Attachment A

Purchasing Policy and Procedures

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PROCUREMENT POLICY

Purpose

The town purchasing section provides a centralized system for the acquisition of goods, services and construction and ensures that all goods and services are of appropriate quality, is acquired in a timely and cost-effective manner at the least expense to the town. Policies and procedures of the purchasing section are regulated by and is generally consistent with provisions of the Virginia Public Procurement Act of the Code of Virginia (Section 2.2-4300).

The town through this policy intends to assure the best quality and price for products and services; to protect the assets and funds of the town; and to maintain sound professional relations with all suppliers within the Procurement Laws and Business Ethics as dictated by Federal, State, and town governments. Nothing in this policy shall prevent the town from complying with the terms and conditions of any grant, bequest or cooperative agreement. Therefore, the following policy for purchasing is hereby approved by the Town Manager and shall take effect immediately.

ARTICLE 1 - GENERAL PROVISIONS

1.1 *Application*

This policy applies to all contracts for goods, services, insurance and construction for all expenditure of funds appropriated by the town. This policy is established by official action of the town. All provisions of this policy are in conformance with the Virginia Public Procurement Act, as amended.

When the procurement involves the expenditure of Federal assistance or contract funds, nothing contained in these regulations shall prevent the town from complying with the terms and conditions of any grant, gift or bequest.

1.2 *Effective Date*

An ordinance amending the town code to update town procurement procedures was adopted on May 9, 2023. This policy has an effective date of June 1, 2023. Contracts entered into prior to the effective date are allowed continued governance by the procurement policy and regulations of the town in effect at the time those contracts were executed.

1.3 *Definitions: For purposes of these regulations, the following terms have the meanings ascribed herein, except where the context clearly requires another meaning.*

A. Alternate Bid: An additional bid submitted where the bidder knows that it differs materially from the specifications.

B. Addendum: A written instrument, issued by the procurement official, prior to the openings of bids or receipt of proposals, to modify or interpret the invitation for bid or request for proposal and attachments, by additions, deletions, or clarifications.

C. Blanket Purchase Agreement: A procurement instrument under which a purchaser contracts with a vendor to provide for a purchaser's demand usage for item(s) or a service under the single quote limit, cooperative contract, or properly procured contract, on an as-required basis for a 12-month period.

D. Brand Name or Equal Specification: A brand name specification to describe the standard of quality, performance, and other characteristics needed to meet the town requirements and which provides for the submission of equivalent products.

E. Change Order: Written order signed by someone authorized under these regulations directing a contractor to make changes, which the changes clause of any contract authorizes to be ordered with or without the consent of the contractor.

F. Competitive Negotiation: (Request for Proposal or RFP) – see Virginia Public Procurement Act. Also see section 4.4.A.

G. Competitive Sealed Bid: (Invitation for Bid or IFB) – see Virginia Public Procurement Act. Also see section 4.3.A.

H. Confidential and Proprietary Information: Any information which is submitted as part of a bid or proposal and noted as proprietary by the bidder or offeror. Such information shall not be disclosed except to a person authorized to receive such information and is not a matter of public knowledge or available to the public on request.

I. Contract: An obligation or agreement, such as an accepted offer, between competent parties upon a legal consideration, to do or abstain from doing some act. The essential elements of a contract are: an offer and an acceptance of that offer; the capacity of the parties to contract or agree; consideration to support the contract; a mutual identity of consent; legality of purpose; and definiteness.

J. Construction: Building, altering, repairing, improving or demolishing any structure or building, and any draining, dredging, excavation, grading or similar work upon real property.

K. Emergency: A condition or occurrence of a sudden and unexpected nature threatening the public health, safety, or welfare.

L. Faith-based organization: A religious organization that is or applies to be a contractor to provide goods or services for programs funded by the block grant provided pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104 -193.

M. Gift: Any present or promised payment, loan, subscription, advance, deposit of money or service given, unless consideration of substantially equal or greater value is exchanged.

N. Goods: All material, equipment, supplies, printing and automated data processing hardware and software.

O. Immediate Family: A spouse, child, parent, brother, sister and any other person living in the same household as the town employee.

P. Informality: A minor defect or variation of a bid or proposal from the exact requirements of the invitation to bid, or the request for proposal, which does not affect the price, quality, or delivery schedule for the goods, services or construction being procured.

Q. Invoice: Is submitted by the vendor after work is complete or the item/good is delivered. The invoice is a request for payment.

R. Multi-year contract: A procurement contract that extends for longer than one year.

S. Nonprofessional Services: Any services not specifically identified as professional services within the Virginia Public Procurement Act.

T. Procurement file: A secure file, manual or electronic, with controlled access within the purchasing department or end user's department.

U. Professional Services: Means work performed by an independent contractor, as defined by the Virginia Public Procurement Act, within the scope of the practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law, dentistry, medicine, optometry, pharmacy or professional engineering. ''Professional services'' shall also include the services of an economist procured by the State Corporation Commission.

V. Procurement Officer or Purchasing Agent: Individual assigned by the procurement official to assist in carrying out the procurement functions of the town, subject to the supervision and control of the procurement official.

W. Procurement official: Appointed by the town manager and assigned to the town's director of finance or other comparable town official as the town procurement official, who shall have general administrative and supervisory authority for the procurement process. The procurement official may appoint one or more procurement officers to assist in carrying out the procurement functions of the town, subject to the supervision and control of the procurement official.

X. Public Body: Any legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board, or political subdivision created by law to exercise some sovereign power or to perform some governmental duty and empowered by law to undertake the activities described in this policy.

Y. Quote: Is a written document stating how much an item/good/service will cost. Quotes are usually on a company's letterhead. The quote is attached to the purchase requisition and is obtained before work begins or an item/good is ordered. Verbal quotes are permissible with proper documentation.

Z. Request for quotation: A request for quote from one or more vendors under an open market procurement where the estimated cost is less than $50,000.

A.A. Responsible Bidder or Offeror: A bidder or offeror that has the capability, in all respects, to fully perform the contract requirements and the moral and business integrity and reliability that will assure good faith performance, and who has, if required, been pre-qualified.

AB. Responsive Bidder: A bidder that has submitted a bid which conforms in all material respects to the invitation to bid.

AC. Services: Any service, to include time, labor or effort by a vendor, not involving the delivery of a specific end product or the rental of equipment, materials and supplies and reports incidental to the required performance. Services shall include maintenance of equipment. Services shall not include contracts for regular employment by the town.

AD. Specification: Any description of the physical or functional characteristics, or of the nature of a good, service or construction item. It may include a description of any requirement for inspecting, testing or preparing a good, service or construction item for delivery.

AE. Using Departments: All departments, agencies, boards and commissions of the town, supported by funds approved by the town.

ARTICLE 2 - OFFICE OF THE PROCUREMENT OFFICIAL

2.1 *Establishment and Appointment.*

The purchasing system shall operate under the direction and supervision of the Procurement Official in accordance with the provisions in this policy. The Town Manager shall appoint the town's Director of Finance or other comparable town official as the town's Procurement Official.

2.2 *Authority and Responsibilities of the Procurement Official.*

A. Authority. The Procurement Official shall serve as the principal public purchasing official for the town, and is responsible for the procurement of goods, services, insurance and construction in accordance with this policy, as well as the management and disposal of equipment.

B. Responsibilities. In accordance with this policy and the Town of Herndon Code the Procurement Official, not limited to, shall:

1. Purchase or supervise the purchase of all goods, services, insurance and construction needed by the town.

2. Exercise supervision or control over central stores and supervise other inventories of goods belonging to the town.

3. Sell, trade or otherwise dispose of surplus goods belonging to the town.

4. Establish and maintain programs for specifications development, contract administration, inspection and acceptance, in cooperation with the using agencies of goods, services, and construction.

5. Establish and promulgate procedures to carry out the provisions of this policy

6. Secure for the town the benefits of research done in the field of purchasing by other governmental jurisdictions, national societies, national trade associations and private businesses and organizations; and

7. Make and effectuate decisions on the responsibility of bidders, in accordance with Article 6.

C. The procurement officer may adopt operational procedures relating to the execution of the duties of the procurement officer which are consistent with this division, and with the approval of the procurement official.

D. The procurement official or the procurement officer, subject to such restrictions as the procurement official may establish as written regulations, is authorized to award any spot-purchase or single year contract not in excess of, or not expected to cost in excess of, $50,000.00 and any multi-year contract not in excess of, or expected to cost in excess of, $100,000.00. The award of any spot-purchase or single year contract in excess of or expected to cost in excess of $50,000.00, or any multi-year contract in excess of, or expected to cost in excess of, $100,000.00 in the aggregate shall require affirmative action by the town council by means of a resolution authorizing such award.

E. The procurement official or the procurement officer, subject to such restrictions as the procurement official may establish as written regulations, is authorized to award a single or term contracts for professional services without requiring competitive negotiation, provided the aggregate or sum of all phases is not expected to exceed $80,000.00.

2.3 *Delegation.*

The procurement official may delegate authority to purchase certain goods, services or construction to other town employees if such delegation is deemed necessary by the procurement official for the effective or efficient procurement of those items.

2.4 *Unauthorized purchases.*

Except as otherwise provided in this division, no one shall contract for any goods, services, insurance or construction on behalf of the town in a manner in conflict with the provisions of this division, and any purchase order or contract made otherwise is not approved and the town is not bound thereby.

