

CHAPTER 2

ADMINISTRATION

ARTICLE XX. DEPARTMENT OF PURCHASING

DIVISION 1. GENERALLY

Sec. 2-552. Establishment, composition and general responsibilities of the department of purchasing.

(a) There is hereby established a department of purchasing, which shall consist of the director of purchasing and such other officers and employees organized into such bureaus, divisions and units as may be provided by ordinance or by the orders of the director of purchasing consistent therewith.

(b) The department of purchasing shall be responsible for buying, in the best interest of the city, all materials, supplies, services and equipment for all city departments and agencies. In addition, it shall be responsible for centralized control and disposal of excess, obsolete and salvageable materials and equipment.

Sec. 2-552.1. Appointment, general powers and duties of the director of purchasing.

The director of purchasing shall be appointed by the city manager. The director of purchasing shall be the head of the department of purchasing and shall, under the supervision of the city manager, have general management and control of the several bureaus, divisions and other units of the department. The director of purchasing shall have the power and it shall be his duty to:

- (1) Endeavor to obtain as full and open competition as possible on all purchases and sales.
- (2) Establish and amend, when necessary, such rules and regulations as he deems necessary for the internal management and operation of the department of purchasing.
- (3) Prepare, adopt and maintain a vendor's catalog file. The catalog shall be filed according to materials and services and contain descriptions of vendor's commodities, prices and discounts, if available.
- (4) Maintain a bidders' list containing the names of all responsible prospective suppliers, including small businesses and businesses owned by women and minorities, who have requested their names to be included on such list and to remove prospective bidders from such list when the public interest will be served thereby.

- (5) Exploit the possibilities of buying "in bulk" so as to take full advantage of discounts.
- (6) Disqualify vendors who default on their quotations from receiving any business from the city.
- (7) Participate in, sponsor, conduct or administer a cooperative procurement agreement on behalf of or in conjunction with one (1) or more other public bodies, or public agencies or institutions or localities of the several states, territories of the United States or the District of Columbia, for the purpose of combining requirements to increase efficiency or reduce administrative expenses in any acquisition of goods and services. Except for certain contracts identified in Section 2.2-4304A of the Code of Virginia, a public body may purchase from another public body's contract even if it did not participate in the request for proposal or invitation to bid, if the request for proposal or invitation to bid specified that the procurement was being conducted on behalf of other public bodies. In entering into a cooperative procurement agreement with a county, city or town whose governing body has adopted alternative policies and procedures pursuant to the Virginia Public Procurement Act, the director of purchasing shall comply with said alternative policies and procedures so adopted by said governing body of such county, city or town as designated in the cooperative agreement.
- (8) Control and supervise the storerooms and warehouses within the department of purchasing.
- (9) Standardize and establish specifications to reduce commodities to a minimum and assure the quality of goods.
- (10) Award contracts within the purview of this article.

Sec. 2-553. Definitions.

For the purposes of this article, the following words and phrases shall have the meanings respectively ascribed to them by this section, unless a different meaning clearly appears from the context:

- (1) *Best Value.* As predetermined in the solicitation, the overall combination of quality, price, and various elements of required services that in total are optimal relative to the City's needs.
- (2) *Brand name specification.* A specification limited to one or more items by manufacturers' names or catalogue numbers.
- (3) *City council.* The city council of the City of Newport News.

- (4) *Competitive negotiation.* A method of contractor selection utilizing a written request for proposal, followed by discussions with responsive, responsible offerors.
- (5) *Competitive sealed bidding.* A method of contractor selection utilizing a written invitation to bid, public opening and announcement of all bids received, evaluation of bids based upon the requirements set forth in the invitation and award to the lowest responsive, responsible bidder.
- (6) *Construction.* Building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavating, grading or similar work upon real property.
- (7) *Contract.* All types of agreements, regardless of what they may be called, for the procurement of goods, services, insurance or construction.
- (8) *Contractor.* Any person having a contract with the city.
- (9) *Direct or indirect participation.* Involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or acting in any other similar capacity.
- (10) *Goods.* All material, equipment, supplies, printing and automated data processing hardware and software.
- (11) *Informality.* 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 and does not give a competitive advantage as a result thereof.
- (12) *Insurance.* A contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils.
- (13) *Invitation for bids.* All documents, whether attached or incorporated by reference, utilized for soliciting sealed bids.
- (14) *Multiphase professional services contract.* 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.
- (15) *Nominal value.* So small, slight or the like, in comparison to what might properly be

expected, as scarcely to be entitled to the name, but in no case to be more than ten dollars (\$10.00).

- (16) *Nonprofessional services.* Any services not specifically identified as professional services.
- (17) *Professional services.* Work performed by an independent contractor within the scope of the practice of accounting, architecture, land surveying, landscape architecture, law, dentistry, medicine, optometry, pharmacy or professional engineering.
- (18) *Person.* Any corporation, partnership, business, individual, union, committee, club, other organization or group of individuals.
- (19) *Public contract.* An agreement between the city and a nongovernmental source that is enforceable in a court of law.
- (20) *Director of purchasing or agent.* The director of purchasing of the City of Newport News, or his designee.
- (21) *Request for proposals.* All documents, whether attached or incorporated by reference, utilized for soliciting proposals.
- (22) *Responsible bidder or offeror.* A person 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.
- (23) *Responsive bidder.* A person who has submitted a bid which conforms in all material respects to the invitation to bid.
- (24) *Services.* 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.
- (25) *Specification.* Any description of the physical or functional characteristics or of the nature of a good, service or construction item. It may include a description of any requirement for inspecting, testing or preparing a good, service or construction item for delivery.

Sec. 2-553.1. Requisitions and estimates from departments.

All city departments, either by or with the authorization of the head of the department, shall file with the director of purchasing detailed requisitions or estimates of their requirements in supplies

and contractual services in such manner, at such times and for such future periods as the director of purchasing shall prescribe.

Sec. 2-553.2. Department reports of obsolete or unused property; transfer or trade of such property.

(a) All departments shall submit to the director of purchasing at such times and in such form as such agent shall prescribe reports showing stocks of all supplies, materials and equipment which are no longer used or which have become obsolete, worn out or scrapped. The director of purchasing may sell such property by competitive bidding or at public auction, may transfer it to other departments or governmental agencies, or any exchange it for or trade it in on new supplies or equipment.

