts owed by the Institution to a vendor that remain unpaid after seven days following the payment date. However, nothing in this section shall affect any contract providing for a different rate of interest, or for the payment of interest in a different manner.

B. The rate of interest charged the Institution pursuant to subsection A shall be the base rate on corporate loans (prime rate) at large United States money center commercial banks as reported daily in the publication entitled The Wall Street Journal. Whenever a split prime rate is published, the lower of the two rates shall be used. However, in no event shall the rate of interest charged exceed the rate of interest established pursuant to § [58.1-1812](#) of the Code of Virginia.

C. Notwithstanding subsection A, no interest penalty shall be charged when payment is delayed because of disagreement between the Institution and a vendor regarding the quantity, quality or time of delivery of goods or services or the accuracy of any invoice received for the goods or services. The exception from the interest penalty provided by this subsection shall apply only to that portion of a delayed payment that is actually the subject of the disagreement and shall apply only for the duration of the disagreement.

D. This section shall not apply to § 26 pertaining to retainage on construction contracts, during the period of time prior to the date the final payment is due. Nothing contained herein shall prevent a contractor from receiving interest on such funds under an approved escrow agreement.

E. Notwithstanding subsection A, no interest penalty shall be paid to any debtor on any payment, or portion thereof, withheld pursuant to the Comptroller's Debt Setoff Program, as authorized by the Virginia Debt Collection Act (§ [2.2-4800](#) et seq.) of the Code of Virginia, commencing with the date the payment is withheld. If, as a result of an error, a payment or portion thereof is withheld, and it is determined that at the time of setoff no debt was owed to the Commonwealth, then interest shall accrue at the rate determined pursuant to subsection B on amounts withheld that remain unpaid after seven days following the payment date.

§ 47. Ineligibility.

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

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

If the evaluation reveals that the bidder, offeror or contractor should be allowed permission to participate in the public contract, the Institution shall cancel the proposed disqualification action. If the evaluation reveals that the

bidder should be refused permission to participate, or disqualified from participation, in the public contract, the Institution shall so notify the bidder, offeror or contractor. The notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within 10 days after receipt of the notice by invoking administrative procedures meeting the standards of § 55 of these Rules, if available, or in the alternative by instituting legal action as provided in § 54.

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

§ 48. Appeal of denial of withdrawal of bid.

A. A decision denying withdrawal of bid under the provisions of § 23 of these Rules shall be final and conclusive unless the bidder appeals the decision within 10 days after receipt of the decision by invoking administrative procedures meeting the standards of § 55, if available, or in the alternative by instituting legal action as provided in § 54.

B. If no bid bond was posted, a bidder refused withdrawal of a bid under the provisions of § 23, prior to appealing, shall deliver to the Institution a certified check or cash bond in the amount of the difference between the bid sought to be withdrawn and the next low bid. Such security shall be released only upon a final determination that the bidder was entitled to withdraw the bid.

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

§ 49. Determination of nonresponsibility.

A. Following public opening and announcement of bids received on an Invitation to Bid, the Institution shall evaluate the bids in accordance with element 4 of the definition of "Competitive sealed bidding" in § 4 of these Rules. At the same time, the Institution shall determine whether the apparent low bidder is responsible. If the Institution so determines, then it may proceed with an award in accordance with element 5 of the definition of "Competitive sealed bidding" in § 4. If the Institution determines that the apparent low bidder is not responsible, it shall proceed as follows:

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

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

3. Such notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within 10 days after receipt of the notice by invoking administrative procedures meeting the standards of § 55 of these Rules, if available, or in the alternative by instituting legal action as provided in § 54.

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

B. If, upon appeal pursuant to § 54 or 55 of these Rules, it is determined that the decision of the Institution was not (i) an honest exercise of discretion, but rather was arbitrary or capricious or (ii) in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid, and the award of the contract in question has not been made, the sole relief shall be a finding that the bidder is a responsible bidder for the contract in question or directed award as provided in subsection A of § 54, or both.