ARTICLE 3 - COOPERATIVE AND JOINT PROCUREMENT

3.1 *Conditions for Use.*

A. Pursuant to the authority granted by Section 2.2-4304 of the Virginia Code, the town may participate in, sponsor, conduct or administer a cooperative procurement agreement for the purpose of combining

requirements to increase efficiency or reduce administrative expenses in the procurement process. All cooperative procurement contracts entered into or used by the town shall be based on procurement principles contained in this policy. Except for contracts for construction, not including the installation of artificial turf and track surfaces, and architectural and engineering services, the town may participate in or purchase goods and services through contracts awarded by other governmental bodies when it is determined by the procurement official that cooperative procurement is in the best interest of the town and the contract is based on competitive procurement principles.

B. If the town enters into a cooperative procurement agreement with the county, city or town whose governing body has adopted alternative procurement policies and procedures pursuant to the act, the town may comply with either the provisions of this division or with the alternative policies and procedures of the governing body of such county, city or town.

C. The town may participate in, sponsor, conduct, or administer a joint procurement agreement in conjunction with one or more other public bodies, or public agencies or institutions or localities of the several states, of the United States or its territories, the District of Columbia, the U.S. General Services Administration, or the Metropolitan Washington Council of Governments, for the purpose of combining requirements to increase efficiency or reduce administrative expenses in any acquisition of goods, services, or construction.

D. The town may purchase from any authority, department, agency or institution of the commonwealth's contract even if it did not participate in the request for proposal or invitation to bid, if the request for proposal or invitation to bid specifies that the procurement was a cooperative procurement being conducted on behalf of other public bodies.

E. The town may procure construction only by competitive sealed bidding (including by being named in another locality's solicitation), except that the use of competitive negotiation may occur in the following instances upon a determination made in advance by the town and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, that writing shall document the basis for this determination:

(1) For the construction of highways and any draining, dredging, excavation, grading or similar work upon real property; and

(2) As otherwise provided for design-build or construction management contracts.

ARTICLE 4 - CONTRACT FORMATION AND METHODS OF SOURCE SELECTION

4.1 *Methods of procurement.*

A. The awarding of all town contracts with non-governmental contractors for the purchase or lease of goods, or for the purchase of services, insurance or construction shall occur after competitive sealed bidding or competitive negotiation as provided in this division, unless otherwise prohibited or otherwise authorized by law or otherwise provided in this division.

B. The town may consider best value concepts when procuring goods and nonprofessional services, but not construction or professional services. The criteria, factors, and basis for consideration of best value and the process for the consideration of best value shall be as stated in the procurement solicitation.

4.2 *Competitive bidding required on certain state-aid projects.*

No contract for the construction of any building or for an addition to or improvement of an existing building for which state funds of not more than $50,000.00 in the aggregate or for the sum of all phases of a contract or project either by appropriation, grant-in-aid or loan are used or are to be used for all or part of the cost of construction shall be let by the town except after competitive sealed bidding or after competitive negotiation as provided by sections 4.3 and 4.4 of this Policy. The procedure for the advertising for bids or for proposals and for letting of the contract shall conform to the requirements of the appropriate section of this document.

4.3 *Procedures required for competitive sealed bidding - Invitation for Bid*

A. *Definition* - Competitive sealed bidding is a method of contractor selection that involves the process of inviting and obtaining bids electronically from competing sources in response to advertised specifications, by which an award is made to the lowest responsive and responsible bidder meeting the specifications. Each bidder must bid on the same advertised specifications, terms and conditions in all the items and parts of a contract. It does not include, for the most part, discussions or negotiations with the bidders. It is the preferred method for acquiring goods, services and construction by the Virginia Public Procurement Act.

B. *Invitation for bid.* The Procurement Official or Procurement Officer shall prepare a written solicitation (invitation for bid) and provide a complete copy to all persons requesting a copy. The invitation for bid shall contain, or incorporate by references, the specifications and contractual terms and conditions applicable to the procurement. If the invitation for bid does not provide for prequalification of bidders, the invitation for bid may contain any requisite qualifications for potential contractors. When it is impractical to prepare initially a purchase description to support an award based on prices, the Purchasing Agent of Procurement Officer may issue an invitation for bid requesting the submission of un-priced offers followed by an invitation for bid that is limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation. No invitation for bid for construction services shall condition a successful bidder's eligibility on having a specified experience modification factor.

For the purposes of this subdivision, "experience modification factor" means a value assigned to an employer as determined by a rate service organization in accordance with its uniform experience rating plan required to be filed pursuant to state law.

C. *Notice of invitation for bid.* Notice inviting bids shall be published at least ten days prior to the date set for receipt of bids by posting on the Virginia Department of General Services' central electronic procurement website, eVA, to provide the public with centralized visibility. In addition, the town may publish an advertisement in a newspaper of general circulation. The procurement official may also solicit bids directly from potential contractors.

D. *Contents of notice.* The notice required in this section shall include a brief description of the divisions to be purchased or sold and shall state where invitations for bid and specifications may be secured and shall state the time and place for the opening of the bids and, if different, the last day set for the submission of bids. If prequalification is required, such requirement shall be stated in the notice along with information as to where information concerning the prequalification procedure may be obtained. If prequalification of bidders is not required, the notice of invitation to bid shall include a statement of any requisite qualifications of potential contractors. The procurement official or officer may also solicit sealed bids by additional advertising.

E. *Prequalification of bidders.*

(1) The Procurement Official or Procurement Officer may require prospective contractors to prequalify for particular types of goods, services, insurance or construction, and consideration of bids limited to prequalified contractors. The Procurement Official or Officer shall establish any prequalification procedure utilized, in writing, sufficiently in advance of its implementation to allow potential contractors a fair opportunity to complete the process. Any prequalification procedure may require prospective contractors to submit such information as the Procurement Official or Officer shall deem appropriate including, but not limited to, financial reports and references.

(2) The Procurement Official may refuse to prequalify any prospective contractor, provided that a statement of the reasons for such a refusal to prequalify is made in writing, is provided to the prospective contractor thereby denied prequalification, and is made a part of the record in each case.

(3) In considering requests for prequalification, the Procurement Official or Officer shall determine whether there is reason to believe that the prospective contractor possesses the management, financial soundness

and history of performance that indicates apparent ability to complete successfully the plans and specifications of the invitation for bid.

(4) Prequalification of a bidder shall not constitute a conclusive determination that the bidder is responsible, and the Procurement Official may reject such a bidder as non-responsible on the basis of subsequently discovered information.

(5) Failure of a bidder to prequalify with respect to a given procurement shall not bar the bidder from seeking prequalification as to future procurements, or from bidding on procurements that do not require prequalification.

F. *Prequalification of bidders for construction contractors.*

(1) On order of the procurement official, the prequalification for prospective contractors may occur for particular types of supplies, services, insurance or construction, and consideration of bids or proposals limited to prequalified contractors.

(2) The town may adopt a prequalification process for prospective contractors for construction and shall apply such a prequalification process for construction projects adopted by the town. The process shall comply with the provisions of this section and the application form used in the prequalification process shall set forth the evaluation criteria used to qualify the prospective contractors. The application form shall request of prospective contractors only such information as is appropriate for an objective evaluation of all prospective contractors pursuant to such criteria. Such form shall allow the prospective contractor seeking prequalification to request, by checking the appropriate box, that all information voluntarily submitted by the contractor pursuant to this section is considered a trade secret or proprietary information subject to the provisions of section 4.5 of this Policy and the Virginia Freedom of Information Act.

(3) When the procurement official requires prequalification of potential contractors for construction projects, the procurement officer shall notify prospective contractors of the deadline for the submission of prequalification applications. The deadline for submission shall be sufficiently in advance of the date set for the submission of bids for such construction to allow the completion of procedures set forth in this section.

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

(5) A decision by the town denying prequalification under the provisions of this subsection shall be final and conclusive unless the contractor appeals the decision as provided in Code of Virginia, § 11-63.

(6) The Procurement Officer may deny prequalification to any contractor only if the procurement officer finds one of the following:

(a) The contractor does not have sufficient financial ability to perform the contract that would result from such procurement. If a bond is required to ensure performance of a contract, evidence that the contractor can acquire a surety bond from a corporation included on the United States Treasury list of acceptable surety corporations in the amount and type required by the procurement officer shall be sufficient to establish the financial ability of such contractor to perform the contract resulting from such procurement.

(b) The contractor does not have appropriate experience to perform the construction project in question.

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

(d) The contractor has been in substantial noncompliance with the terms and conditions of prior construction contracts with a public body without good cause. If the town has not contracted with a contractor in any prior construction contracts, the procurement officer may deny prequalification if the contractor has been in substantial noncompliance with the terms and conditions of comparable construction contracts with another public body without good cause. The procurement officer may not utilize this subsection to deny prequalification unless the facts underlying such substantial

noncompliance were documented in writing in the prior construction project file and such information related thereto given to the contractor at that time, with the opportunity to respond.

(e) The contractor, or any officer, director, owner, project manager, procurement manager or chief financial official thereof, has been convicted within the past ten years of a crime related to governmental or nongovernmental construction or contracting including, but not limited to, a violation of Code of Virginia, § 11-72 et seq., the Virginia Governmental Frauds Act, Code of Virginia, §§ 18.2-498.1 et seq., 59.1-68.6 et seq., or any substantially similar law of the United States or another state.

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

(7) The contractor failed to provide to the Procurement Official or Officer, in a timely manner, any information requested by the Procurement Official or Officer relevant to subsections (6)(a) through (6)(f) of this section.

G. *Withdrawal of bid due to error.*

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

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

(2) One of the following procedures for bid withdrawal shall be selected by the procurement official or officer and shall be stated in the notice of invitation to bid or request for proposals, other than contracts for construction or maintenance of public highways:

a. The bidder shall give notice in writing of his claim of right to withdraw his bid within two business days after the conclusion of the bid opening procedure and shall submit original work papers with such notice. The work papers, documents and materials submitted by the bidder shall, at the bidder's request, be considered trade secrets or proprietary information and are not subject to public disclosure under the Virginia Freedom of Information Act.