(b) All sales of such property, when the estimated value is not expected to exceed one hundred thousand dollars (\$100,000), may be sold by the director of purchasing in accordance with rules and regulations established by him; these sales need not follow the competitive bidding or public auction process and such property may be sold without newspaper advertisement and without observing the procedures prescribed by Divisions 2 and 3 of this article, unless the director of purchasing determines that the public interest demands such procedure.

(c) Notwithstanding the provision of subsection (a) and (b), and in lieu therefore, library books, tapes, CD's and any other library materials which have been identified by the director of the department of libraries and information services as surplus to the needs of the Newport News Public Library System may be donated by the city manager or his designee, on behalf of the city, to the Friends of the Newport News Public Library for its use in support of the Newport News Public Library System. Funds generated by the Friends of the Newport News Public Library from the sale of donated library materials or any other funding source may be accepted from the Friends of the Newport News Public Library by the city manager on behalf of the city for use by the Newport News Library System.

Furthermore, any law books or research materials which have been identified by the city attorney as surplus to the needs of the office of the city attorney may be donated to the city farm or the city jail for use in the law libraries of those facilities.

Sec. 2-553.3. Methods of procurement.

(a) All city contracts for 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 article, unless otherwise authorized by law.

(b) Professional services, whether for single or term contracts, may, but need not, be procured by competitive negotiation when the aggregate or sum of all phases is not expected to exceed fifty thousand dollars (\$50,000.00). Such small purchase procedures shall provide for competition wherever practicable. Professional services shall be procured by competitive negotiation

where the cost of the professional service is expected to exceed fifty thousand dollars (\$50,000.00).

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

(d) Upon a written determination made in advance by the director of purchasing that competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured through a licensed agent or broker selected in the manner provided for the procurement of things other than professional services in section 2-570.2. The basis for this determination shall be documented in writing.

(e) Upon a determination in writing by the director of purchasing 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.

(f) 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 director of purchasing 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: (i) for the construction, alteration, repair, renovation or demolition of buildings or structures when the contract is not expected to cost more than one and one-half million dollars (\$1,500,000.00); or (ii) for the construction of highways and any draining, dredging, excavation, grading or similar work upon real property.

(g) Upon a determination made in advance by the director of purchasing and set forth in writing that the purchase of goods, products or commodities from a public auction sale is in the best interests of the public, such items may be purchased at the auction, including online public auctions. The writing shall document the basis for this determination. However, bulk purchases of commodities used in road and highway construction and maintenance, and aggregates shall not be made by online public auction.

(h) The director of purchasing may provide for incentive contracting that offers a contractor whose bid is accepted, the opportunity to share in any cost savings realized by the locality when the projects costs are reduced by such contractor, without affecting project quality, during the construction of the project. The fee, if any, charged by the project engineer or architect for determining such cost savings shall be paid as a separate cost and shall not be calculated as part of any cost savings. Such provisions, including the percentage of cost sharing, shall be included in the language of the contract or may be added by change order with the agreement of both parties.

Sec. 2-553.4 Alternative method of procurement; reverse auctioning.

(a) 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.

(b) As used in this section, the term ‘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 electronic bidding.

Sec. 2-554. General procedure.

(a) The purpose of this article is to enunciate the public policies pertaining to governmental procurement from nongovernmental sources, to include governmental procurement which may or may not result in monetary consideration for either party. This article shall apply whether the consideration is monetary or non-monetary and regardless of whether the city, the contractor, or some third party is providing the consideration.

(b) All single or term contracts for goods and services other than professional services when the estimated cost is expected to exceed one hundred thousand dollars (\$100,000.00) shall be purchased from the lowest responsive, responsible bidder, after due notice inviting bids.

Sec. 2-554.1. Open market procedure for purchases and sales of one hundred thousand dollars, or less.

(a) All purchases of goods and services other than professional services, when the estimated value is one hundred thousand dollars (\$100,000.00) or less, may be made in the open market, without newspaper advertisement and without observing the procedures prescribed by Divisions 2 and 3 of this article, unless the director of purchasing determines that the public interest demands such procedure. Purchases under this subsection that are expected to exceed two thousand five hundred dollars (\$2,500.00) shall require, whenever possible, the informal solicitation of a minimum of four bidders or offerors and shall be awarded to the lowest responsive, responsible bidder in accordance with the standards set forth in section 2-563.

(b) Small purchase items in an amount not exceeding two thousand five hundred dollars (\$2,500.00) may be purchased directly by a department in accordance with rules and regulations established by the director of purchasing; these purchases need not follow the competitive bidding process. Maximum limits may be established for each department by the director of purchasing up to, but not exceeding, two thousand five hundred dollars (\$2,500.00)

(c) In making a purchase or sale under this section, when bidding is required, the director of purchasing shall solicit bids, by mail, electronic means, telephone, or in person from prospective vendors or purchasers.

Sec. 2-554.2. Competitive bidding on state-aid projects.

No contract for the construction of any building or for an addition to or improvement of an existing building by the city for which state funds of not more than fifty thousand dollars (\$50,000.00) in the aggregate or for the sum of all phases of a contract or project either by appropriation, grant-in-aid or loan, are used or are to be used for all or part of the cost of construction shall be let except after competitive sealed bidding or after competitive negotiation as provided under Section 2-553.3. The procedure for the advertising for bids and for letting of the contract shall conform to this article.

Sec. 2-554.3. Contracts or purchases not to be subdivided to avoid requirements of article.

No contract or purchase shall be subdivided to avoid the requirements of this article.

Sec. 2-554.4. Certain contracts and expenditures prohibited.

No officer, department or agency shall, during any budget year, expend or contract to expend any money or incur any liability, or enter into any contract which by its terms involves the expenditure of money, for any purpose, in excess of the amounts appropriated for that general classification of expenditure pursuant to the City Charter. Any contract, verbal or written, made in violation of the Charter shall be null and void. Any officer or employee of this city who shall violate this section shall be guilty of a misdemeanor and, upon conviction, thereof, shall cease to hold his office or employment. Nothing contained in this section, however, shall prevent the making of contracts or the spending of money for capital improvements to be financed in whole or in part by the issuance of bonds, nor the making of contracts of lease or for services for a period exceeding the budget year in which such contract is made, when such contract is permitted by law.

Sec. 2-555. Emergency purchases.

