Commonwealth of Virginia
Procurement Manual for Institutions of Higher Education and their Vendors

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The *Procurement Manual for Institutions of Higher Education and their Vendors* specifies those policies which govern the procurement processes at specifically designated publicly-funded colleges and universities who are eligible to be or are governed by *Subchapter 3 of the Restructured Higher Education Financial and Administrative Operations Act, § 23-38.88 et seq. of the Code of Virginia and Chapters 824 and 829, Acts of Assembly, 2008 and as re-codified by § 23.1 -1000 et seq. of the Code of Virginia and Chapters 588, Acts of Assembly, 2016.* These policies are structured to support the mission of higher education and to comply with the principles of the *Virginia Public Procurement Act* and are in compliance with the individually adopted, "*Rules Governing Procurement of Goods, Services, Insurance, and Construction by a Public Institution of Higher Education of the Commonwealth of Virginia"* (hereafter referred to as *'The Governing Rules', see Appendix A).*

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

The Governing Rules states that "competition be sought to the maximum feasible degree," and that "procurement procedures involve openness and administrative efficiency." It also states that "individual public bodies enjoy broad flexibility in fashioning details of such competition."

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

- Support the mission of Higher Education
- Maximize competition
- Comply with the *Code of Virginia as it relates to Higher Education*
- Comply with the "*Rules Governing Procurement of Goods, Services, Insurance and Construction"*
- Present a clear, concise policy document which is specific to the procurement departments of fully decentralized Institutions of Higher Education
- Provide the flexibility to Institutions to design their own small purchase procedures
- Provide information to vendors which seek to compete for the Institutions' business
- Streamline policies to facilitate public and private sector cooperation
- Demonstrate Higher Education's commitment to fair and ethical business practices

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

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

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

It is in the spirit of stewardship, a greater mission, and support of the leadership of the Commonwealth, that this Manual is maintained and utilized by these Institutions of Higher Education:

College of William and Mary
George Mason University
James Madison University
Longwood University
Old Dominion University
Radford University
University of Mary Washington
University of Virginia
Virginia Commonwealth University
Virginia Military Institute
Virginia Tech

The Manual was revised October 2016.

Key to Abbreviations

Institutions of Higher Education = Institutions
Procurement Manual for Institutions of Higher Education and Their Vendors = The Manual
Virginia Information Technology Agency = VITA
Rules Governing Procurement of Goods, Services, Insurance and Construction = The *Governing Rules*
Invitation for Bid; Invitation for Bids; Invitation to Bid = IFB
Request for Proposals = RFP
Electronic Virginia Procurement System = eVA
Department of General Services = DGS
Division of Purchases and Supply = DPS
Small, Women-owned, Minority-owned, or Disabled Veteran-owned Businesses = SWaM
Virginia Department of Small Business and Supplier Diversity = SBSD

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Section 1 - Authority and Responsibilities

A. Introduction

The designated Institutions of Higher Education are eligible to become or are currently governed through Management Agreements or Memorandum of Understanding authorized through the Restructured Higher Education Financial and Administrative Operations Act of 2004 and Chapters 824 and 829 of the Acts of Assembly, 2008 and as re-codified by § 23.1 -1000 et seq. of the Code of Virginia and Chapters 588, Acts of Assembly, 2016. These Institutions embrace the fundamental obligation to the general public to ensure that purchases are accomplished in accordance with the intent of the laws enacted by the Virginia General Assembly. The *Governing Rules* govern each Institution's procurement of goods, services and insurance and states that:

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

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

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

B. Authority and Responsibility

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

C. Federal Grants

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

D. Authority to Sign Purchase Orders and Contracts

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

E. Procurement Records

The procurement department awarding a contract or purchase order is responsible for maintaining all records relating to the procurement process. .

F. Surplus Property

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

Section 2 - Methods of Procurement

There are seven (7) typical methods of procurement for goods and nonprofessional services. Only competitive negotiation will be used in procuring professional services (see Appendix B for definition of professional services). This section outlines those methods and the requirements that shall be met by both the Institution and the vendor.

A. Selection of Procurement Method

Purchases not expected to exceed $50,000, shall be made in accordance with small purchase policies and procedures of each Institution.

If the purchase is over $50,000, Institutions shall utilize competitive sealed bidding or competitive negotiations. In certain circumstances, it may be in the best interest of the Institution to utilize sole source, emergency, public auction or reverse auctioning procurement methods as authorized by the *Governing Rules*.

B. Small Dollar Purchases

The *Governing Rules* allow Institutions of Higher Education to establish and implement its own small dollar policies and procedures for purchases not expected to exceed $50,000. The policies and procedures should

encourage competition to the maximum feasible degree, provide fair access for vendors to small dollar purchases, and maintain flexibility to minimize administrative hardship for the private sector. Copies of these policies and procedures are established and maintained by each Institution.