(3) No bidder may withdraw their bid under this subsection when the awarding of the contract on another bid of the same bidder would result or of another bidder in which the ownership of the withdrawing bidder is more than five percent.

(4) If a bid is withdrawn under the authority of this subsection, the lowest remaining bid is deemed as the low bid.

(5) No bidder who is permitted to withdraw a bid shall, for compensation, supply any material or labor to or perform any subcontract or other work agreement for the person 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.

(6) The Procurement Official shall notify the bidder in writing within five business days of its decision regarding the bidder's request to withdraw its bid. If the Procurement Official denies the withdrawal of a bid under the provisions of this section, it shall state in such notice the reasons for its decision and award the contract to such bidder at the bid price, provided such bidder is a responsible and responsive

bidder. At the same time that the notice is provided, the Procurement Official shall return all work papers and copies thereof that have been submitted by the bidder.

H. *Bid opening.*

(1) Bidder shall submit bids sealed in accordance with the instructions in the invitation to bid in accordance with the instructions in the invitation to bid by the closing date and time.

(2) Bids shall be opened in public and announced at the time and place stated in the public notice of invitation to bid. If a bid should accidentally be opened by town personnel prior to the announced bid opening, the bid shall be immediately resealed, and the contents shall not be disclosed to anyone prior to the opening of the bids in public at the time and place stated in the public notices.

I. *Bid evaluation.*

(1) In determining the lowest responsible bidder, in addition to price, the Procurement Official or Officer shall consider:

a. The ability, capacity and skill of the bidder to perform the contract or provide the service required;

b. Whether the bidder can perform the contract or provide the service promptly, or within the time specified, without delay or interference;

c. The character, integrity, reputation, judgment, experience and efficiency of the bidder;

d. The quality of performance of previous contacts or services;

e. The previous and existing compliance by the bidder with laws and ordinances relating to the contract or service;

f. The sufficiency of the financial resources and ability of the bidder to perform the contract or provide the service;

g. The quality and availability of the goods or services and the adaptability of the goods or services to the particular use required;

h. The ability of the bidder to provide future maintenance and service for the use of the subject of the contract;

i. The number and scope of conditions attached to the bid and the terms of the bid; and

j. In addition, the Procurement Official or Officer shall base the evaluation of bids on the requirements set forth in the notice of invitation to bid. Also, the Procurement Official or Officer may consider special qualifications of potential contractors, life cycle costing, value analysis and any other criteria such as inspection, testing or delivery, that are helpful in determining acceptability of bids.

(2) At the same time the bids are evaluated, using the relevant criteria set out in the solicitation, the Procurement Official or Officer shall determine in writing whether the apparent low bidder is responsible. If the Procurement Official or Officer makes the determination, then the town may proceed with an award. If the Procurement Official or Officer determines that the apparent low bidder is not responsible, the Procurement Official or Officer shall provide a written notification to the apparent non-responsible low bidder.

J. *Contract award.*

(1) When contracts are awarded, they shall go to the responsive bidder who is determined as the lowest responsible bidder. Except as otherwise permitted in this section, the town council shall approve awards by means of a resolution. When the invitation for bid has the appropriate condition included the awarding of a bid to more than one bidder may occur.

(2) Unless cancelled or rejected, a responsive bid from the lowest responsible bidder shall be accepted as submitted, except that if the bid from the apparent lowest responsible bidder exceeds available funds, the procurement official or officer may negotiate with the apparent lowest responsible bidder to try to obtain a contract price within available funds, provided that the town council has approved the written

conditions and procedures under which such negotiation may be undertaken prior to issuance of the invitation to bid, and that such conditions and procedures are summarized therein.

K. *Tie bids.*

In the case of a tie bid, preference shall be given to goods, services and construction produced in the town or provided by persons, firms or corporations having principal places of business in the town, if such a choice is available. If the previous sentence cannot be applied, preference shall be given to goods, services and construction produced in Virginia or provided by Virginia persons, firms or corporations, if such a choice is available. If the previous two sentences cannot be applied, in instances where goods are being offered, and existing price preferences have already been taken into account, preference shall be given to the bidder whose goods contain the greatest amount of recycled content. Whenever any bidder is a resident of any other state and such state under its laws allows a resident contractor of that state preference, a like preference may be allowed to the lowest responsible bidder who is a resident of Virginia.

L. *Notification to lowest responsible bidder of award.*

When awarded, the contract shall be awarded or notice of intent to award shall be issued, and written notice of the award or intent to award shall be sent, to the successful bidder with reasonable promptness, and posted on eVA, and on the Town's website.

M. Multi-Step Sealed Bidding.

When it is considered impractical to initially prepare a purchase description to support an award based on price, the Procurement Official or Officer may issue an invitation for bid requesting the submission of un-priced offers. Bidders whose offers are determined as technically acceptable under the criteria set forth in the first solicitation shall be invited to submit priced offers.

4.4 *Procedures required for Competitive Negotiation – Request for Proposals*

A. *Definition of competitive negotiation.* Competitive negotiation is a method of contractor selection that involves individual discussions between the town and at least two of the offerors (if available) deemed as fully qualified and best suited among those submitting proposals on the basis of responses to the town's request for proposals.

B. *Public notice.* At least ten days prior to the date set for receipt of proposals by posting on the Virginia Department of General Services' central electronic procurement website (eVA), or other appropriate websites. Additionally, the town may publish a notice in a newspaper of general circulation in the area where contract performance will occur so as to provide reasonable notice to the maximum number of offerors that are reasonably anticipated to submit proposals in response to the particular request. The Procurement Official or Officer may also solicit proposals directly from potential contractors.

C. *Request for proposals.* Written requests for proposals are required and shall indicate in general terms the good, service or item intended for acquisition through the procurement process, specifying the factors that are used in evaluating the proposal, indicate the scoring system intended for use in evaluating proposals such as a numerical scoring system and containing or incorporating by reference other applicable contractual terms and conditions, including any unique capabilities, specifications or qualifications that are required of the contractor. In the event that a numerical scoring system is used in the evaluation of proposals, include the point values assigned to each of the evaluation criteria in the request for proposal or posted at the location designated for public posting of procurement notices prior to the due date and time for receiving proposals. No request for proposal for construction authorized by this section shall condition a successful offeror's eligibility on having a specified experience modification factor. For purposes of this section, "experience modification factor" means a value assigned to an employer as determined by a rate service organization in accordance with its uniform experience rating plan required filing pursuant to subsection D of Code of Virginia, § 38.2-1913.

D. *Professional services; costs.* The procurement of professional services shall occur by competitive negotiation, except as otherwise provided for in this division. However, where the aggregate cost or

sum of all phases of the professional services does not exceed or is not expected to exceed, $80,000.00, the procurement may occur other than by competitive negotiation if, in the opinion of the Procurement Official or Officer, it is in the best interests of the town so to do.

(1) For professional services, the town 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 are permissible. The town shall encourage the offerors to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. In addition, the town shall inform the offerors of any ranking criteria that is intended for use by the town in addition to the review of the professional competence of the offeror. The request for proposal shall not, however, request that offerors furnish estimates of man-hours or cost for services. At the discussion stage, the town may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of price for services. In accordance with section 4.6 of this Policy, the town shall not disclose proprietary information from competing offerors to the public or to competitors. At the conclusion of discussions, outlined under this section, on the basis of evaluation factors published in the request for proposal and all information developed in the selection process to this point, the public body shall select in the order of preference two or more offerors whose professional qualifications and proposed services are deemed most meritorious.

Negotiations are then conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the public body is negotiated at a price considered fair and reasonable, the town shall award to that offeror. Otherwise, the town shall formally terminate negotiations with the offeror ranked first and shall begin conducting negotiations with the offeror ranked second, and so on until such a contract is negotiated at a fair and reasonable price.

Notwithstanding the foregoing, if the terms and conditions for multiple awards are included in the request for proposal, the town may award contracts to more than one offeror.

Should the town 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, the town may negotiate and award a contract to that offeror.

E. *Competitive negotiation impracticable or disadvantageous.*

Upon a written determination made in advance by the procurement official that competitive negotiation is either not practicable or not fiscally advantageous, the procurement of insurance may occur through a licensed agent or broker selected in the manner provided for the procurement of goods or services other than professional services in the subsection - *Evaluation factors and award for other than professional services*.

F. *Construction.*

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

(1) For the alteration, repair, renovation or demolition of buildings or structures when the contract price is not expected to exceed $1,500,000.00.

(2) For the construction of highways and any draining, dredging, excavation, grading or similar work upon real property; or

(3) For the construction, alteration, repair, renovation or demolition of buildings when approved by the town council on a fixed price design-build basis or construction management basis under Code of Virginia § 2.2-4308 when the contract is not expected to cost more than $1,500,000.00.

G. *Evaluation factors and award for other than professional services.*

The town council shall award any contract under this subsection where the cost of the procurement exceeds or is expected to exceed $50,000.00 for spot purchases or $100,000.00 for multi-year contracts; and the Procurement Official or Officer shall award any such contract when the cost for such procurement is or is expected to be $50,000.00 or less for spot purchases or single year contracts, or $100,000.00 or less for multi-year contracts. Council award is not required for the use of cooperative contracts. For goods, nonprofessional services and insurance, selection shall be made of two or more offerors deemed to be fully qualified and best suited among those submitting proposals, on the basis of the factors involved in the request for proposals, including price, if so stated in the request for proposals. Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered but need not be the sole determining factor. After negotiations have been conducted with each offeror so selected, the Procurement Official or Officer or the town council as appropriate will select the offeror who in its opinion has made the best proposal, and if the contract is awarded shall award the contract to that offeror. When the terms and conditions of multiple awards are provided for in the request for proposal, awards may be made to more than one offeror. Should the Procurement Official or Officer or the town council, as appropriate determine in writing 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.