(a) In case of an emergency which requires immediate purchase of supplies or contractual services, the director of purchasing shall have the authority to secure, by the open market procedure set forth in section 2- 554.1, at the lowest obtainable price, any supplies or contractual services, regardless of the amount of the expenditure. A full report of the circumstances of an emergency purchase so made shall be filed by the director of purchasing with the city manager.

(b) The director of purchasing shall prescribe, by rules and regulations, the procedure under which emergency purchases by heads of departments may be made outside of normal city business hours.

Sec. 2-555.1. Modification of contract.

No contract which has been approved by the city council may be modified or changed by amendment, change order, or any other agreement without the prior approval of the city council unless (i) such modifications, in the aggregate, do not increase the amount of the contract by more

than twenty-five (25) percent of the original amount of the contract or fifty thousand dollars (\$50,000.00), whichever is greater, (ii) such changes are the result of unforeseen circumstances or changed conditions encountered during the progress of the performance of the contract, and (iii) such changes are directly related to the performance of the purpose of the contract. Extensions of time to perform a contract may be granted without prior approval of the city council provided such extensions involve no increase in cost to the city. In no event shall the aggregate of all modifications increase the cost of the contract beyond the amount appropriated for the project.

Sec. 2-556. Inspection and testing of supplies or contractual services.

(a) The director of purchasing shall inspect or supervise the inspection of all deliveries of supplies or contractual services to determine their conformance with the specifications set forth in the order or contract.

(b) The director of purchasing shall have the authority to authorize departments having the staff and facilities for adequate inspection to inspect all deliveries made to such departments under rules and regulations which the director of purchasing shall prescribe.

(c) The director of purchasing shall have the authority to require chemical and physical tests of samples, submitted with bids and samples of deliveries, which are necessary to determine the quality and conformance of such samples with the specifications. In the performance of such tests, the director of purchasing shall have the authority to make use of laboratory facilities of any department of the city government or any outside laboratory.

Sec. 2-557. Discrimination prohibited.

(a) In the solicitation or awarding of contracts, the city shall not discriminate because of race, religion, color, sex or national origin, age, disability, status as a service disabled veteran, or any other basis prohibited by state law relating to discrimination in employment.

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

Sec. 2-557.1. Required contract provisions: unauthorized aliens; employment discrimination by contractor prohibited; drug-free workplace to be maintained by contractor.

- a) The city shall include in every contract, that the contractor does not, and shall not during the performance of the contract for goods and services in the Commonwealth, knowingly employ an unauthorized alien as defined in the federal Immigration Reform and Control Act of 1986, as amended.
- b) The city shall include in every contract of over ten thousand dollars (\$10,000.00) the provisions in (1) and (2) herein:

(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 or national origin, except where religion, sex or national origin 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 ten thousand dollars (\$10,000.00) so that the provisions will be binding upon each subcontractor or vendor.

(3) 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 violation of 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 ten thousand dollars (\$10,000.00), so that the provisions will be binding upon each subcontractor or vendor.

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

Sec. 2-557.2. Public inspection of certain records.

(a) Except as provided herein, all proceedings, records, contracts and other public records relating to procurement transaction 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 (' 1-340 et seq.).

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

(c) Any competitive sealed bidding bidder, upon request, shall be afforded the opportunity to inspect bid records within a reasonable time after the opening of all bids but prior to award, except in the event that the director of purchasing decides not to accept any of the bids and to reopen the contract. Otherwise, bids 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 director of purchasing 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 section 2-560 shall not be subject to public disclosure under the Virginia Freedom of Information Act; however, the bidder, offeror or contractor must invoke the protections of this section 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. Information leading to the decision to award, including prices and other factors, shall be made public.

Sec. 2-557.3. Exemptions.

(a) The provisions of this article, except for sections 2-554.4, 2- 555.1, 2-557 and 2-557.1, and Division 6, shall not be applicable to purchases of services for maintenance and cleaning of health care facilities, it being the conclusion of the council that considerations of health, safety and welfare warrant such action.

(b) The provisions of Divisions 1, 2, 3, 4 and 5 of this article, except for section 2-554.4, shall not apply to contracts for the printing of ballots, statements of results or other materials essential to the conduct of an election. The provisions of Division 6 of this article shall be applicable

to such contracts.

(c) The following transactions are hereby exempt from the provisions of Divisions 1, 2, 3, 4 and 5 of this article, except for section 2-554.4:

(1) Purchases on state contracts, from the state penitentiary and from the state purchasing department warehouse.

(2) Legal services, law books and supplies for the city attorney and the commonwealth's attorney, and expert witnesses and other services associated with actual or potential litigation and administrative proceedings.

(3) Purchases for water, sewer, electric, telephone and other utility services and motor vehicle license plates.

(4) Purchases for special police work when the chief of police certifies to the city manager that items are needed for undercover police operations.

(5) Purchases of services or goods (i) which are performed or produced by persons, or in schools or workshops, under the supervision of the Virginia Department for the Visually Handicapped or (ii) which are performed or produced by nonprofit sheltered workshops or other nonprofit organizations which offer transitional or supported employment services serving the handicapped.

(d) The selection of services by the board of trustees of the Newport News employees retirement fund, related to the management, purchase or sale of authorized investments, including but not limited to actuarial services shall be by the standards set forth in section 51-111.24:2, Code of Virginia, 1950, as amended, and shall not be subject to the provisions of this article.

(e) In the administration of the public assistance program and the fuel assistance program, goods and personal services may be procured for direct use by the recipients of such programs without competitive sealed bidding or competitive negotiations if the procurement is made for an individual recipient. Contracts for the bulk procurement of goods or services for the use of recipients are not exempted from the requirements of this article.

(f) The city may enter into contracts without competitive sealed bidding or competitive negotiation for insurance if purchased through an association of which it is a member if the association was formed and is maintained for the purpose of promoting the interest and welfare of and developing close relationships with similar public bodies, provided such association has procured the insurance by use of competitive principles and provided that the director of purchasing 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.

Sec. 2-558. Purchase of handguns by retired officers.

The director of purchasing may allow any fulltime sworn law enforcement officer who retires after at least twenty-five (25) years of service and any auxiliary police officer who has served the city as an auxiliary police officer for at least twenty-five (25) years to purchase the service handgun issued to him by the city at a cost of one dollar (\$1.00) for the weapon.

Sec. 2-559. Reserved.