C. Competitive Sealed Bidding

1. Invitation for Bid (IFB)

Competitive sealed bidding is used for procurements where clear and concise specifications can be written and pricing schedules can be established. Price, responsiveness and responsibility are the basis of selection and award. In competitive sealed bidding, the Invitation for Bid is the solicitation document used to specify the goods and services or scope of work, all contractual terms and conditions and instructions to bidders. Public notice of the Invitation for Bid shall be at least 10 days prior to the date set for receipt of bids by publication on the Department of General Services' central electronic procurement website, eVA. Public notice also may be published in a newspaper of general circulation or on other appropriate websites, or both. In addition, bids may be solicited directly from potential contractors. Any additional solicitations shall include businesses selected from a list made available by the Virginia Department of Small Business and Supplier Diversity. *(Governing Rules* §4)

2. Negotiation with Lowest Responsible Bidder

Bids are solicited from developed bidders list(s) based on commodity or services and/or by direct solicitation or through e-procurement for competitive sealed bids. Sealed bids are publicly opened. As soon as practical, bids are evaluated and an award is made to the lowest responsive and responsible bidder. Any bidder who, despite being the apparent low bidder, is determined not to be a responsible bidder for a particular contract shall be notified in writing. (Refer to Section 10, "Remedies, Protests, and Disputes")

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

3. Responsible Bidder

A responsible bidder is determined as a vendor which:

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

4. Responsive Bidder

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

5. Multiple Awards

Multiple awards may be made when provided for in the solicitation.

6. Informalities & Best Interest

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

D. Competitive Negotiation

1. Request for Proposal (RFP)

Competitive negotiation is a method for purchasing goods and services under which vendors are solicited by a Request for Proposal. The Request for Proposal includes all terms and conditions and is the tool used during the competitive negotiation process to describe in general terms what will be purchased, and to specify the criteria used to evaluate proposals. Price may be considered but need not be the sole determining factor. Public notice of the Request for Proposals shall be given at least 10 days prior to the date set for receipt of proposals by publication in a newspaper or newspapers of general circulation in the area in which the contract is to be performed to provide reasonable notice to the maximum number of offerors that can be reasonably anticipated to submit proposals in response to the particular request. Public notice also shall be published on the Department of General Services' central electronic procurement website, eVA and may be published on other appropriate websites. In addition, proposals may be solicited directly from potential contractors. *(Governing Rules* §4)

2. Goods and Non Professional Services

a. Ranking of Qualifications and Negotiations

In the competitive negotiation process for goods and non-professional services, the Institution reviews proposals according to selection criteria included in the RFP. Negotiations shall typically occur with two or more offerors deemed to be fully qualified and best suited among those submitting proposals. If a written determination is made that only one offeror has made the best proposal, a contract may be negotiated and awarded to that offeror. This applies to the purchase of goods and nonprofessional services only.

b. Final Contract

The final written Contract will reflect documentation of the mutual understanding of the Institution and vendor reached as a result of negotiations.

3. Professional Services

a. Ranking of Qualifications and Negotiations

In the competitive negotiation process for professional services, the Institution shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence to provide the required services. Repetitive informal interviews shall be permissible. The offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. Discussions include nonbinding estimates of total project costs. Proprietary information from competitive offerors shall not be disclosed to the public or to competitors. At the conclusion of discussions, on the basis of evaluation factors published in the RFP and all information developed in the selection process to this point, the Institution shall select in the order of preference two or more offerors whose professional qualifications and proposed services are deemed most meritorious. Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the Institution can be negotiated with a price considered fair and reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with the offeror ranked second, and so on until such a contract can be negotiated with a fair and reasonable price. Should the Institution determine in writing and in its sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified and suitable than the others under consideration, a contract may be negotiated and awarded to that offeror. (*Governing Rules* §*4.3A)*

b. Final Contract

The final written Contract will reflect documentation of the mutual understanding of the Institution and vendor reached as a result of negotiations.

E. Sole Source

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

F. Emergency

An emergency is an occurrence of serious or urgent nature that demands immediate action. In case of an emergency, a contract may be awarded without competitive sealed bidding or competitive negotiation; however, such procurement shall be made with such competition as is practical under the circumstances. The Institution shall issue a written notice stating that the contract is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted in a designated public area, which may be the Department of General Services' website for the Commonwealth's central electronic procurement system, or published in a newspaper of general circulation on the day the Institution awards or announces its decision to award the contract, whichever occurs first, or as soon thereafter as is practicable. Public notice may also be published on the Department of General Services' website for the Commonwealth's central electronic procurement system and other appropriate websites. (*Governing Rules §5.F*)

G. Reverse Auctioning

The purchase of goods or nonprofessional services, but not construction or professional services, may be made by reverse auctioning. *(Governing Rules §5.J)*

H. Public Auction

Upon a determination made in advance by the Institution and set forth in writing that the purchase of goods, products, or commodities from a public auction sale is in the best interest of the public; such items may be purchased at the auction, including online public auctions. (*Governing Rules §5.I)*

Section 3 – Preparing the Solicitation

Solicitations for purchases must convey to the reader, in a clear, concise and logical sequence, all necessary information and requirements. Terms and conditions must be written clearly and concisely, and express the intent of the Institution.

All Invitation for Bids, Requests for Proposals, contracts, and purchase orders shall contain a nondiscrimination statement indicating that it does not discriminate against faith based organizations, race, religion, color, sex, national origin, age, disability or any other basis prohibited by state law relating to discrimination in employment. (*Governing Rules §9.A & §36.E)*

A. Specifications

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

1. Generic (Performance and Design)

Buyers must analyze incoming requirements with a view towards soliciting the requirement on a generic specification basis. Under appropriate circumstances, performance specifications (setting forth the

performance requirements), design specifications (setting forth the essential characteristics of the items solicited), or a qualified products list may be used.