H. *Evaluation factors, discussion and award with regard to professional services.*

The town council shall award any contract under this subsection where the cost of the procurement exceeds or is expected to exceed $80,000.00; and the Procurement Official or Officer shall award any such contract when the cost for such procurement is or is expected to be less than $80,000.00. The Procurement Official or Officer shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses to the request for proposals and with the emphasis on professional competence, to provide the required services. Repetitive informal interviews shall be permissible. Such offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. In addition, offerors shall be informed of any ranking criteria that will be used by the town in addition to the review of the professional competence of the offeror. At the discussion stage, the Procurement Official or Officer may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of price for services. Proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of such discussions, on the basis of evaluation factors published in the request for proposal and all information developed in the selection process to this point, the Procurement Official or Officer 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 town can be negotiated at a price considered fair and reasonable, the Procurement Official or Officer may award or recommend as appropriate that award be made to that offeror. Otherwise, negotiations conducted with the offeror ranked first shall be formally terminated and negotiations conducted with the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable price. Notwithstanding the foregoing, if the terms and conditions for multiple awards are included in the request for proposal, a Procurement Official or Officer, or the town council, may award contracts to more than one offeror. Should the Procurement Official or Officer or town council, as appropriate determine in writing 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, the negotiation and possible awarding of a contract to that offeror may occur.

I. *Architectural and professional engineering term contracting; limitations.*

(1) A contract for architectural or professional engineering services relating to multiple construction projects may be awarded by the town, provided (i) the projects require similar experience and expertise, (ii) the nature of the projects is clearly identified in the request for proposal, and (iii) the contract is limited to a term of one year or when the cumulative total project fees reach the maximum authorized in this section, whichever occurs first. Such contracts may be renewable for three additional one-year terms at the option of the town. The fair and reasonable prices as negotiated shall be used in determining the cost of each project performed.

(2) The sum of all projects performed in a one-year contract term shall not exceed $10 million, and the fee for any single project shall not exceed $ 2.5 million.

(3) Competitive negotiations for such architectural or professional engineering services contracts may result in awards to more than one offeror, provided (i) the request for proposal so states and (ii) the town has established procedures for distributing multiple projects among the selected contractors during the contract term. Such procedures shall prohibit requiring the selected contractors to compete for individual projects based on price.(*) See Page 42.

(4) For the purposes of subsection (2), any unused amounts from one contract term shall not be carried forward to any additional term.

J. The Procurement Official or Officer or town council may negotiate and award *multiphase professional services contracts* satisfactory and advantageous to the town for the completion of large, phased, or long-term projects based on a fair and reasonable price for the first phase only, when completion of the earlier phases is necessary to provide information critical to the negotiation of a fair and reasonable price for succeeding phases. Prior to the procurement of any such contract, the town shall state the anticipated intended total scope of the project and determine in writing that the nature of the work is such that the best interests of the town require awarding the contract.

K. *Job order contracting; limitations.*

(1) A job order contract may be awarded by a town for multiple jobs, provided (i) the jobs require similar experience and expertise, (ii) the nature of the jobs is clearly identified in the solicitation, and (iii) the contract is limited to a term of one year or when the cumulative total project fees reach the maximum authorized in this section, whichever occurs first. Contractors may be selected through either competitive sealed bidding or competitive negotiation.

(2) Such contracts may be renewable for three additional one-year terms at the option of the town. The fair and reasonable prices as negotiated shall be used in determining the cost of each job performed, and the sum of all jobs performed in a one-year contract term shall not exceed $10,000,000.00. Individual job orders shall not exceed $1,000,000.00.

(3) For the purposes of this section, any unused amounts from one contract term shall not be carried forward to any additional term.

(4) Order splitting with the intent of keeping a job order under the maximum dollar amounts prescribed in subsection (2) is prohibited.

(5) The town shall not issue or use a job order, under a job order contract, solely for the purpose of receiving professional architectural or engineering services that constitute the practice of architecture or the practice of engineering as those terms are defined in Code of Virginia, § 54.1-400. However, professional architectural or engineering services may be included on a job order where such professional services (i) are incidental and directly related to the job, (ii) do not exceed $25,000.00 per job order, and (iii) do not exceed $75,000.00 per contract term.

(6) Job order contracting shall not be used for construction, maintenance, or asset management services for a highway, bridge, tunnel, or overpass.

4.5 *PROVISIONS IN EVERY INVITATION FOR BID, REQUEST FOR PROPOSAL AND CONTRACT*

Unless specifically excluded and where applicable, the following provisions are deemed incorporated in every invitation to bid and request for proposal issued by the town and in every contract awarded by the town whether or not specifically appearing or referenced in the invitation to bid, the request for proposal, other solicitation documents or the contract.

A. *Contract pricing arrangements.*

(1) Except as otherwise prohibited by this division or by other applicable law, procurement contracts may be awarded by the town on any pricing arrangement appropriate to the procurement and in the best interests of the town.

(2) Except in case of emergency affecting the public health, safety or welfare, when the procurement cannot be accomplished in a timely manner on other pricing arrangements, the use of a cost plus a percentage of cost contract is prohibited; provided, however, that this prohibition shall not apply to a policy or contract of insurance or prepaid coverage having a premium computed on the basis of claims paid or incurred, plus the insurance carrier's administrative costs and retention stated, in whole or in part, as a percentage of such claims.

(3) A contract pricing arrangement based in whole or in part upon reimbursement of cost may be used only when a determination is made in writing by the town council that such contract is likely to be less costly to the town than any other type or that it is impracticable to obtain the supply, service or construction item required except under such a contract. Such written determination may be made by the procurement official or officer when the total price of the contract does not or is not expected to exceed $50,000.00 for spot purchases or single year contracts, or $100,000.00 for multi-year term contracts. Such written determination shall be made a part of the contract file.

B. *Use of brand names.*

Unless otherwise provided in the invitation to bid or request for proposals, the name of a certain brand, make or manufacturer does not restrict bidders to the specific brand, make or manufacturer named. It conveys the general style, type, character and quality of the division desired, and any division which the town, in its sole discretion, determines to be the equal of that specified, considering quality, workmanship, economy of operation and suitability for the purpose intended, shall be accepted.

C. *Cancellation or rejection of bids; waiver of informalities.*

(1) An invitation to bid, a request for proposals or other solicitation may be cancelled or any or all bids or proposals may be rejected in whole or in part, when the public body or official designated by the public body determines that it is in the best interests of the town to do so. The procurement official or officer shall have the authority to so act when the lowest bid or offer is not greater than $50,000.00 for spot purchases or single year contracts, or $100,000.00 for multi-year term contracts. The reasons for cancellation or rejection shall be made part of the contract file.

(2) The town has the right in its sole discretion to waive informalities in bids or proposals.

D. *Multi-year contract.*

Unless otherwise provided by law, a contract for goods, services or insurance may be entered into for any period of time deemed to be in the best interest of the town, provided that the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds, therefore. When funds are not appropriated or otherwise made available, for any reason, to support continuation of performance of any given contract in a subsequent fiscal period, the contract shall be cancelled, and the liability of the town shall be limited to paying for the goods, services or insurance accepted by the town prior to the date of cancellation. Purchase orders are issued each year and shall align with contract/project out years. The town shall have no liability for lost profits, termination costs or other damages of any sort arising from or related to such cancellation.

E. *Contract modification.*

Town contracts may include provisions for modification of the contracts during performance, but no fixed-price contract may be increased over the life of the contract by amounts totaling more than 25 percent of the amount of the contract or $50,000.00, whichever is greater, without the advance, written approval of the town council, except the procurement official or officer may act on contract modifications involving amounts less than $50,000.00. The amount of contract shall not be increased for any purpose without adequate consideration. Relief of an offeror or bidder from the consequences of an error in its bid or offer is prohibited without adequate consideration.

F. *Contractual disputes.*

(1) Contractual claims, whether for money or other relief, shall be submitted to the procurement official 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 in this subsection 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 amounts agreed due in the final payment.

(2) The town shall include in its contracts a procedure for consideration of contractual claims. Such procedure may be contained in the contract or may be specifically incorporated into the contract by reference and made available to the contractor.

(3) The procurement official or officer shall render a final decision on any such claim within 60 days of its submission or within 120 days after final payment, whichever is later. Failure by the procurement official to render a decision shall be deemed a denial of the claim as of the latest date a response was required.

(4) The decision of the procurement official shall be final and conclusive unless the contractor appeals within six months of the date of the final decision on the claim by the procurement official by invoking administrative procedures in accordance with Article 6 of this Policy, or in the alternative by instituting legal action as provided in [Code of Virginia,] § 2.2-4364.

G. *Public access to procurement information.*

(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, in accordance with the Virginia Freedom of Information Act (Code of Virginia, § 2.1-340 et seq.).

(2) Cost estimates relating to the proposed procurement transaction prepared by or for the town 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 if the town 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 if the town 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 established by the procurement official 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 shall not be subject to public disclosure under the Virginia Freedom of Information Act; however, the bidder, offeror or contractor must invoke the protections of this section prior to or upon submission of the data or other materials and must identify the data or other materials to be protected and state the reasons why protection is necessary.