DIVISION 2. COMPETITIVE BIDDING

Sec. 2-560. 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 shall be pursuant to a prequalification process for construction projects adopted by the director of purchasing.

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. Such 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 provision of Section 2-557.2.

In all instances in which the director of purchasing 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 section to be accomplished.

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

A decision by the director of purchasing denying prequalification under the provisions of this subsection shall be final and conclusive unless the contractor appeals the decision as provided in ' 2-576.

The director of purchasing may deny prequalification to any contractor only if he finds one of the following:

- (1) The contractor does not have sufficient financial ability to perform the contract that would result from such procurement. If a bond is required to ensure performance of a contract, evidence that the contractor can acquire a surety bond from a corporation included

on the United States Treasury list of acceptable surety corporations in the amount and type required by the public body shall be sufficient to establish the financial ability of such contractor to perform the contract resulting from such procurement;

(2) The contractor does not have appropriate experience to perform the contraction project in question;

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

(4) The contractor has been in substantial noncompliance with the terms and conditions of prior construction contracts with the city without good cause. If the city has not contracted with a contractor in any prior construction contracts, the director of purchasing 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 director of purchasing 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 with the past ten years of a crime related to governmental or nongovernmental construction or contracting, including, but not limited to, a violation of the following portions of the Code of Virginia, 1950, as amended: (i) Article 4 (' 11-72 et seq.) of Title 11, (ii) the Virginia Governmental Frauds Act (' 18.2-498.1 et seq.) of Title 18.2, (iii) Chapter 4.2 (' 59.1-68.6 et seq.) of Title 59.1, or (iv) any substantially similar law of the United States or another state;

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

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

Sec. 2-560.1. Use of brand names.

Unless otherwise provided in the invitation to bid, the name of a certain brand, make or manufacturer does not restrict bidders to the specific brand, make or manufacturer named; it conveys the general style, type, character and quality of the article desired; and any article which the director of purchasing in his 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.

Sec. 2-561. Notice inviting bids.

(a) The notice inviting bids referred to in section 2-554 shall be posted on a public bulletin board at the department of purchasing, or published in a newspaper of general circulation, or both, and may be posted on a website normally used for such postings, at least ten (10) days prior to the date set for the receipt of bids. Such notice shall include a general description of the articles to be purchased or sold and shall state where bid forms and specifications may be secured and the time and place for opening bids. Such notice shall state the procedure for the withdrawal of a bid due to error.

(b) In addition to the notice referred to in subsection (a) above, the director of purchasing may solicit bids by mail from vendors in the business of providing the commodity or service desired.

Sec. 2-561.1. Pre-bid conferences.

For complex equipment, supplies, repairs or construction projects, pre-bid conferences with prospective bidders may be called, when deemed necessary by the director of purchasing.

Sec. 2-561.2. Submission, opening and tabulation of bids.

Bids shall be submitted, sealed, to the director of purchasing and shall be identified as bids on the envelope. Such bids shall be opened in public at the time and place stated in the public notices, and a tabulation of all bids received shall be available for public inspection.

Sec. 2-561.3. Bid evaluation.

Evaluation of bids shall be based upon the requirements set forth in the invitation, which may include special qualifications of potential contractors and any other criteria such as inspection, testing, quality, workmanship, delivery and suitability for a particular purpose, which are helpful in determining acceptability. The city may consider best value concepts when procuring goods and nonprofessional services, but not construction or professional services. The criteria, factors and basis for consideration of best value and the process for the consideration of best value shall as stated in the procurement solicitation.

Sec. 2-561.4. 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 therein, 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 the bid, which unintentional arithmetic

error or unintentional omission can be clearly shown by objective evidence drawn from inspection of original work papers, documents and materials used in the preparation of the bid sought to be withdrawn. The bidder shall give notice in writing of his claim of right to withdraw his bid within two (2) business days after the conclusion of the bid opening procedure and shall submit original work papers with such notice. Such mistake shall be proved only from the original work papers, documents and materials delivered as required herein. The work papers, documents, and materials submitted by the bidder shall, at the bidder's request, be considered trade secrets or proprietary information subject to the conditions of section 2-557.2(f).

(b) A bidder for a non-construction contract may withdraw his bid from consideration in accordance with the procedures set forth in subsection (a) above.

(c) No bid may be withdrawn under this section when the result would be the awarding of the contract on another bid of the same bidder or of another bidder in which the ownership of the withdrawing bidder is more than five (5) percent.

(d) If a bid is withdrawn under the authority of 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 which the contract is awarded or otherwise benefit, directly or indirectly, from the performance of the project for which the withdrawn bid was submitted.

(f) The director of purchasing shall notify the bidder in writing within five (5) business days of his decision regarding the bidder's request to withdraw its bid. If the director denies the withdrawal of a bid under the provisions of this section, he shall state in such notice the reasons for his decision and award the contract to such bidder at the bid price, provided such bidder is a responsible and responsive bidder. At the same time that the notice is provided, the director shall return all work papers and copies thereof that have been submitted by the bidder.

Sec. 2-562. Bid bonds.

(a) Except in cases of emergency, all bids or proposals for non-transportation-related construction contracts in excess of five hundred thousand dollars (\$500,000.00) or transportation-related projects authorized under Code of Virginia, section 33.1-12 that are in excess of two hundred fifty thousand dollars (\$250,000.00) and partially or wholly funded by the Commonwealth shall be accompanied by a bid bond from a surety company selected by the bidder which is legally authorized to do surety business in Virginia, as a guarantee that if the contract is awarded to such bidder, that bidder will enter into the contract for the work mentioned in the bid. The amount of the bid bond shall not exceed five (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 director of purchasing from requiring bid bonds for construction contracts anticipated to be less than five hundred thousand dollars (\$500,000.00) for non-transportation-related projects or two hundred fifty thousand dollars (\$250,000.00) for transportation-related projects authorized under Code of Virginia, section 33.1-12 and partially or wholly funded by the Commonwealth.

Sec. 2-562.1. Bonds for other than construction contracts.

(a) At the discretion of the director of purchasing, bidders may be required to submit with their bid a bid bond, or a certified check, in an amount to be determined by the director of purchasing and specified in the invitation to bid, which shall be forfeited to the city as liquidated damages upon the bidder's failure to execute within ten (10) days a non-construction contract awarded to him or upon the bidder's failure to furnish any required performance or payment bonds in connection with a contract awarded to him as specified in the request for bids.