2. Brand Name or Equal

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

3. Proprietary

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

(a) must be compatible with or is an integral component of existing equipment or products
(b) must be pre-qualified to support specific needs of a program
(c) is covered by a patent or copyright
(d) must yield absolute continuity of results - one with which a user has had extensive training and experience, and the use of any other similar piece of equipment would require considerable reorientation and training.

B. Vendor Assistance in Specification Preparation

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

C. Comments or Questions Regarding Specifications

Every Institution’s solicitation shall include procedures whereby comments concerning specifications or other provisions in IFBs or RFPs can be received and considered prior to the date and time set for receipt of bids or proposals or award of the contract. (*Governing Rules* §*13*)

Section 4 –Requirements within the Solicitation

A. Bonds

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

A certified check or cash escrow may be accepted in lieu of a bid, payment, or performance bond. If approved by the Attorney General, a bidder may furnish a personal bond, property bond, or bank or savings and loan association's letter of credit on certain designated funds in the face amount required for the bid, payment or performance bond. Approval shall be granted only upon a determination that the alternative form of security offered affords protection to the Institution equivalent to a corporate surety bond.

If a performance bond requirement is not stated in the solicitation and the Institution later determines that a bond should be provided prior to the award of a contract, the contractor to whom the award will be made shall provide a performance bond, and the Institution will pay the cost of the bond. For more information reference the *Governing Rules* §*29*.

B. Response Time

When establishing a date and time for receipt of bids or proposals, Institutions should allow time for vendors to adequately respond.

C. Vendor Registration/SBSD Certification

Institutions should establish procedures for vendor registration and/or use the Commonwealth of Virginia's electronic procurement site, eVA, for vendor registration. (http://www.eva.virginia.gov/)

All Small, Woman-owned, Minority-owned and Disabled Veteran-owned businesses who meet the definition established by the *Code of Virginia* as certifiable are strongly encouraged to obtain certification with the Commonwealth of Virginia Department of Small Business and Supplier Diversity.
http://www.sbsd.virginia.gov/

D. Prebid or Preproposal Conferences

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

E. Amending or Withdrawing Bids or Proposals by Vendors

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

Withdrawal of bids or proposals after the bids/proposal opening will be at the discretion of the Institution with the exception of construction bids. (*Governing Rules* §*23 A-F)*

F. Alterations to Bids or Proposals

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

G. Late Bids or Proposals

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

H. Cancellation or Rejection of Bids or Proposals

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

I. Mistakes in Bids or Withdrawals of Bids

1. Mistakes Discovered Before Opening

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

2. Mistakes Discovered After Opening But Before Award

a. Informality

Informality is a minor defect or variation of a bid or proposal from the exact requirements of the Invitation for Bid or Request for Proposal, which does not affect the price, quality, and quantity or delivery schedule for the goods or services being purchased. The Institution may, in its sole

discretion, waive such informalities or permit the vendor to correct them, whichever procedure is in the best interest of the Institution. Examples include but are not limited to:
(1) Failure of a vendor to return the number of signed bids or proposals required by the solicitation.
(2) Signing the face of the bid or proposal in the space provided, or
(3) Acknowledged receipt of an addendum to the solicitation.

b. Judgment Errors

An Institution may allow a vendor to withdraw a bid prior to award upon written request. Approval to withdraw a bid shall not be unreasonably withheld. However, if approval is given, the Institution shall make no award to the vendor which withdrew its bid for a period of sixty calendar days. The vendor may not submit a replacement bid. This only applies to goods and services procurements.

c. Non-judgmental Errors

If the mistake and the intended correct bid are clearly evident on the face of the bid document, the bid shall be corrected to the intended correct bid and may not be withdrawn. Examples of mistakes that may be clearly evident on the face of the bid include but are not limited to:
(1) Typographical errors,
(2) Errors in extending unit prices,
(3) Transposition errors, and
(4) Arithmetical errors.

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

Institutions may establish procedures for the withdrawal of bids. If a bid is withdrawn, the lowest remaining bid is to be deemed to be the low bid. No bidder who is permitted to withdraw a bid shall, for compensation, supply any material or labor, or perform any subcontract or other work agreement for the person or vendor to whom the contract is awarded or otherwise benefit, directly or indirectly, from the performance of the project for which the withdrawn bid was submitted. No bid may be withdrawn when the result would be the awarding of the contract on another bid from the same bidder or of another bidder in which the ownership of the withdrawing bidder is more than five percent.

J. Denial of Withdrawal of Bid

If the Institution denies the withdrawal of a bid it must notify the bidder in writing stating the reasons for its decision. The decision denying withdrawal of a bid is final unless the bidder invokes legal action within ten (10) calendar days as provided in the *Governing Rules* §*48.*

Section 5 – Additional Factors in Vendor Selection

A. Freight

Freight terms may be specified in the solicitation document and may be considered in the overall determination of the award. Freight charges are used as a factor in award and should be clearly shown on all documentation of the procurement.

B. Small, Women-owned, Minority-owned Businesses (SWaM)

In the solicitation and awarding of purchase orders and contracts, Institutions are encouraged to consider the use of Small, Woman-owned, Minority-owned businesses. Institutions will comply with Appendix D, SWaM Procurement Programs.