(7) The individual is legally liable for procurements not the Town.

H. *Discrimination.*

In the solicitation or awarding of contracts, the town shall not discriminate because of race, religion, color, sex, sexual orientation, gender identity, or national origin, age, disability, status as a service disabled veteran, or any other basis prohibited by state law relating to discrimination in employment, of the bidder or offeror.

I. *Employment discrimination by contractor.* Every contract of over $10,000.00 shall include the following provisions:

(1) During the performance of the contract, the contractor agrees as follows:

a. The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by state law regarding discrimination in employment, except where religion, sex, or national origin is a

bona fide occupational qualification reasonably necessary to the normal operation of the contractor. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.

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

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

(2) The contractor shall include the provisions of subsections I.1, a-c of this section in every subcontract or purchase order of over $10,000.00, so that the provisions will be binding upon each subcontractor or vendor.

J. *Bonds.*

(1) *Bid bonds.* Except in cases of emergency, all bids or proposals for non-transportation related construction contracts in excess of $500,000.00 or transportation-related projects authorized under Article 2 [Code of Virginia] § 33.2-208 et seq. of Chapter 2 of Title 33.2 that are in excess of $350,000.00 and partially or wholly funded by the Commonwealth shall be accompanied by a bid bond from a surety company, selected by the bidder or offeror, which is authorized to do business in the commonwealth, as a guarantee that if the contract is awarded to such bidder or offeror, that bidder or offeror will enter into the contract for the work mentioned in the bid or proposal. The amount of the bid bond in such cases shall be in the amount equal to five percent of the amount bid.

a. A bid bond shall be forfeited to the town as liquidated damages upon the bidder's or offeror's failure to execute a contract awarded to him within seven days of the award or upon the bidder's or offeror's failure to furnish any required performance or payment bonds in connection with a contract awarded to him within seven days of the award unless, and only to the extent that, the seven-day requirement is waived in writing by the procurement official.

b. No forfeiture under a bid bond shall exceed the lesser of the difference between the bid for which the bond was written and the next low bid by a responsible bidder, or the face amount of the bid bond.

c. At the discretion of the procurement official or officer, bidders or offerors on a construction contract may be required to submit a bid bond in compliance with the foregoing requirements on a bid or proposal anticipated to be less than $500,000.00 for non-transportation-related projects or $350,000.00 for transportation-related projects authorized under Article 2 ([Code of Virginia,] § 33.2-208 et seq.) of Chapter 2 of Title 33.2 and partially or wholly funded by the commonwealth. Such condition and the amount of the bid bond required shall, if applicable, be specified in the invitation to bid or request for proposals.

d. For non-transportation-related construction contracts in excess of $100,000.00 but less than $500,000.00, where the bid bond requirements are waived, prospective contractors shall be prequalified for each individual project in accordance with section 4.3.F.

(2) *Performance and payment bonds.*

a. Except as otherwise provided, upon the award of any construction contract exceeding $500,000.00 awarded to any prime contractor; construction contract exceeding $500,000.00 awarded to any prime contractor requiring the performance of labor or the furnishing of materials for buildings, structures or other improvements to real property owned or leased by the town; construction contract exceeding $500,000.00 in which the performance of labor or the furnishing of materials will be paid with public funds; or transportation-related projects exceeding $350,000.00 that are partially or wholly funded by the Commonwealth, the contractor shall furnish to the town the following bonds:

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

ii. A payment bond in the sum of the contract amount. Such bond shall be for the protection of claimants who have or fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded, or to any subcontractors, in the furtherance of the work provided for in such contract and shall be conditioned upon the prompt payment for all such material furnished or labor supplied or performed in the furtherance of the work. Labor or material shall include public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site.

b. Each of such bonds shall be executed by one or more surety companies selected by the contractor which are legally authorized to do business in the commonwealth.

c. At the discretion of the procurement official or officer, the invitation to bid or request for proposals may specify that the successful bidder or offeror will be required to submit a payment or performance bond in compliance with the foregoing requirements on construction contracts for less than $350,000.00.

d. The performance and payment bond requirements of subsection J.1.d for transportation-related projects that are valued in excess of $250,000.00 but less than $350,000.00 may only be waived by the town if the bidder provides evidence satisfactory to the town that a surety company has declined an application from the contractor for a performance or payment bond.

(3) *Bonds generally.*

a. Bonds shall be made payable to the Town of Herndon.

b. Each of the bonds filed shall be filed with the procurement official, in a form acceptable to the procurement official.

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

(4) *Alternative forms of security.*

a. In lieu of a bid, payment or performance bond, a bidder may furnish a certified check, cashier's check, or cash escrow in the face amount, required for the bond. The town is authorized to deposit any such check and to retain the funds represented thereby as the cash escrow.

b. If approved by the town attorney, a bidder may furnish a personal bond, property bond, or bank or savings institution's letter of credit on certain designated funds in the face amount required for the bid, payment or performance bond. Approval shall be granted only upon a determination that the alternative form of security proffered affords protection to the town equivalent to a corporate surety's bonds.

(5) *Bonds on other than construction contracts.*

The town may require bid, payment or performance bonds for contracts for goods or services if so, specified in the invitation to bid or request for proposals.

(6) *Actions on performance bonds.*

No action against the surety on a performance bond shall be brought more than one year after completion of the contract, including the expiration of all warranties and guarantees, or discovery of the defect or breach of warranty, if the action is for such defect, or breach of warranty.

(7) *Actions on payment bonds.*

a. Subject to the provisions of section J, any claimant who has performed labor or furnished materials in accordance with the contract documents in the furtherance of the work provided in any contract for which a payment bond has been given, and who has not been paid in full therefore before the expiration of 90 days after the day on which such claimant performed the

last of such labor or furnished the last of such materials for which he claims payment, may bring an action on such payment bond to recover any amount due him for labor or material. The obligee named in the bond need not be named a party to such action.

b. Any claimant who has a direct contractual relationship with any subcontractor from whom the contractor has not required a subcontractor payment bond under the following subsection of this section, but who has no contractual relationship, express or implied, with such contractor, may bring an action on the contractor's payment bond only if he has given written notice to such contractor within 180 days from the day on which the claimant performed the last of the labor, or furnished the last of the materials for which he claims payment, stating the substantial accuracy the amount claimed and the name of the person for whom the work was performed or to whom the material was furnished. Any claimant who has a direct contractual relationship with a subcontractor from whom the contractor has required a subcontractor payment bond under the following subsection (10) g.3, but who has no contractual relationship, express or implied, with such contractor, may bring an action on the subcontractor's payment bond. Notice to the contractor shall be served by registered or certified mail, postage prepaid, in an envelope addressed to such contractor at any place where his office is regularly maintained for the transaction of business. Claims for sums, withheld as retainages with respect to labor performed or materials furnished, shall not be subject to the time limitations stated in this subsection.

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

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

(8) *Retainage on construction contracts.*

a. In any town contract for construction which provides for progress payments in installments based upon an estimated percentage of completion, the contractor shall be paid at least 95 percent of the earned sum when payment is due, with not more than five percent being retained to ensure faithful performance of the contract. All amounts withheld may be included in the final payment.

b. Any subcontractor for a town project which provides for similar progress payments shall be subject to the same limitations.

c. In any contract directly between the town and a contractor in the amount of $200,000.00 or more for construction of highways, roads, streets, bridges, parking lots, demolition, clearing, grading, excavating, piledriving, miscellaneous drainage structures, or the installation of water, gas, sewer lines or pumping stations where portions of the contract price are to be retained, the bid proposal shall include an option for the contractor to use an escrow account procedure for utilization of the town's retainage funds by so indicating in the space provided in the proposal documents. If the contractor elects to use the escrow account procedure, the escrow agreement form included in the bid proposal and contract shall be executed and submitted to the town within 15 calendar days after notification. If the escrow agreement form is not submitted within the 15-day period, the contractor shall forfeit his rights to the use of the escrow account procedure.

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

e. The provisions of this subsection concerning escrow account procedures for retainage shall not apply to town contracts for construction for railroads, public transit systems, runways, dams, foundations, installation or maintenance of power systems for the generation and primary and secondary distribution of electric current ahead of the customer's meter, the installation or

maintenance of telephone, telephone or signal systems for public utilities, and the construction or maintenance of solid waste or recycling facilities and treatment plants.

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

g. Any subcontract for a town project that provides for similar progress payments is subject to the provisions of this section.

K. *Termination for convenience of the town.*

The town may terminate performance of any contract, in whole or in part, at any time the procurement official or officer determines such action to be in the town's best interests. Notice of such termination shall be given to the contractor in writing, specifying the extent of the termination and the effective date. Upon receipt of such notice of termination, the contractor shall take all steps necessary to comply therewith. The liability of the town to the contractor shall be limited to paying at the contract rate for all performance of the contract accepted by the town.

L. *Qualifications of artificial persons.*

a. Every written contract procured under this article must provide that a contractor organized as a stock or nonstock corporation, limited liability company, business trust, or limited partnership or registered as a registered limited liability partnership shall be authorized to transact business in the Commonwealth as a domestic or foreign business entity if so required by the Virginia Public Procurement Act or as otherwise required by law.

b. Pursuant to competitive sealed bidding or competitive negotiation, if required under the Virginia Public Procurement Act or as otherwise required by law, the town shall include in the solicitation a provision that requires a bidder or offeror organized or authorized to transact business in the Commonwealth to include in its bid or proposal the identification number issued to it by the state corporation commission. Any bidder or offeror, who is a foreign business entity under the Code of Virginia or as otherwise required by law, shall include in its bid or proposal a statement describing why the bidder or offeror does not require authorization to transact business in the Commonwealth.

c. Any bidder or offeror described in subsection b. that fails to provide the required information shall not receive an award unless a waiver of this requirement and the administrative policies and procedures established to implement this section is granted by the town.

d. Any business entity described in this subsection that enters into a contract with the town pursuant to this article shall not allow the business entity's existence to lapse or its certificate of authority or registration to transact business in the Commonwealth, if so required under Code of Virginia or as otherwise required by law, to be revoked or cancelled at any time during the term of the contract.

e. The town may void any contract with a business entity if the business entity fails to remain in compliance with the provisions of this section.