(b) The director of purchasing may require successful bidders to furnish a performance bond and a payment bond at the expense of the successful bidder, in amounts to be determined by the director of purchasing and specified in the invitation to bid, to ensure the satisfactory completion of the work for which a contract or purchase order is awarded.

Sec. 2-563. Award of contract to lowest, responsive, responsible bidder.

The director of purchasing shall award contracts governed by this division to the lowest responsive, responsible bidder. In determining the lowest responsive, responsible bidder, in addition to price, the agent shall consider:

- (1) The ability, capacity and skill of the bidder to perform the contract or provide the service required.
- (2) Whether the bidder can perform the contract or provide the service promptly or within the time specified, without delay or interference.
- (3) The character, integrity, reputation, judgment, experience and efficiency of the bidder.
- (4) The quality of performance of previous contracts or service.
- (5) The previous and existing compliance by the bidder with laws and ordinances relating to the contract or service.
- (6) The sufficiency of the financial resources and ability of the bidder to perform the contract or provide the service.
- (7) The quality, availability and adaptability of the supplies or contractual services to the

particular use required.

(8) The ability of the bidder to provide future maintenance and service for the use of the subject of the contract.

(9) The number and scope of conditions attached to the bid.

Sec. 2-563.1. Award of contract to other than low bidder.

When the award of a contract under this division is not given to the lowest bidder, a full and complete statement of the reasons therefore shall be prepared by the director of purchasing and filed with the other papers relating to the transaction.

Sec. 2-563.2. 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 director of purchasing may negotiate with the apparent low bidder to obtain a contract price within available funds.

Sec. 2-563.3. Reserved

Sec. 2-563.4. Bid deposits.

When deemed necessary by the director of purchasing, bid deposits shall be prescribed in the public notices inviting bids. Unsuccessful bidders shall be entitled to return of the surety where the director of purchasing has required such. A successful bidder shall forfeit any surety required by the director of purchasing upon failure on his part to enter into a contract and provide all required documents within ten (10) days after the award or as otherwise provided by the director of purchasing.

Sec. 2-564. Cancellation, rejection of bids; waiver of informalities.

(a) An invitation to bid, a request for proposal, any other solicitation, and any and all bids or proposals, and parts thereof, may be cancelled or rejected. The reasons for cancellation or rejection shall be made part of the contract file.

(b) The director of purchasing may waive informalities in bids.

Sec. 2-564.1. Tie bids.

In the case of a tie bid, after taking into consideration cash discounts for early payment, if any, preference shall be given to goods, services and construction produced in Newport News or provided by Newport News persons, if such a choice is available; otherwise to a Virginia person, if such

choice is available; if no such choices are available, then the tie shall be decided by lot.

Sec. 2-565. Performance and payment bonds.

(a) Upon the award of any public construction contract exceeding one hundred thousand dollars (\$100,000.00) awarded to any prime contractor, or (ii) construction contract exceeding one hundred thousand dollars (\$100,000.00) 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 city, such contractor shall furnish to the city the following bonds:

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

(2) A payment bond in the sum of the contract amount. Such 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 the prosecution of the work provided for in such contract, and shall be conditioned upon the prompt payment for all such material furnished or labor supplied or performed in the prosecution 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 such bonds shall be executed by one or more surety companies selected by the contractor which are legally authorized to do surety business in Virginia.

(c) Such bonds shall be payable to the City of Newport News.

(d) Each of the bonds shall be filed with the City of Newport News, or a designated officer or official thereof.

(e) Nothing in this section shall preclude the director of purchasing from requiring payment or performance bonds for construction contracts for one hundred thousand dollars (\$100,000.00) or less.

(f) Nothing in this section shall preclude such 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 which are directly with the subcontractor for performing labor and furnishing materials in the prosecution of the work provided for in the subcontract.

Sec. 2-565.1. Action on performance bond.

No action against the surety on a performance bond shall be brought unless 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, if the action be for such.

Sec. 2-565.2. Actions on payment bonds.

(a) Any claimant who has direct contractual relationship with the contractor and who has performed labor or furnished material in accordance with the contract documents in the prosecution of the work provided in any contract for which a payment bond has been given, and who has not been paid in full therefore before the expiration of ninety (90) days from the day on which such claimant performed the last of such labor or furnished the last of such materials for which he claims payment, may bring an action on such payment bond to recover any amount due him for such labor or material, and may prosecute such action to final judgment and have execution on the judgment. The Obligee named in the bond need not be named a party to such action.

(b) Any claimant who has a direct contractual relationship with any subcontractor from whom the contractor has not required a subcontractor payment bond under section 2-565(f) but who has no contractual relationship, express or implied, with such contractor, may bring an action on the contractor's payment bond only if he has given written notice to such contractor within ninety (90) days from the day on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment, stating with substantial accuracy the amount claimed and the name of the person for whom the work was performed or to whom the material was furnished. Any claimant who has a direct contractual relationship with a subcontractor from whom the contractor has required a subcontractor payment bond under section 2-565(f) but who has no contractual relationship, express or implied, with such contractor, may bring an action on the subcontractor's payment bond. 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 must be brought within one year after the day on which the person bringing such action last performed labor or last furnished or supplied materials.

Sec. 2-565.3. 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 city attorney, a bidder may furnish a bank or savings and loan association's irrevocable letter of credit on certain designated funds in the face amount required for

the bid bond. Approval shall be granted only upon a determination that the alternative form of security proffered affords protection to the city at least equivalent to a corporate surety's bond.

Sec. 2-565.4. Construction contract provisions barring damages for unreasonable delays declared void.

(a) Any provision contained in any public contract for constructions entered into on or after July 1, 1991, 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 such delay is caused by acts or omissions of the city, its agents or employees and due to causes within their control is against public policy and is void and unenforceable.

(b) Subsection (a) shall not be construed to render void any provision of a public contract for construction that:

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

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

(d) If the city 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 contract for construction, 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 city shall be equal to the percentage of the contractor's total delay claim for which the city's denial is determined through litigation or arbitration to have been made in bad faith.

Sec. 2-566. Retainage on construction contracts.

(a) In any public contract for construction which provides for progress payments in installments based upon an estimated percentage of completion, the contractor shall be paid at least ninety-five (95) percent of the earned sum when payment is due, with not more than five (5) percent

being retained to assure faithful performance of the contract. All amounts withheld may be included in the final payment.