C. Cash Discounts

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

D. Determination of Price Reasonableness

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

E. Contract Pricing Arrangements

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

F. Preference for Virginia Coal Used in the Institution (*Governing Rules §21)*

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

G. Recycled Content

In determining the award of any contract for paper and paper products to be purchased for use by the Institution, it shall competitively procure recycled paper and paper products of a quality suitable for the purpose intended, so long as the price is not more than 10 percent greater than the price of the lowest responsive and responsible bidder or offeror offering a product that does not qualify as recycled paper and paper products which meets the EPA Recommended Content Standards as defined in 40 C.F.R. Part 247. (*Governing Rules* §*22.C*)

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

Section 6 – Additional Vendor Information

A. Term Contracts

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

B. Unsolicited Proposals

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

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

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

C. Taxes

1. Excise

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

2. State Sales

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

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

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

- **Hotels, motels, tourist camps, etc.** The tax applies to the sale or charge or any room or rooms, lodgings or accommodations furnished to transients by any hotel, motel, inn, tourist cabin, camping grounds, club or other similar place. The tax applies to all sales of tangible personal property by such business.
- **Charges in connection with accommodations.** Any additional charges made in connection with the rental of a room or other lodging or accommodations are deemed to be a part of the charge for the room and subject to the tax. For example, additional charges for movies, local telephone calls and similar services are subject to the tax. Toll charges for long-distance telephone calls are not subject to the tax.
- **Meals (Generally).** Retail sales of meals by restaurants, hotels, motels, clubs, caterers, cafes and others are taxable. Related service charges (examples: cover charge, minimum sales fee, or room service charges) are part of the sales price and are taxable. Any applicable tips are not subject to sales tax. See *Code of Virginia*, Section 630-10-64.

D. Insurance

Whenever work is to be performed on State owned or leased facilities, the contractor is required to have insurance required by law and the Institution's regulations to perform the type of work required. This includes Workers' Compensation, Employer's Liability, Commercial General Liability and Automobile Liability, and in certain types of programs Professional Liability/Errors and Omissions insurance coverage. In addition, for construction contracts, if any subcontractors are involved, subcontractors will also be required to have Workers' Compensation Insurance in accordance with *Governing Rules* §*25.C* and 65.2-800 et seq. of the *Code of Virginia*. Stipulated insurance must be obtained prior to contract award and be maintained during the entire term of the contract. An Institution may require that the contractor provide the certificate of insurance prior to the provision of any goods and services or the commencement of any work.

E. Drug-Free Workplace

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

The Contractor agrees to (i) provide a drug-free workplace for the contractor's employees; (ii) post in conspicuous places a statement notifying employees that the unlawful manufacture, sale, distribution, dispensation, possession, or use of a controlled substance or marijuana is prohibited in the contractor's workplace, and specify the actions that will be taken against employees for violations of such prohibition; (iii) state in all solicitations or advertisements for employees placed by or on behalf of the contractor that the contractor maintains a drug-free workplace and (iv) include the provisions of the foregoing clauses in every subcontract or purchase order of over $10,000, so that the provisions will be binding upon each subcontractor or vendor. (Governing Rules §11)

F. Purchases from Cooperative State Contracts

Term contracts have been established by the Institutions, the Colleges and Universities Cooperative Procurement Group (CUCPG on behalf of VASCUPP), and other cooperative contract sources including state contracts and other cooperatives and consortiums. Term contract vendors offer favorable pricing for a wide variety of goods and services from reliable vendors and should be regarded as the preferred procurement source to obtain more favorable prices through volume purchasing and to reduce procurement lead time and administrative effort. Written notices of contract awards are issued notifying Institutions of the existence of such contracts.

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

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

G. Cooperative Procurement

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

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

VASCUPP cooperative solicitations should routinely include these components:

1. **Term**

   The contract and solicitation should contain a clause that specifies a contract term of not less than one year.

2. **Additional Goods and Services**

   The contract and solicitation should include a provision to acquire other goods or services that the supplier provides other than those specifically delineated. The provision should include the ability to obtain additional goods and/or services under the same pricing, terms and conditions to make modifications or enhancements to the existing goods and services. Such additional goods and services may include other products, components, accessories, subsystems or related services that are newly introduced during the term, and should be provided at favored nations pricing, terms and conditions.

3. **Fees**

   A fee schedule for goods and services should be included in the award. Such fees should be broad enough to cover most goods (i.e., discounts from list price, prices, warranties or delivery fees) and services (i.e. hourly rates, travel and expenses or flat rates) supplied by the vendor.

4. **Cooperative**

   The solicitation and contract will include a VASCUPP approved cooperative procurement clause or Additional Users Clause. When practical, the procurement will be issued with the VASCUPP logo and include language that indicates that the procurement is issued as a cooperative procurement on behalf of VASCUPP. The approved VASCUPP Zone Map will be included in the procurement document when deemed appropriate.