M. Mandatory Terms and Conditions Applicable to all Contracts.

1. *Compliance with state law; contract terms inconsistent with state law.*
   a) As used in this section, "information technology goods and services" means communications, telecommunications, automated data processing, applications, databases, data networks, management information systems, and other related goods and services.
   b) No term or provision in any public contract for the acquisition of information technology goods or services shall be valid or enforceable to the extent that it is in conflict with Virginia law. A public contract containing such a term or provision shall otherwise remain enforceable.

c) Any term or provision in such a public contract that (i) makes the public contract subject to, governed by, or interpreted under the laws of another state or country or (ii) requires or permit to provide for the application of the law of the Commonwealth of Virginia, without regard to such contract's choice of law provisions, and to provide for jurisdiction in the courts of the Commonwealth.

The provisions of this act shall apply to any public contract that becomes effective on or after July 1, 2025

2. *Procurement of imported goods; forced and indentured child labor prohibition.*
   a) For the purposes of this section, "forced or indentured child labor" means all work or service (i) exacted from any person younger than 18 years of age under the menace of any penalty for the nonperformance of such work or service and for which such person does not offer himself voluntarily or (ii) performed by any person younger than 18 years of age pursuant to a contract the enforcement of which can be accomplished by process or penalties.
   b) A public body that enters into a public contract for goods or services that exceeds $10,000 shall include in such a public contract provisions (i) prohibiting the use of forced or indentured child labor in the performance of the contract and (ii) requiring that the contractor include such prohibition in every subcontract or purchase order that exceeds $10,000, so that the prohibition will be binding

4.6 *Exceptions to the requirement of competitive sealed bidding or competitive negotiation.*

A. *Sole source procurement.*

Upon a determination in writing by the town council (or the procurement official or officer for contracts that do not or that are not expected to exceed $50,000.00 in cost for a spot purchase or single year contract, or $100,000.00 for a multi-year contract) 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 such determination. Public award notices shall be posted on the Virginia Department of General Services' central electronic procurement website (eVA) or in a designated public area and on the town's procurement webpage or may be published in a newspaper of general circulation on the day the town council, procurement official or officer awards or announces its decision to award the contract, whichever occurs first.

B. Emergency purchases.

(1) In case of emergency, a contract may be awarded by the procurement official or officer without competitive sealed bidding or competitive negotiation; however, such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file.

(2) If any emergency occurs during regular town business hours, the using department shall immediately notify the procurement official or officer who shall either purchase the required supplies goods or services or authorize the using department to do so.

(3) If an emergency occurs at times other than regular business hours, and reasonable attempts to contact the procurement official or officer have failed, the using department may purchase directly the required supplies, goods or services. The department shall, however, to the extent as is practicable under the circumstance, secure competitive telephone bids, and the department shall order delivery to be made by the equivalent of the lowest responsible bidder. The head of the using department shall personally verify and promptly submit to the procurement official or officer a requisition, a tabulation of bids received, a copy of any delivery record received and a brief written explanation of the circumstances of the emergency and the reasons for choosing the bidder selected.

(4) In any situation where an emergency procurement occurs, the town 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.

Public award notices shall be posted on the Virginia Department of General Services' central electronic procurement website (eVA) or in a designated public area and on the town's procurement webpage or may be published in a newspaper of general circulation on the day the town council, procurement official or officer awards or announces its decision to award the contract, whichever occurs first, or as soon thereafter as is practicable.

C. *Small purchases.*

(1) The Procurement Official is authorized to establish small purchase procedures for any contract or purchase order where the estimated total of the materials, equipment, supplies, shipping, insurance, construction or service does not exceed or is not expected to exceed $50,000.00 for any spot purchase or single year contract, and any multi-year contract not exceeding or not expected to exceed $100,000.00 in the aggregate. Such procurements may be made without the necessity of competitive sealed bidding or competitive sealed negotiations. The Procurement Official may conduct an informal solicitation process. Town staff shall not artificially divided contract requirements so as to constitute small purchases for the purpose of qualifying under this provision.

(2) Under small purchase procedures, quotations shall be solicited under the guidance of the procurement official or officer, from three or more contractors or vendors, unless the procurement official or officer, in general or in specific cases, determines that using the procedures and standards of this division that such quote would not be possible or practical. Award, if made, shall be made to the responsible contractor or vendor making the best overall offer, considering such factors as price, quality, utility and the need for prompt delivery as well as the town's experience with and the reliability of the offeror. The names of the contractor or vendor submitting a quotation and the dates and amounts of each quotation, shall be recorded and maintained as a public record. Contract requirements shall not be artificially divided so as to constitute small purchases for the purpose of qualifying under this provision. No competition is required for purchases under $10,000.00 but a quote is required and attached to the purchase requisition. A minimum of three (3) quotes are required for purchases in excess of $10,000.00 and up to $50,000.00. These quotes are attached to the purchase requisition.

(3) Contracts or purchase orders to any single vendor not exceeding $10,000.00 per order with a maximum amount of $30,000.00 per department in a fiscal year shall not be subject to the town's small purchase requirements. Departments will solicit quotations and retain a written record as documentation of the contractor's pricing. The prohibition against artificially dividing contract requirements shall apply to all purchases regardless of amount.

(4) Purchasing Thresholds

Goods, Construction and Non-Professional Services		
Value	**Method of Procurement**	**Approval**
Below $ 10,000	Single quote	Department
$10,001 to $ 50,000	3 written quotes or rideable contract	Department
$50,001 to $ 100,000	Consult Procurement Agent	Department / Town Council
$100,001 or greater	TOH Formal Competitive Sealed Bidding (IFB), or Competitive Negotiations (RFP), or Rideable contract. For rideable contract, no council Approval is required.	Town Council
Professional Services		
Value	**Method of Procurement**	**Approval**
Below $ 80,000	Single Quote	Department
$80,001 or greater	Competitive Negotiations (RFP), or Rideable contract. For rideable contract, no council Approval is required.	Town Council
Note: Professional Services means the practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law, dentistry, medicine, optometry, pharmacy, or professional engineering. Shall also include the services of an economist.		

Transportation-related Construction		
Value	**Method of Procurement**	**Approval**
Below $ 25,000.00	Single Quote	Department
$25,001 to $50,000	3 written quotes or rideable contract	Department
$50,001 to $ 100,000	Consult Procurement Agent	Department / Town Council
$100,001 or greater	TOH Formal Competitive Sealed Bidding (IFB), or Competitive Negotiations (RFP), or Rideable contract. For rideable contract, no council Approval is required.	Town Council

D. *Auctions.*

Upon a determination made in advance by the town council, or procurement official for goods not exceeding or not expected to exceed $30,000.00 in cost and set forth in writing that the purchase of goods from the public auction sale is in the best interests of the public, such items may be purchased at the auction including online public auctions. The writing shall document the basis for this determination.

E. *Miscellaneous exceptions to requirement for competitive procurement.*

Transaction exempt from the competitive procurement requirements of the Virginia Public Procurement Act include:

(1) The purchase of goods and services which are performed or produced by persons, or in schools or workshops, under the supervision of the state department for the visually handicapped or which are performed or produced by nonprofit, sheltered workshops or other nonprofit organizations which offer transitional or supported employment services serving the handicapped. The term "sheltered workshop," for purposes of this subsection means 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.

(2) Contracts for legal services, expert witnesses, real estate appraisals, and other services associated with pending or contemplated litigation or regulatory proceedings.

(3) Any extension of 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.

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

4.7 *Participation in bid preparation; limitation on submitting bid for same procurement.*

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

4.8 *Disposal of surplus property.*

A. All using agencies shall submit to the procurement official, at such time and in such form as he shall prescribe, reports showing stocks of all goods and supplies which are no longer used or which have become obsolete, worn out or scrapped.

B. The Procurement Official shall have the authority to transfer surplus stock to other using agencies.

C. The Procurement Official and Officer have the authority to sell all goods and supplies which, in the opinion of the procurement official, have been or have become unsuitable or unnecessary for the town's use, or to exchange the same for, or trade in the same on, new supplies.

D. Sales under this section shall be made on the basis of competitive bids when practical to obtain the highest price. This includes the use of online auction services. The Procurement Official or Officer may require sealed bids in his discretion.

ARTICLE 5 – GENERAL BUSINESS PRACTICES

5.1 *Blanket Purchase Orders.*

Blanket purchase orders are entered at the beginning of each fiscal year. Funds for goods or services are encumbered for the entire year not monthly/quarterly amounts. Invoices throughout the year for the goods or services are drawn down from the encumbered amount of the purchase order.

5.2 *Purchase Requisitions, Purchase Orders and Change Orders.*

When creating a purchase requisition, ensure that your name is listed as the buyer and not the Purchasing Agent or Director of Finance. If issuing a blanket purchase order, make sure "blanket" is chosen under "Type" on the terms and miscellaneous tab.

5.3 *Quotes*.

Quotes are required to be attached to purchase requisitions and change orders.