(b) Any subcontract for a public project which provides for similar progress payments shall be subject to the same limitations.

Sec. 2-566.1. Deposit of certain retained funds on certain contracts; penalty for failure to timely complete.

(a) Commencing January 1, 1990, the city, when contracting directly with contractors for public contracts of two hundred thousand dollars (\$ 200,000.00), or more, for construction of highways, roads, streets, bridges, parking lots, demolition, clearing, grading, excavating, paving, pile driving, miscellaneous drainage structures, and the installation of water, gas, sewer lines and pumping stations where portions of the contract price are to be retained, shall include in the bid proposal an option for the contractor to use an escrow account procedure for utilization of the city's retainage funds by so indicating in the space provided in the proposal documents. In the event the contractor elects to use the escrow account procedure, the "escrow agreement" form included in the bid proposal and contract shall be executed and submitted to the city within fifteen (15) calendar days after notification. If the "escrow agreement" form is not submitted within the fifteen-day period, the contractor shall forfeit his rights to the use of the escrow account procedure.

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

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

(d) Any such public contract for construction with the city, which includes payment of interest on retained funds, may require a provision whereby the contractor, exclusive of reasonable circumstances beyond the control of the contractor stated in the contract, shall pay a specified penalty for each day exceeding the completion date stated in the contract.

(e) Any subcontract for such public project which provides for similar progress payments shall be subject to the provisions of this section.

Sec. 2-566.2. Multi-term contracts.

(a) Unless otherwise provided by law, a contract for goods, services or insurance may be entered into for any period of time deemed to be in the best interest of the city provided the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefore.

(b) When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be cancelled.

Secs. 2-567, 2-568. Reserved.

DIVISION 3. COMPETITIVE NEGOTIATION

Sec. 2-569. Competitive negotiation generally.

Competitive negotiation is a method of source selection which involves individual discussions between the city and the offeror on the basis of responses to the city's request for proposals. The source selection methods of competitive negotiation incorporates sections 2-557.2, 2-560, 2-560.1 and 2-561.1, 2-564 and 2-566.1, in addition to the provisions of this division.

Sec. 2-569.1. Request for proposals.

A request for proposals shall be in writing and indicate in general terms that which is sought to be procured, specifying the factors which 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 which will be required of the contractor.

Sec. 2-569.2. Public notice.

At least ten (10) days prior to the date set for receipt of proposals, public notice shall be given by posting on a public bulletin board at the department of purchasing, and 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. In addition, proposals may be solicited directly from potential contractors.

Sec. 2-569.3. Receipt of proposals.

No proposals shall be handled so as to permit disclosure of the identity of any offeror or the contents of any proposal during the process of negotiation.

Sec. 2-569.4. Evaluation factors.

The request for proposals shall state the relative importance of price and other evaluation factors.

Sec. 2-569.5. Discussion with responsible offerors and revision of proposals.

As provided in the request for proposals, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and conformance to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there

shall be no disclosure of the identity of competing offerors or of any information derived from proposals submitted by competing offerors.

Sec. 2-570. Award.

Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the city taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made. When the terms and conditions for multiple awards are provided in the request for proposal, awards may be made to more than one (1) offeror.

Sec. 2-570.1. Contracting for professional services.

(a) *Competitive negotiation procedure.* The director of purchasing shall engage in individual discussions with all 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. Such 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 cost for services. These discussions may encompass nonbinding estimates of total project costs, including where appropriate, design, construction and life cycle costs. Methods to be utilized in arriving at price for services may also be discussed. Proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of discussions, outlined herein, on the basis of evaluation factors published in the request for proposals and all information developed in the selection process to this point, the director of purchasing shall select in the order of preference two (2) or more offerors whose professional qualifications and proposed services are deemed most meritorious. Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the city can be negotiated at a price considered fair and reasonable, 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 director of purchasing determine in writing and in his 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. Once formally terminated, negotiations may not be reopened with any offeror.

(b) *Multiphase contracts.* Multiphase professional services contracts satisfactory and advantageous to the city for environmental, location, design and inspection work regarding highways and bridges may be negotiated and awarded based on 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 city 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 the city require awarding the contract.

(c) *Contracting for multiple projects.* A contract for architectural or professional engineering services relating to construction projects may be negotiated by the city, for multiple projects provided (i) the projects require similar experience and expertise, (ii) the nature of the projects is clearly identified in the request for proposals, and (iii) the contract term is limited to one (1) year or when the cumulative total project fees reach the maximum cost authorized in this paragraph, whichever occurs first. Such a contract may be renewable for four (4) additional one-year terms at the option of the city. 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 (1) contract term shall not exceed five million dollars (\$5,000,000.00); and (c) the project fee of any single project shall not exceed one million dollars (\$1,000,000.00). Any unused amounts from the first contract term shall not be carried forward to the additional term. Competitive negotiations for such contracts may result in awards to more than one (1) offeror provided (1) the request for proposals so states and (2) the city has established procedures for distributing multiple projects among the selected contractors during the contract term.

Sec. 2-570.2. Contracting for other than professional services.

Selection shall be made of two (2) 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 director of purchasing shall select the offeror which, in his opinion, has made the best proposal, and shall award the contract to that offeror. Should the director of purchasing determine in writing and in his sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified than the others under consideration, a contract may be negotiated and awarded to that offeror.

Secs. 2-571, 2-572. Reserved.

DIVISION 4. DEBARMENT

Sec. 2-573. Authority to debar or suspend.

After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the director of purchasing is authorized to debar a person for cause from consideration for award of contracts. The debarment shall not be for a period of more than three (3) years. The director of purchasing is authorized to suspend a person from consideration for award of contracts if there is probable cause to believe that the person has engaged in any activity which might lead to debarment. The suspension shall not be for a period of more than three (3) months. The causes for debarment include:

(1) Conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;

(2) Conviction under state or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously and directly affects responsibility as a city contractor;

(3) Conviction under state or federal antitrust statutes arising out of the submission of bids or proposals;

(4) Violation of contract provisions, as set forth below, of a character which is regarded by the director of purchasing to be so serious as to justify debarment action:

(a) Deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or

(b) A recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided, that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment; or

(5) Any other cause the director of purchasing determines to be so serious and compelling as to affect responsibility as a city contractor, including debarment by another governmental entity for any cause mentioned in this section, or for violation of the ethical standards set forth in Division 6 of this article.