Section 7 – Exceptions to Competitive Requirements

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

A. Sole Source
B. Emergency
C. Selected categories of goods and services not expected to exceed $50,000 as outlined in the Institution's small purchase procedures
D. Purchases of used equipment
E. Purchases from governmental sources
F. Purchases not expected to exceed $50,000 for testing or evaluation (limited to purchases of quantities considered necessary for complete and adequate testing)
G. Demand payments as identified by the Institution
H. Other exemptions as defined within Governing Rules §37, to include:

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

Section 8 - Procurements with Special Considerations

A. Information Technology

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

1. Information Technology Access Act

The following clause shall apply to all information technology contracts:

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

(i) effective, interactive control and use of the Technology shall be readily achievable by nonvisual means;
(ii) the Technology equipped for nonvisual access shall be compatible with information technology used by other individuals with whom any blind or visually impaired user of the Technology interacts;

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

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

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

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

B. Construction

1. Capital Outlay Projects

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

Construction is defined as building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavation, grading or similar work upon real property (*Governing Rule* §4). Construction is purchased by competitive sealed bidding. Competitive negotiation may be used if a determination is made in advance, and explained in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the Institution (*Governing Rule* §5d). Competitive negotiation may only be used specifically in these circumstances:

(a) On a fixed price design-build basis or construction management basis under. (*Governing Rule* §5d1)
(b) For the alteration, repair, renovation, or demolition of buildings. (*Governing Rule* §5d2)
(c) For the construction of highways and any draining, dredging, excavation, grading, or similar work on real property. *(Governing Rule* §5d3)

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

Small construction projects valued not over $1 million, not specifically identified as professional services may be procured under methods of procurement for Goods and Services. (*Governing Rules §4, Non Professional Services definition*)

At a minimum, a construction contractor will be required to provide insurance as required based on the type of construction service being performed.

2. Contractor License Requirements

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

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

It is the vendor's responsibility to comply with the rules and regulations issued by State regulatory agencies.

If a purchase of more than $1,000 involves construction, removal, repair or improvement of any building or structure permanently annexed to real property or any other improvement to such real property, the contractor must possess an applicable contractor's license issued by the State Board for Contractors for the type of work involved (*Code of Virginia*, Sections 54.1-1103 and 54.1-1115).

The solicitation must state that the appropriate contractor license number must be furnished with the bid or proposal. If a contractor who is already licensed fails to submit the license number with the bid or proposal, the bid or proposal may still be considered if the contractor promptly submits the number upon the request of the procurement office. An unlicensed vendor submitting a bid or offer when license is

required is nonresponsive and is in violation of State law. Any buyer who knowingly receives or considers a response from an unlicensed vendor when a license is required is in violation of State law (*Code of Virginia*, Section 54.1-1115). Contractors must be licensed in the proper classification and specialty to perform the work required by the solicitation. If there is any question as to whether a licensed contractor is required for a specific procurement, call the State Board for Contractors for information or for policy interpretation.

C. Printing, Copyright, and Trademark

1. Ownership of Artwork, Negatives, Etc.

All artwork, negatives, dyes, overlays or similar material used to print a job is the Institution's property and must be returned to the Institution upon completion of the job. This should be clearly stated in all solicitations. Institutions should not process any invoice for payment until these items are returned. The Institution may waive this requirement when it is not practical. The Institution may elect to trademark and/or copyright associated products but such efforts to trademark and/or license any Institutional property by the vendor shall be prohibited.

2. Copyright

No vendor may copyright or trademark any work produced for the Institution without prior written consent.

D. Individual Services

Contracting for the services of individuals should be treated the same as any other purchase. However, Institutions contracting with individuals are cautioned that problems have arisen with the Federal Internal Revenue Service concerning withholding and Social Security taxes when the individual performs under the supervision and control of the Institution. An employer - employee relationship has been determined to exist in such cases, and subjects the Institution to tax liability and employment obligations established by State law or gubernatorial policy. Procurement departments should consult with their financial officers, human resources officers, and legal counsel to establish policies and procedures for the use of independent contractors.

E. Legal Services and Expert Witness

Institutions may enter into contracts without competition for legal services, provided that the pertinent provisions of Chapter 5 (Section 2.2-500 et seq.) of Title 2.2 remain applicable or for expert witnesses and other services associated with litigation or regulatory proceedings. Special approval for procurement of legal services shall be granted by the Office of the Attorney General or the Institution's appointed legal counsel.

F. Department of Corrections

Institutions purchase goods and services produced or manufactured by State correctional facilities as specified within legislation or policy.

G. Nonprofit Sheltered Workshops of Virginia

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

H. Rental, Lease, or Installment Purchase of Goods

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

Section 9 - Contract Administration and Vendor Performance

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

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

A. Contract Modification Restriction

A contract awarded by the Institution may include provisions for modification of the contract during performance, but no fixed-price contract may be increased by more than 25 percent of the amount of the contract or $50,000, whichever is greater, without the advance written approval of the Institution's president or his designee. In no event may the amount of any contract, without adequate consideration, be increased for any purpose, including, but not limited to, relief of a bidder or an offeror from the consequences of an error in its bid or offer. The Institution may extend the term of an existing contract for services to allow completion of any work undertaken but not completed during the original term of the contract. (*Governing Rules* §*8)*

B. Assignment of Contract

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

C. Contract Renewal or Extension

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

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

D. Special Types of Contracts

1. Requirements-Type Contracts

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

2. Time and Materials Contracts

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

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

3. Consultant Services

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

4. Revenue Sharing Contracts

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

E. Purchase Order, Authority, and Shipment

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

1. Purchase Order Changes

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

2. Cancellation of Purchase Orders and Contracts

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

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

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

F. Delivery and Receipt of Goods

1. Delivery

Delivery must be made by the date or period specified in the purchase order or contract or the contractor may be considered to be in default. If a contractor cannot make delivery as specified under an existing purchase order or contract, the contractor must immediately notify the procurement department. The contractor may offer a new delivery date; however, if it is not acceptable to the Institution and delivery cannot be made as originally specified, the contractor may be considered in default. Delivery by a contractor to a common carrier does not constitute delivery to the Institution. Any claim for loss or damage incurred during delivery is between the contractor and the carrier. Unless otherwise specified contractually, the Institution accepts title only when goods are received and accepted regardless of the FOB point. Contractors should ensure they have been given a specific delivery location and must obtain a signed receipt for goods delivered.