Quotes are received and attached to a purchase requisition before work/delivery begins. The purchase order is issued to the vendor which gives the vendor the authority to begin work or ship items. An invoice and quote are not the same. See definitions listed above.

5.4 *Debarment.*

Authority to debar or suspend.

After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the procurement official, after consulting with the town attorney, may debar a person for cause from consideration for award of contracts. The debarment shall not be for a period of more than three years, and the notice to the person involved shall state the period for which debarment is proposed. After consultation with the town attorney, the procurement official may suspend a person from consideration for award of contracts if there is probable cause to believe that the person has engaged in any activity which might lead to debarment; provided, however, that if reasonable notice to the person involved and a reasonable opportunity for that person to be heard is not afforded with respect to a decision to suspend by the procurement official, an appeal to the town council shall be given expeditious consideration, and such suspension shall not be for a period exceeding six months.

The causes for debarment include:

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

B. Conviction of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously and directly affects responsibility as a town contractor.

C. Conviction under state or federal antitrust statutes arising out of the submission of bids or proposals.

D. Violation of contract provisions of a character which is regarded by the procurement official to be so serious as to justify debarment action:

1. Failure without good cause to perform in accordance with the specifications or within the time limit provided in a town contract; or

2. A recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided, however, that failure to perform or unsatisfactory performance, caused by acts beyond the control of or for which the contractor should not be held accountable, shall not be considered to be a basis for debarment.

E. Any other cause the procurement official or officer determines to be so serious and compelling as to affect responsibility as a town contractor, including violation of any ethical standards set forth in this division or debarment by another governmental entity.

F. A conviction or violation, for the purposes of this section, shall include, in the case of corporations, convictions or violations of any officer or director of the corporation, and in the case of partnerships, convictions or violations of any partner.

5.5 *Decision to debar or suspend.*

A. The procurement official shall issue a written decision with regard to any decision to debar or suspend. The decision shall state the reasons for the action taken, the period of time of debarment or suspension, and shall advise the debarred or suspended person involved briefly of his rights to a review of the decision by town council and to judicial review.

B. A copy of the decision shall be mailed by certified mail, return receipt, to the last known business or personal residence address of the debarred or suspended person or otherwise furnished promptly to the debarred or suspended person.

A decision by the procurement official denying pre-qualification under the provisions of this subsection is final and conclusive unless the contractor appeals the decision as provided in Article 6 of this Policy. The procurement official may deny pre-qualification to any contractor only if the procurement official finds one of the following:

1. The contractor does not have sufficient financial ability to perform the contract that would result from such procurement. If a bond is required to ensure performance of a contract, evidence that the contractor can acquire a surety bond from a corporation included on the United States Treasury list of acceptable surety corporations in the amount and type required by the procurement official shall be sufficient to establish the financial ability of such contractor to perform the contract resulting from such procurement;

2. The contractor does not have appropriate experience to perform the construction project in question;

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

4. The contractor has been in substantial noncompliance with the terms and conditions of prior comparable construction contracts with any public body without good cause; provided however, the procurement official shall not deny prequalification to the

contractor unless the facts underlying the substantial noncompliance were documented in writing and the contractor has been furnished a copy of the information thereto with the opportunity to respond;

5. The contractor or any officer, director, owner, project manager, procurement official or chief financial official thereof has been convicted within the past ten (10) years of a crime related to governmental or nongovernmental construction or contracting.

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

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

ARTICLE 6 – APPEALS AND REMEDIES FOR BID PROTESTS

6.1 *Finality of decisions of procurement official;* review by town council.

A. Decisions of the procurement official or officer regarding:

1. Debarment or suspension;

2. Withdrawal of bids;

3. A determination that an apparent low bidder is not a responsible bidder for a particular contract;

4. A refusal to prequalify a potential contractor for a particular contract when prequalification is a requirement of the procurement;

5. Contract modifications or involving contract claims or disputes; and

6. A refusal of permission to participate or disqualification from participation;

shall be considered final decisions of the town except that such decisions shall not be considered to be final decisions of the town when, but only when, review by the town council of any such decision is requested by a person affected by the decision in writing, stating the specific reasons why such a review is sought and filed with the procurement official within ten days of the decision of the procurement official or officer for which review is sought or, in the case of debarment or suspension, within ten days after receipt of the decision of the procurement official. The decision of the town council shall be rendered in writing and shall constitute the final decision of the town.

B. All other decisions of the procurement official or officer shall be considered final decisions of the town except when such decisions are to be made by town council under the provisions of this division. Subject to the provisions of subsection (a)(4) of this section, protest of award, all decisions of the town council shall be considered final decisions of the town.

C. No provision in this division shall be construed as precluding the procurement official or officer from submitting any matter to the town council for decision in the first instance.

D. Protest of award. Any bidder of offeror may protest the award or decision to award a contract by the procurement official or officer or the town council by submitting such protest in writing to the procurement official no later than ten days after public notice of 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 in a manner prescribed by the terms and conditions of the invitation for bid or request for proposal. 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 town council shall issue a decision in writing stating the reasons for the action taken on the protest, and such a decision shall be the final decision of the town.

E. Decisions by town council. All decisions by the town council on any request for review as set forth in this section shall be rendered within 45 days from the date the request for review was filed with the procurement official. Decisions on protests of awards or of decisions to award shall be rendered within ten days from the date the notice of protest was filed with the procurement official. The town council may decide the matter on the written submission of the protestant and the written response of the procurement official, or, in its sole discretion, request additional written argument, or oral argument at a public meeting of the town council. If the town council for any reason fails to render a decision within the required time, the decision of the procurement official or officer shall be deemed approved and is the town's final decision as of the date the town council decision was due. Such final decision shall be conclusive unless appealed to the county circuit court within 15 days of receipt of the decision.

6.2 *Remedies on appeal*

A. Decisions affecting eligibility.

1. If on appeal to the town council or to the courts it is determined that the debarment or suspension of a prospective contractor was arbitrary or capricious, or not in accordance with the law, the sole relief shall be restoration of eligibility.

2. Any bidder, offeror or contractor refused permission to participate, or disqualified from participation, in public contracts shall be notified in writing. Prior to the issuance of a written determination of disqualification or ineligibility, the procurement officer shall notify such person in writing of the results of the evaluation, disclose the factual support for the determination, and allow the person an opportunity to inspect any documents which relate to the determination, if so requested by the person within five business days after receipt of the notice.

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

4. If the evaluation reveals that the bidder, offeror or contractor should be allowed permission to participate in the public contract, the procurement officer 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 procurement officer shall so notify the bidder, offeror or contractor. Such notice shall state the basis for the determination, which shall be final unless such person appeals the decision within ten days after receipt of the notice by invoking procedures set out in this section.

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

6.3 *Appeal of denial of withdrawal of bid.*

A. A final decision by the town denying withdrawal of a bid shall be final and conclusive unless the bidder appeals the decision the county circuit court, pursuant to subsection 6.1.E of this Policy.

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

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

6.4 *Appeal of determination of nonresponsibility.*

A. Prior to the issuance of a written determination of nonresponsibility, the procurement officer shall notify the apparent low bidder in writing of the results of the evaluation, disclose the factual support for the determination, and 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 the receipt of the notice.

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

C. Such notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision to the town council within ten days after receipt of the notice by invoking procedures set out in this section.

D. The provisions of this section 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.

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

F. If, upon appeal to the circuit court, it is determined that the decision of the town was not an honest exercise of discretion, but rather was arbitrary or capricious or not in accordance with the state constitution, applicable state law or regulation, or the terms of conditions of the invitation to bid, and the award of the contract in question has not been made, the sole relief shall be a finding that the bidder is a responsible bidder for the contract in question.

6.5 *Protest of award or decision to award.*

A. A final decision by the town denying a protest of award or of decision to award shall be final and conclusive unless the bidder appeals the decision pursuant to subsections 6.3 or 6.4 of this section.

B. If prior to an award it is determined that the decision to award is arbitrary or capricious, or otherwise in violation of the law, then the sole relief shall be a finding to that effect. The town 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, or otherwise in violation of the law, 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 town may declare the contract void upon a finding that this action is in the best interest of the public. Where a contract is declared void, the performing contractor shall be compensated for the cost of performance up to the time of such declaration. In no event shall the performing contractor be entitled to lost profits.

C. Where the town council, procurement official or the court determines, after a hearing held following reasonable notice to all bidder, that there is probable cause to believe that a decision to award was based on fraud or corruption or an act in violation of Article 8 of this Policy, the town, procurement official or court may enjoin the award of the contract to a particular bidder.

6.6 *Effect of appeal upon contract.*

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

6.7 *Stay of award during protest.*

An award need not be delayed for the period allowed a bidder or offeror to protest, but in the event of a timely protest, no further action to award the contract will be taken unless there is a written determination by the procurement official that proceeding without delay is necessary to protect the public interest or unless the bid or offer would expire.

6.8 *Legal action.*

The town adopts the standards of proof and other elements set out in Code of Virginia, for the conduct of legal actions under this provision.

ARTICLE 7 – FAITH-BASED AND MINORITY BUSINESS ENTERPRISES

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

B. The town shall ensure that all invitations to bid, requests for proposals, contracts, and purchase orders prominently display a nondiscrimination statement indicating that the town does not discriminate against faith-based organizations.

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

D. Consistent with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193, funds provided for expenditure pursuant to contracts with the town shall not be spent for sectarian worship, instruction, or proselytizing; however, this prohibition shall not apply to expenditures pursuant to contracts, if any, for the services of chaplains.