Sec. 2-573.1. Decision to debar or suspend.

If the director of purchasing shall debar or suspend a person, the director of purchasing shall issue a written decision to debar or suspend. The decision shall state the reasons for the action taken and inform the debarred or suspended person involved of his rights concerning judicial or administrative review.

Sec. 2-573.2. Notice of decision.

A copy of the decision required by section 2-573.1 of this division shall be mailed or otherwise furnished immediately to the debarred or suspended person.

Sec. 2-573.3. Finality of decision.

A decision under section 2-573.1 of this division shall be final and conclusive, unless the debarred or suspended person within ten (10) days after receipt of the decision takes an appeal to the director of purchasing pursuant to section 2-577.2.

Secs. 2-574, 2-575. Reserved.

DIVISION 5. APPEALS AND REMEDIES FOR BID PROTESTS

Sec. 2-576. Ineligibility of bidder, offeror or contractor.

(a) Any bidder, offeror or contractor, other than one who has been debarred pursuant to Division 4 of this article, refused permission to, or disqualified from participating in public contracts shall be notified in writing. Such notice shall state the reasons for the action taken. This decision shall be final unless the bidder, offeror or contractor appeals within thirty (30) days of receipt thereof by invoking the administrative appeal procedure established by the director of purchasing, if any, or in the alternative by instituting legal action as provided in section 2-577.1 of this division.

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

Sec. 2-576.1. Appeal of denial or withdrawal of bid.

(a) A decision denying withdrawal of bid under the provisions of section 2-561.4 shall be final and conclusive unless the bidder appeals the decision within ten (10) days after receipt of the decision by invoking the administrative procedures established by the director of purchasing, if any, or in the alternative by instituting legal action as provided in section 2-577.1 of this division.

(b) If no bid bond was posted, a bidder refused withdrawal of a bid under the provisions of section 2-561.4 prior to appealing shall deliver to the director of purchasing a certified check or cash bond in the amount of the difference between the bid sought to be withdrawn and the next lowest 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 arbitrary or capricious, the sole relief shall be withdrawal of the bid.

Sec. 2-576.2. Determination of nonresponsibility.

(a) Following public opening and announcement of bids received on an invitation to bid, the director of purchasing shall evaluate the bids. At the same time the director of purchasing shall determine whether the apparent low bidder is responsible. If the director of purchasing so determines, then he may proceed with an award in accordance with the provisions of section 2-563. If the director of purchasing determines that the apparent low bidder is not responsible, he shall proceed as follows:

(1) Prior to the issuance of a written determination of nonresponsibility, the director of purchasing 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 which relate to the determination, if so requested by the bidder within five (5) business days after receipt of the notice.

(2) Within ten (10) business days after receipt of the notice, the bidder may submit rebuttal information challenging the evaluation. The director of purchasing shall issue his written determination of responsibility based on all information in his possession, including any rebuttal information, within five (5) business days of the date he received such rebuttal information. At the same time, the director of purchasing shall notify the bidder in writing of his determination.

(3) Such notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision with ten (10) days by invoking the administrative procedures as provided in section 2-577.2, or in the alternative by instituting legal action as provided in section 2-577.1.

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

(b) If, upon appeal pursuant to section 2-577.1 or section 2-577.2, it is determined that the decision of the director of purchasing was arbitrary or capricious, and the award of the contract in question has not been made, the sole relief shall be a finding that bidder is a responsible bidder for the contract in question. If it is determined the decision of the director of purchasing was arbitrary or capricious, the relief shall be as set forth in section 2-576.3

(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 section 2-576.3.

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

Sec. 2-576.3. Protest of award or decision to award.

(a) Any bidder or offeror may protest the award or decision to award a contract by submitting such protest in writing to the director of purchasing no later than ten (10) days after the award or the announcement of the decision to award, whichever occurs first. 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 director of purchasing shall issue a decision in writing within ten (10) days stating the reasons for the action taken. This decision shall be final unless the bidder or offeror appeals within ten (10) days of the written decision by invoking the administrative procedures established by the director of purchasing, if any, or in the alternative by

instituting legal action as provided in section 2-577.1 of this division.

(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 awarding authority (city council or director of purchasing) 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 by the court. Where the award has been made and performance has begun, the awarding authority (city council or director of purchasing) 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. A decision to award shall be deemed to be arbitrary and capricious if it is not in accordance with the Constitution of Virginia, applicable law or regulation, or the terms and conditions of the invitation to bid or request for proposal. Nothing in this subsection shall be construed to permit a bidder to challenge the validity of the terms and conditions of the invitation to bid or request for proposal.

(c) Where the awarding authority (city council or director of purchasing) determines, after a hearing held by it, or its designee, 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 ethics in public contracting as set forth in division 6 of this article, the city council or the director of purchasing , as the case may be, shall not award the contract to the offending bidder.

Sec. 2-576.4. Effect of appeal upon contract.

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

Sec. 2-576.5. 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, no further action to award the contract shall be taken unless there is a written determination by the director of purchasing that proceeding without delay is necessary to protect the public interest or unless the bid or offer would expire.

Sec. 2-577. Contractual disputes.

(a) Contractual claims, whether for money or other relief, shall be submitted in writing no later than sixty (60) days after final payment; however, written notice of the contractor's intention to file such claim shall have been 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) A procedure for consideration of contractual claims may be included in each contract. Such procedure, which may be incorporated into the contract by reference, shall establish a time limit for a final decision in writing by the director of purchasing.

(c) A contractor may not invoke the administrative procedures established by the director of purchasing, if any, or institute legal action as provided in section 2-577.1 of this division, prior to receipt of the decision on the claim, unless the director of purchasing fails to render such decision within the time specified in the contract.

(d) The decision of the director of purchasing shall be final and conclusive unless the contractor appeals within six (6) months of the date of the final decision on the claim by the director of purchasing by invoking the administrative procedures established by the director of purchasing, if any, or in the alternative by instituting legal action as provided in section 2- 577.1 of this division.

Sec. 2-577.1. 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 circuit court for the City of Newport News challenging that decision, which shall be reversed only if the petitioner establishes that the decision was arbitrary or capricious, or, in the case of denial of prequalification, that the decision to deny prequalification was not based upon the criteria for denial of prequalification as set forth in subsection 2-560(b).