2. Over shipments and Overruns

The Institution's procurement department has the authority to approve the acceptance of goods in excess of those specified on the purchase order or contract provided the acceptance of excess good or services is in accordance with Section 9A, "Contract Modification Restrictions."

3. Substitutions

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

4. New, Used, Altered

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

5. Packaging

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

6. Receipt of Shipments

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

7. Inspection

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

8. Lost or Damaged Shipments

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

G. Complaints on Vendor's Goods or Services

The Institution's procurement department shall report differences between the contract and subsequent performance to the contractor in accordance with each Institution's procedures. Failure to respond within the specified time may result in removal, suspension or debarment from future opportunities. Complaints or discrepancies on contractor performance should be reported as they occur.

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

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

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

2. Termination for Default, Default Actions

A contractor may be considered in default if it fails to perform in accordance with the terms of the purchase order or contract. If a satisfactory resolution has not been reached, the Institution sends the contractor a Termination for Default Letter and takes repurchase action by awarding to the next lowest bidder or re-soliciting bids. If the repurchase results in increased costs to the Institution, the Institution may invoice the original contractor for the excess costs. Until the excess costs repayment has been received, the contractor may be removed, suspended or debarred from future opportunities by the Institution. If repayment has not been made by the end of the specified period of time, collection action may be taken under the Institution's approved debt collection policy. Contractors shall not be liable for any excess cost if the failure to perform arises out of any act of war, order of legal authority, strikes, act of God, or other unavoidable causes not attributed to their fault or negligence. Failure of a contractor's source to deliver is generally not considered to be an unavoidable cause.

3. Termination for Convenience

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

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

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

4. Debarment

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

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

a. Causes for Debarment

The debarring official can debar an individual or vendor without judicial determination for any of these reasons but not limited to:

(1) Breach (including anticipatory breach) of contract with an Institution.
(2) Sale or attempted sale to an Institution of items or services which are required to be purchased under another contract, when the vendor knew or had reason to know that the items or services are required to be purchased under that contract.
(3) Statement of an unwillingness or inability to honor a binding bid. A mere request to withdraw a bid, which does not otherwise state an unwillingness or inability to perform, is not a cause for debarment.
(4) Falsifying or misrepresentation of manufacturer's specifications in order to appear responsive to a solicitation.

(5) Conferring or offering to confer any gift, gratuity, favor, or advantage, present or future, upon any employee of an Institution who exercises any "official responsibility" for a procurement transaction. It is not necessary that the employee accept the offer, or that the offer be made with intent to influence the employee in an official act. Offers of any discounts or privileges not available to all State employees are considered to be offering an advantage.
(6) Failure to disclose a condition constituting a conflict of interest by any officer, director, owner, or partner of the vendor awarded the contract or purchase order.
(7) Any cause indicating that the individual or vendor is not a responsible vendor.
(8) A determination by the Institution that a vendor has used abusive or obscene language or behaved in a threatening manner toward Institutional personnel.
(9) Sale, under non-emergency conditions, of building materials, supplies, or equipment for any building or structure constructed by or for the Institution by an independent vendor employed to furnish architectural or engineering services, but not construction for such building or structure or from any partnership, association or corporation in which such architect or engineer has a personal interest.
(10) Sale of goods or services to the Institution when such sale is prohibited by any debarment then in effect.
(11) Conviction of any criminal offense involving public contracting. Examples include, but are not limited to, bribery (*Code of Virginia*, Section 18.2-447) and knowingly making a false statement in regard to collusion on a solicitation (*Code of Virginia*, Section 18.2498.4). Conviction for any of the above of any officer, director, owner, partner, agent, or related business entity of a vendor constitutes grounds for the removal of the vendor.
(12) Court judgment finding a violation of either Federal or State antitrust laws.
(13) Conviction of any offenses indicating a lack of moral or business integrity.
(14) Any other activity which is so serious as to justify debarment.

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

5. Ineligibility or Disqualification of Manufacturer

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

6. Debarment Period

Debarment is for a period of one year, except that debarment for reasons in section 9)G)4)A) k, l, m, and n., may be for up to three years. Debarment commences upon notification of debarment, or if later, upon expiration of any existing debarments.

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

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

7. Debarment Notification and Appeal Procedure

An individual or vendor being debarred must be notified in writing. The notice must state the reasons for the action taken. This decision is final, unless the bidder, offeror, or vendor appeals the decision as provided for in *Governing Rules* §54 or institutes legal action as provided for in the *Governing Rules* §54. See Manual Section 10, "Remedies, Protests and Disputes" for additional information.