If it is determined that the decision of the Institution was not an honest exercise of discretion, but rather was arbitrary or capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation,

or the terms or conditions of the Invitation to Bid, and an award of the contract has been made, the relief shall be as set forth in subsection B of § 54 of these Rules.

C. A bidder contesting a determination that he is not a responsible bidder for a particular contract shall proceed under this section, and may not protest the award or proposed award under the provisions of § 50 of these Rules.

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

§ 50. Protest of award or decision to award.

A. Any bidder or offeror, who desires to protest the award or decision to award a contract shall submit the protest in writing to the Institution, or an official designated by the Institution, no later than 10 days after the award or the announcement of the decision to award, whichever occurs first. Public notice of the award or the announcement of the decision to award shall be given by the Institution in the manner prescribed in the terms or conditions of the Invitation to Bid or Request for Proposal. Any potential bidder or offeror on a contract negotiated on a sole source or emergency basis who desires to protest the award or decision to award such contract shall submit the protest in the same manner no later than 10 days after posting or publication of the notice of such contract as provided in § 5 of these Rules. However, if the protest of any actual or potential bidder or offeror depends in whole or in part upon information contained in public records pertaining to the procurement transaction that are subject to inspection under § 34 of these Rules, then the time within which the protest shall be submitted shall expire 10 days after those records are available for inspection by such bidder or offeror under § 34, or at such later time as provided in this section. No protest shall lie for a claim that the selected bidder or offeror is not a responsible bidder or offeror. The written protest shall include the basis for the protest and the relief sought. The Institution or designated official shall issue a decision in writing within 10 days stating the reasons for the action taken. This decision shall be final unless the bidder or offeror appeals within 10 days of receipt of the written decision by invoking administrative procedures meeting the standards of § 55 of these Rules, if available, or in the alternative by instituting legal action as provided in § 54. Nothing in this subsection shall be construed to permit a bidder to challenge the validity of the terms or conditions of the Invitation to Bid or Request for Proposal. The use of Alternative Dispute Resolution (ADR) shall constitute an administrative appeal procedure meeting the standards of § 55 of these Rules.

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

Where the award has been made but performance has not begun, the performance of the contract may be enjoined. Where the award has been made and performance has begun, the Institution may declare the contract void upon a finding that this action is in the best interest of the public. Where a contract is declared void, the performing contractor shall be compensated for the cost of performance up to the time of such declaration. In no event shall the performing contractor be entitled to lost profits.

C. Where the Institution, an official designated by it, or an appeals board determines, after a hearing held following reasonable notice to all bidders, that there is probable cause to believe that a decision to award was based on fraud or corruption or on an act in violation of these Rules, the Institution, designated official or appeals board may enjoin the award of the contract to a particular bidder.

§ 51. Effect of appeal upon contract.

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

§ 52. Stay of award during protest.

An award need not be delayed for the period allowed a bidder or offeror to protest, but in the event of a timely protest as provided in § 50 of these Rules, or the filing of a timely legal action as provided in § 54, no further action to award the contract shall be taken unless there is a written determination that proceeding without delay is necessary to protect the public interest or unless the bid or offer would expire.

§ 53. Contractual disputes.

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

B. The Institution shall include in its contracts a procedure for consideration of contractual claims. Such procedure, which may be contained in the contract or may be specifically incorporated into the contract by reference and made available to the contractor, shall establish a time limit for a final decision in writing by the Institution. If the Institution has established administrative procedures meeting the standards of § 55 of these Rules, such procedures shall be contained in the contract or specifically incorporated in the contract by reference and made available to the contractor. The Institution may require the submission of contractual claims pursuant to any contract to Alternative Dispute Resolution (ADR) as an administrative procedure.

C. A contractor may not invoke administrative procedures meeting the standards of § 55 of these Rules, if available, or institute legal action as provided in § 54, prior to receipt of the Institution's decision on the claim, unless the Institution fails to render such decision within the time specified in the contract.