(b) A bidder denied withdrawal of a bid under section 2-576.1 of this Code may bring an action in the circuit court for the City of Newport News challenging that decision, which shall be reversed only if the bidder establishes that the decision was clearly erroneous.

(c) A bidder, offeror or contractor may bring an action in the circuit court for the City of Newport News 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 an honest exercise of discretion, but rather is arbitrary or capricious or not in accordance with the Constitution of Virginia, statutes, regulations or the terms and conditions of the invitation to bid or request for proposal. In the event the apparent low bidder having been previously determined by the director of purchasing to be not responsible, is found by the court to be responsible, the court may direct the award of the contract to such bidder in accordance with the requirements of this section and the invitation to bid or request for proposal. The provisions of subsection 2-576.3 (b) shall apply to any such award.

(d) If injunctive relief is granted, the court, upon request of the city, shall require the posting of reasonable security to protect the city.

(e) A contractor shall bring an action involving a contract dispute with the city in the circuit

court for the City of Newport News.

(f) A bidder, offeror or contractor need not utilize administrative procedures meeting the standards of section 2-577.2 of this Code, 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 city agrees otherwise.

(g) Nothing herein shall be construed to prevent the city from instituting legal action against a contractor.

Sec. 2-577.2. Administrative appeals procedure.

(a) The director of purchasing shall establish an administrative procedure for hearing protests of a decision to award or an award, appeals from refusals to allow withdrawal of bids, appeals from disqualifications and determinations of nonresponsibility, and appeals from decisions on disputes arising during the performance of a contract, or any of these. Such administrative procedure shall provide for a hearing before a disinterested person or panel, the opportunity to present pertinent information and the issuance of a written decision containing findings of fact. The disinterested person shall not be an employee of the city and no member of the panel shall be an employee of the city. The findings of fact shall be final and conclusive and shall not be set aside unless the same are fraudulent or arbitrary or capricious, or so grossly erroneous as to imply bad faith, or in the case of denial of prequalification, such findings were not based upon the criteria for denial of prequalification as set forth in subsection 2-560(b). No determination on an issue of law shall be final if appropriate legal action is instituted in a timely manner.

(b) Any party to the administrative procedure, including the city, shall be entitled to institute judicial review if such action is brought within thirty (30) days of receipt of the written decision.

Secs. 2-578, 2-579. Reserved.

DIVISION 6. ETHICS IN PUBLIC CONTRACTING

Sec. 2-580. Purpose.

The provisions of this division supplement, but do not supersede, other provisions of law, including, but not limited to, the State and Local Government Conflict of Interests Act (section 2.1-639.1 et seq.), the Virginia Governmental Frauds Act (section 18.2-498.1 et seq.), and Articles 2 and 3 of Chapter 10 of Title 18.2 of the Code of Virginia, 1950, as amended. The provisions of this division apply notwithstanding the fact that the conduct described may not constitute a violation of the State and Local Government conflict of Interests Act.

Sec. 2-581. Definitions.

For the purposes of this division, the following words and phrases shall have the meanings respectively ascribed to them by this section, unless a different meaning clearly appears from the context:

(1) *City employee* shall mean any person employed by the city, including elected officials or appointed members of governing bodies.

(2) *Immediate family* shall mean a spouse, children, parents, brothers and sisters, and any other person living in the same household as the employee.

(3) *Official responsibility* shall mean administrative or operating authority, whether intermediate or final, to initiate, approve, disapprove or otherwise affect a procurement transaction, or any claim resulting therefrom.

(4) *Pecuniary interest arising from the procurement* shall mean a personal interest in a contract as defined in the State and Local Government Conflict of Interests Act (section 2.1-639.1 et seq.).

(5) *Procurement transaction* shall mean all functions that pertain to the obtaining of any goods, services or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

Sec. 2-582. Proscribed participation by public employees in procurement transaction.

Except as may be specifically allowed by provisions of the State and Local Government Conflict of Interests Act, no city employee having official responsibility for a procurement transaction shall participate in that transaction on behalf of the city when the employee knows that:

(1) The employee is contemporaneously employed by a bidder, offeror or contractor

involved in the procurement transaction; or

(2) The employee, the employee's partner, or any member of the employee's immediate family holds a position with a bidder, offeror or contractor such as an officer, director, trustee, partner or the like, or is employed in a capacity involving personal and substantial participation in the procurement transaction, or owns or controls an interest of more than five (5) percent; or

(3) The employee, the employee's partner, or any member of the employee's immediate family has a pecuniary interest arising from the procurement transaction; or

(4) The employee, the employee's partner, or any member of the employee's immediate family is negotiating, or has an arrangement concerning, prospective employment with a bidder, offeror or contractor.

Sec. 2-582.1. Solicitation or acceptance of gifts.

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

Sec. 2-582.2. Disclosure of subsequent employment.

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

Sec. 2-582.3. Gifts by bidders, offerors, contractors or subcontractors.

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

Sec. 2-582.4. Kickbacks.

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

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

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

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

Sec. 2-582.5. Purchase of building materials, etc., from architect or engineer prohibited.

(a) No building materials, supplies or equipment for any building or structure constructed by or for the city shall be sold by or purchased from any person employed as an independent contractor by the public body to furnish architectural or engineering services, but not construction, for such building or structure or from any partnership, association or corporation in which such architect or engineer has a personal interest as defined in ' 2.2-3101, Code of Virginia, 1950, as amended.

(b) No building materials, supplies or equipment for any building or structure constructed by or for the city shall be sold by or purchased from any person which has provided or is currently providing design services specifying a sole source for such materials, supplies or equipment to be used in such building or structure to the independent contractor employed by the city to furnish architectural or engineering services in which such person has a personal interest as defined in ' 2.2-3101, Code of Virginia, 1950, as amended.

(c) The provision of subsections (a) and (b) shall not apply in cases of emergency.

2. That Section 2-563.3, Sale to highest responsive, responsible bidder, be, and the same hereby is, repealed.

Sec. 2-583. Penalty for violation.

Willful violation of any provision of this division shall constitute a Class I misdemeanor. Upon conviction, any city employee, in addition to any other fine or penalty provided by law, shall forfeit his employment.

Sec. 2-584. Participation in bid preparation; limitation on submitting bid for same procurement.

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

Sec. 2-585. Reserved.

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