H. Billings and Invoices

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

1. Invoice Processing

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

2. Partial Payments

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

3. Vendor Payment Assistance

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

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

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

a. "**Payment date**" means either (1) the date on which payment is due under the terms of a contract for provision of goods or services, or (2) if such date has not been established by contract, thirty days

after receipt of a proper invoice by the Institution for the amount of payment due, or thirty days after receipt of the goods or services, whichever is later.

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

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

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

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

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

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

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

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

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

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

5. Payment Requirements - All Contracts

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

a. Within seven days after the receipt of payment for the work performed:

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

b. If an individual contractor, provide social security number in order to receive payment.

c. If a proprietorship, partnership or corporation provide Federal employer identification number.

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

e. Accrue interest at no more than the rate of one percent per month.

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

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

6. Electronic Payment

Vendors will be paid in accordance with Governing Rules Section §39-46, which requires payment within 30 days of invoice or receipt of goods or services date, whichever is later, or by the terms, conditions and early payment discounts established under contracts with the Institution. Institutions may require vendors to receive payments via specified electronic methods and provide the Institution with any additional discounts that may result from paying electronically. Each party must bear the respective fees and other charges assessed by its designated bank(s) and third party service providers for electronic payments.

Section 10 - Remedies, Protests, and Disputes

A. Ineligibility (*Governing Rules* §*47)*

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

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

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

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

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

A decision denying withdrawal of bid shall be final and conclusive unless the bidder appeals the decision within 10 days after receipt of the decision by instituting legal action as provided in §54 of the *Governing Rules*.

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

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

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

Following public opening and announcement of bids received on an Invitation for Bid, the Institution shall evaluate the bids in accordance with the definition of "competitive sealed bidding." At the same time, the Institution shall determine whether the apparent low bidder is responsible. If the Institution so determines, then it may proceed with an award in accordance with the definition of "competitive sealed bidding" as defined in the

Governing Rules §*49.* If the Institution determines that the apparent low bidder is not responsible, it shall proceed as follows.

1. Prior to the issuance of a written determination of non-responsibility, the Institution shall:

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

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

3. Such notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within 10 days after the receipt of the notice by instituting legal action as provided in the *Governing Rules* §*49.*

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

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

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

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

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

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

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

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

Where the Institution determines that there is probable cause to believe that a decision to award was based on fraud or corruption or on an act in violation of the *Governing Rules*, the Institution may enjoin the award of the contract to a particular bidder.

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

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

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

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

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

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

The Institution shall include in its contracts a procedure for consideration of contractual claims. Such procedure, which may be contained in the contract or may be specifically incorporated into the contract by reference and made available to the contractor, shall establish a time limit for a final decision in writing by the Institution.

A contractor may not institute legal action as provided in *Governing Rules §54*, prior to receipt of the Institution's decision on the claim, unless the Institution fails to render such decision within the time specified in the contract.

The decision of the Institution shall be final and conclusive unless the contractor appeals within six months of the date of the final decision on the claim by the Institution by instituting legal action as provided in *Governing Rules §54*.

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

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

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

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

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

1. an honest exercise of discretion, but rather was arbitrary or capricious or
2. in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation for Bid.

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

1. an honest exercise of discretion, but rather is arbitrary or capricious or
2. in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms and conditions of the Invitation for Bid or Request for Proposal.

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

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

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

Section 11 - Ethics, Conflict of Interests, and Freedom of Information

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

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

No State employee having official responsibility for procurement transactions:

1. shall solicit, demand, accept, or agree to accept from a bidder, offeror, contractor or subcontractor any payment, loan, subscription, advance, deposit of money, services or anything of more than nominal or minimal value present or promised, unless consideration of substantially equal or greater value is exchanged (*Code of Virginia*, Section 2.2-4371); or
2. shall accept employment from any bidder, offeror or vendor with whom the employee dealt in an official capacity concerning procurement transactions for a period of one year from the cessation of employment by the State unless the employee or former employee provides written notification to the president of the Institution prior to commencement of employment by that bidder, offeror or vendor (*Code of Virginia*, Section 2.2-4370).

Further, all personnel having official responsibility for procurement transactions shall be knowledgeable about the provisions of Article 6, Sections 2.2-4367 through 2.2-4377, the *Code of Virginia*, entitled "Ethics in Public Contracting." "No public employee having official responsibility for a procurement transaction shall knowingly falsify, conceal, or misrepresent a material fact; knowingly make any false, fictitious or fraudulent statements or representations; or make or use any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry" (*Code of Virginia*, Section 2.2-4376). "Willful violation of any provision of this article shall constitute a Class 1 misdemeanor. Upon conviction, any public employee, in addition to any other fine or penalty provided by law, shall forfeit his employment (*Code of Virginia*, Section 2.2-4377). Institutions "may require public employees having official responsibility for procurement transactions in which they participated to annually submit for such transactions a written certification that they complied with the provisions of this article" (*Code of Virginia*, Section 2.2-4375).

Most Institutions in the Commonwealth are also members of the National Association of Educational Procurement (NAEP). The Institution, by their membership, agrees to adhere to the NAEP Code of Ethics (See Appendix C.)

B. Vendor Seminars

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

C. Documentation of Files and Public Access to Procurement Records

A complete file must be maintained by the Institution for each purchase transaction.