D. The decision of the Institution shall be final and conclusive unless the contractor appeals within six months of the date of the final decision on the claim by the Institution by invoking administrative procedures meeting the standards of § 55 of these Rules, if available, or in the alternative by instituting legal action as provided in § 54.

§ 54. Legal actions.

A. A bidder or offeror, actual or prospective, who is refused permission or disqualified from participation in bidding or competitive negotiation, or who is determined not to be a responsible bidder or offeror for a particular contract, may bring an action in the appropriate circuit court challenging that decision, which shall be reversed only if the petitioner establishes that the decision was not (i) an honest exercise of discretion, but rather was arbitrary or capricious; (ii) in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid; or (iii) in the case of denial of prequalification, based upon the criteria for denial of prequalification set forth in subsection B of § 14 of these Rules. In the event the apparent low bidder, having been previously determined by the Institution to be not responsible in accordance with § 4, is found by the court to be a responsible bidder, the court may direct the Institution to award the contract to such bidder in accordance with the requirements of this section and the Invitation to Bid.

B. A bidder denied withdrawal of a bid under § 23 of these Rules may bring an action in the appropriate circuit court challenging that decision, which shall be reversed only if the bidder establishes that the decision of the Institution was not (i) an honest exercise of discretion, but rather was arbitrary or capricious or (ii) in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid.

C. A bidder, offeror or contractor, or a potential bidder or offeror on a contract negotiated on a sole source or emergency basis in the manner provided in § 5 of these Rules, whose protest of an award or decision to award under § 50 of these Rules is denied, may bring an action in the appropriate circuit court challenging a proposed award or the award of a contract, which shall be reversed only if the petitioner establishes that the proposed award or the award is not (i) an honest exercise of discretion, but rather is arbitrary or capricious or (ii) in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms and conditions of the Invitation to Bid or Request for Proposal.

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

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

F. A bidder, offeror or contractor need not utilize administrative procedures meeting the standards of § 55 of these Rules, if available, but if those procedures are invoked by the bidder, offeror or contractor, the procedures shall be exhausted prior to instituting legal action concerning the same procurement transaction unless the Institution agrees otherwise.

G. Nothing herein shall be construed to prevent the Institution from instituting legal action against a contractor. § 55. Administrative appeals procedure.

A. The Institution may establish an administrative procedure for hearing (i) protests of a decision to award or an award, (ii) appeals from refusals to allow withdrawal of bids, (iii) appeals from disqualifications and determinations of nonresponsibility, and (iv) appeals from decisions on disputes arising during the performance of a contract, or (v) any of these. Such administrative procedure may include the use of Alternative Dispute Resolution (ADR) or shall provide for a hearing before a disinterested person or panel, and the opportunity to present pertinent information and the issuance of a written decision containing findings of fact. The disinterested person or panel shall not be an employee of the governmental entity against whom the claim has been filed. The findings of fact shall be final and conclusive and shall not be set aside unless the same are (a) fraudulent, arbitrary or capricious; (b) so grossly erroneous as to imply bad faith; or (c) in the case of denial of prequalification, the findings were not based upon the criteria for denial of prequalification set forth in subsection B of § 14 of these Rules. No determination on an issue of law shall be final if appropriate legal action is instituted in a timely manner. The Institution may seek advice and input from the Alternative Dispute Resolution Council in establishing an Alternative Dispute Resolution (ADR) procedure.

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

§ 56. Alternative dispute resolution.

The Institution may enter into agreements to submit disputes arising from contracts entered into pursuant to these Rules to arbitration and utilize mediation and other alternative dispute resolution procedures. However, such procedures shall be nonbinding and subject to § 2.2-514 of the Code of Virginia, as applicable.

§ 57. Ethics in public contracting.

The Institution and its governing body, officers and employees shall be governed by the Ethics in Public Contracting provisions of the Virginia Public Procurement Act, Article 6 (§ 2.2-4367 et seq.) of Chapter 43 of Title 2.2 of the Code of Virginia.

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