D. Virginia Freedom of Information Act (*Governing Rules §34)*

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

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

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

4. Any competitive negotiation offeror, upon request, shall be afforded the opportunity to inspect proposal records within a reasonable time after the evaluation and negotiations of proposals are completed but prior to award, except in the event that the Institution decides not to accept any of the proposals and to reopen the contract. Otherwise, proposal records shall be open to public inspection only after award of the contract.

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

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

Appendix A -- Resources

- ***The Governing Rules***

  Rules Governing Procurement of Goods, Services, Insurance, and Construction by a Public Institution of Higher Education of the Commonwealth of Virginia Governed by Subchapter 3 of the Restructured Higher Education Financial and Administrative Operations Act, Chapter 4.10 (§ 23-38.88 et seq.) of Title 23 of the Code of Virginia. *https://vascupp.org/rules.pdf*

- ***Commonwealth of Virginia Construction and Professional Services Manual (CPSM)***

  Division of Engineering and Buildings, Department of General Services, 805 East Broad Street, Richmond, Virginia 23219.
  http://www.dgs.virginia.gov/DivisionofEngineeringandBuildings/BCOM/CPSM/tabid/402/Default.aspx

- **VASCUPP Website**

  https://vascupp.org/

Appendix B -- Definitions

These definitions are provided as general guidance for the use of this Manual.

Best Value

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

Bid

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

Bid Bond

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

Bidder

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

Blanket Purchase Agreement (BPA)

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

Competitive Bidding

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

Competitive Sealed Bid

A bid submitted in a sealed envelope to prevent disclosure of its contents before the deadline set for the receipt of all bids. Sealed bidding procedures are used for procurements exceeding the small purchase threshold. Competitive sealed bidding shall not be used to contract for professional services.

Competitive Negotiation

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

Confirming Purchase Order

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

Consideration

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

Construction

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

Construction Management Contract

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

Consulting Services

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

Contract

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

Contract Administration

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

Contract, Cost-Plus-A-Fixed-Fee

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

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

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

Contract, Fixed Price

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

Contract, Fixed Price With Escalation/De-escalation

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

Contract, Requirements Type

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

Contract, Service

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

Contract, Time and Material

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

Contract Officer, Purchase Officer, Buyer

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

Contractor

An individual or vendor which has entered into a contract to provide goods or services.

Cure Notice

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

Debarment

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

Default

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

Design-build Contract

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

Design Specification

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

Designated Public Area

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

Drug-Free Workplace

A drug-free workplace is a site for the performance of work done in connection with a specific contract awarded to a contractor in accordance with the *Governing Rules*, the employees of whom are prohibited from engaging in the unlawful manufacture, sale, distribution, dispensation, possession, or use of any controlled substance or marijuana during the performance of the contract.

Emergency

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

Ethics

Pertaining to or relative to moral action, conduct, motive or character; as ethical emotion; professionally right or befitting; conforming to professional standards of conduct. (*Governing Rules §57*).

Evaluation of Bids

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

General Terms and Conditions

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

Goods

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

Informality

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

Inspection

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

Invitation for Bids (IFB)

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

Late Bid or Proposal

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

Latent Defect

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

Liquidated Damages

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

Multiple Award

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

Negotiation

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

Non-Competitive Negotiation

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

Nonprofessional Services

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

Notice of Award

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

Notice of Intent to Award

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

Offeror

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

Payment Bond, For Labor and Material

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

Performance Bond

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

Performance Specification

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

Potential Bidder or Offeror

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

Prebid or Preproposal Conference

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

Prequalification

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

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

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

Procurement

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

Professional Services

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

Proposal

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

Proprietary Specification

One that restricts the acceptable products or services to those of one manufacturer or vendor. A common example would be a specification by brand name which **excludes** consideration of proposed "equals". Although all sole source specifications are proprietary, all proprietary specifications are not sole source. Proprietary items may be available from several distributors through a competitive solicitation.

Protest

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

Public Bid Opening

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

Public Posting

The display of procurement notices in an area or on a board designated and regularly used for that purpose that is available to the public during normal working hours.

Purchase Order

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

Regular Dealer

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

Request for Proposals (RFP)

A solicitation method that involves competitive negotiation (*Governing Rules §*4).

Responsible Bidder or Offeror

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

Responsive Bidder

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

Reverse Auctioning

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

Sealed Bid

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

Services

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

Sheltered Workshops

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

Software

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

Sole Source

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

Solicitation

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

Special Terms and Conditions

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

Spot Purchase

A one-time purchase made in the open market.

Surplus Property

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

Technical Proposal

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

Technical Specifications

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

Term Contracting

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

Termination For Convenience

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

Termination For Default

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

Unsealed Bid

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

Unsolicited Proposal

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

Used Equipment

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

Vendor

One who sells goods or services.

Appendix C-- NAEP Code of Ethics

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

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

Appendix D -- SWaM Procurement Programs

Institutions shall establish programs to facilitate the participation of small, women-owned, and minority (SWaM) businesses. When practicable, Institutions will seek certified micro businesses for non-contracted goods or services and may award when the best value is offered in accordance with each Institution's small purchasing program. These programs shall be established in writing and may include cooperation with the Virginia Department of Small Business and Supplier Diversity (SBSD), the United States Small Business Administration, and other public or private agencies. Institutions shall submit annual progress reports on small, women-owned, and minority-owned business procurements to the Virginia Department of Small Business and Supplier Diversity (*Governing Rules* §*9).*

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