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

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

G. The town shall provide to each individual who applies for or receives goods, services, or disbursements provided pursuant to a contract between the town and a faith-based organization a notice in bold face type that states: "Neither the town's selection of a charitable

or faith-based provider of services nor the expenditure of funds under this contract is an endorsement of the provider's charitable or religious character, practices, or expression. No provider of services may discriminate against you on the basis of religion, a religious belief, or your refusal to actively participate in a religious practice. If you object to a particular provider because of its religious character, you may request assignment to a different provider. If you believe that your rights have been violated, please discuss the complaint with your provider or notify the appropriate person as indicated in this form.

ARTICLE 8 - ETHICS IN PUBLIC CONTRACTING.

The provisions of the Virginia Public Procurement Act regarding ethics in public contracting are hereby incorporated in this section and adopted by reference.

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

8.1 *Definitions.*

As used in this article:

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

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

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

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

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

8.2 No Town employee having official responsibility for a procurement transaction shall participate in that transaction on behalf of the Town when the employee knows that:

A. The employee is contemporaneously employed by a bidder, offeror or contractor involved in the procurement transaction;

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

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

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

8.3 *Disclosure of subsequent employment.*

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

8.4 *Prohibition on solicitation or acceptance of gifts; gifts by bidders, offerors, contractor or subcontractors prohibited.*

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

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

8.5 *Kickbacks.*

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

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

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

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

8.6 *Participation in bid preparation; limitation on submitting bid for same procurement.*

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

8.7 *Purchase of building materials, etc., from architect or engineer prohibited.*

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

B. No building materials, supplies or equipment for any building or structure constructed by or for the Town shall be sold by or purchased from any person who has provided or is currently

providing design services specifying a sole source for such materials, supplies or equipment to be used in the building or structure to the independent contractor employed by the Town to furnish architectural or engineering services in which such person has a personal interest as defined in § 2.2-3101.

8.8 *Misrepresentations prohibited.*

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

ARTICLE 9 – SURPLUS PROPERTY.

9.1 *Disposal of surplus property*.

A. All using agencies shall submit to the procurement official, at such time and in such form as he shall prescribe, reports showing stocks of all goods and supplies that are no longer used or that have become obsolete, worn out or scrapped.

B. The procurement official shall have the authority to transfer surplus stock to other using agencies.

C. The procurement official and officer have the authority to sell all goods and supplies which, in the opinion of the procurement official, have been or have become unsuitable or unnecessary for the town's use, or to exchange the same for, or trade in the same on, new supplies.

D. Sales under this section shall be made on the basis of competitive bids when practical to obtain the highest price. This includes the use of online auction services. The procurement official or officer may require sealed bids in his discretion.

PUBLIC-PRIVATE EDUCATION FACILITIES AND INFRASTRUCTURE ACT OF 2002 PROCEDURES

In general.

A. The town council adopts as its guidelines for implementation of the Public-Private Education Facilities and Infrastructure Act of 2002, Code of Virginia, § 56-575.1, et seq. ("PPEA") those presented to the town council on August 11, 2015 and entitled "Town of Herndon Guidelines for Implementation of the Public-Private Education Facilities and Infrastructure Act of 2002, as amended - August 11, 2015". The guidelines are on file in the office of the town attorney.

B. The town will follow these guidelines for any procurements under the PPEA that are initiated after August 11, 2015.

C. The town council designates the town manager to serve as the point of contact to receive proposals submitted under the PPEA and to respond to inquiries regarding the PPEA.

FEDERAL GRANT FUNDED PROJECTS - PROCUREMENT REQUIREMENTS

Title 2: Grant and Agreements (2 CFR 200.317-326)
Part 200 – Uniform Administrative Requirements, Cost Principles, and audit requirements for federal awards
Subpart D – Post Federal Award Requirements

Procurement Policy and Procedures

The following procurement policies and procedures apply to all Federal Government Grant money awarded/issued to the Town of Herndon. In addition to these procurement policy and procedures, all of the Town of Herndon's

standard ordinances and procurement policy and procedures apply to Federal Government Grant money. When the two policy's conflict, these Federal Grant Policy and Procedures take precedence.

A. Definitions

Cost Analysis – a break out of costs for an item or service. Example: parts cost, labor cost, overhead costs, profit etc. Everything that is included in the price of an item or service broken out.
Informal procurement methods – include emailed, faxed or verbal quotes where no formal solicitation is posted to the public.

Price Analysis – process of examining and evaluating a prospective price without performing a cost analysis; that is, without evaluating separate cost elements and profit. Example: comparing proposed prices with prices of same or similar items obtained through market research.
Single Source – a procurement decision whereby purchases are directed to one source because of standardization, warranty or other factors, even though other competitive sources may be available.

Sole Source - May result because only one vendor or supplier possesses the unique capability to meet the particular requirements of the solicitation. There are no other supplier options.
Value Engineering – is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

B. General Procurement Standards

1) The Town is encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions.

2) The Town may use a time and materials type contract only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time and materials type contract means a contract whose cost to the Town is the sum of:

    a. The actual cost of materials; and
    b. Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.

3) Since this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the Town must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

4) The Town alone is responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the Town of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the Town unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction.

C. Competition

1) All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to:

    a. Placing unreasonable requirements on firms in order for them to qualify to do business;

b. Requiring unnecessary experience and excessive bonding;
c. Noncompetitive pricing practices between firms or between affiliated companies;
d. Noncompetitive contracts to consultants that are on retainer contracts;
e. Organizational conflicts of interest;
f. Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance or other relevant requirements of the procurement; and
g. Any arbitrary action in the procurement process.

2) The Town must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

3) The Town must have written procedures for procurement transactions. These procedures must ensure that all solicitations:

a. Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equivalent" description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated; and

b. Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

4) The Town must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the Town must not preclude potential bidders from qualifying during the solicitation period.

D. Methods of Procurement

1) Procurement by micro-purchases. Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold of $10,000.00. To the extent practicable, the Town must distribute micro-purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the Town considers the price to be reasonable. A written quote is required.

Micro-purchases mean $10,000, except it means -

1) For acquisitions of construction subject to 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction), $2,000;

2) For acquisitions of services subject to 41 U.S.C. chapter 67, Service Contract Labor Standards, $2,500;

3) For acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation; to facilitate defense against or recovery from cyber, nuclear, biological, chemical or radiological attack; to support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance pursuant to 22 U.S.C. 2292 et seq.; or to support response to an emergency or major disaster (42 U.S.C. 5122), as described in 13.201(g)(1), except for construction subject to 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction) (41 U.S.C. 1903) -

   (i) $20,000 in the case of any contract to be awarded and performed, or purchase to be made, inside the United States; and

4) For acquisitions of supplies or services from institutions of higher education (20 U.S.C. 1001(a)) or related or affiliated nonprofit entities, or from nonprofit research organizations or independent research institutes -

   (i) $10,000; or

   (ii) A higher threshold, as determined appropriate by the head of the agency and consistent with clean audit findings under 31 U.S.C. chapter 75, Requirements for Single Audits; an internal institutional risk assessment; or State law.

2) Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources.

   a. $10,001 to $50,000 three written quotes required. A no-bid/proposal does not count as a quote.

3) Procurement by sealed bids (formal advertising). Bids are publicly solicited, and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price.

4) In order for sealed bidding to be feasible, the following conditions should be present:

   a. A complete, adequate, and realistic specification or purchase description is available;

   b. Two or more responsible bidders are willing and able to compete effectively for the business; and

   c. The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

5) If sealed bids are used, the following requirements apply:

   a. Bids must be solicited from an adequate number of known suppliers, providing them sufficient response time prior to the date set for opening the bids (10 days minimum), for local governments, the invitation for bids must be publicly advertised using eVA and the Town of Herndon websites. The advertised bid may be placed in a local newspaper.

   b. The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;

c. All bids will be opened at the time and place prescribed in the invitation for bids. The bids must be opened and read aloud publicly including price;

d. A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

e. Any or all bids may be rejected if there is a sound documented reason.

6) Procurement by competitive proposals (formal advertising). The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids.

7) If sealed proposals are used, the following requirements apply:

a. Requests for proposals must be advertised on eVA, and on the Town's website and the solicitation must identify all evaluation factors and their relative importance. Any response to advertised requests for proposals must be considered to the maximum extent practical;

b. Proposals must be solicited from an adequate number of qualified sources;

c. The Town must have a written method for conducting technical evaluations of the proposals received and for selecting recipients;

d. Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

e. The Town may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated, and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

8) Procurement by noncompetitive proposals (Sole/Single Source). Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply:

a. The item is available only from a single source;

b. The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

c. The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the Town; or
d. After solicitation of a number of sources, competition is determined to be inadequate.

9) Prepare and submit to Purchasing an Independent Cost Estimate along with the Sole Source Justification form and detailed pricing from the vendor.

10) If the sole request is to be approved, prepare a cost analysis and submit to purchasing.

11) Purchasing will evaluate the cost analysis and negotiate with vendor as needed/required and handle public posting.

E. Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.

1) The Town must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible. This shall be achieved by listing solicitations on the eVA and Town of Herndon websites and through direct contact.

2) Affirmative steps must include:

   a. Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

   b. Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

   c. Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;

   d. Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;

   e. Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and

   f. Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (a) through (e) of this section.

F. Procurement of recovered materials.

The Town and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds $10,000 or the value of the quantity acquired during the preceding fiscal year exceeded $10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

G. Contract cost and price.

1) The Town must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold ($250,000) including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the Town must make independent estimates before receiving bids or proposals.

2) The Town must negotiate profit as a separate element of the price for each contract in which there is no price competition and, in all cases, where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

3) Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred, or cost estimates included in negotiated prices would be allowable for the Town.

4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

H. Federal awarding agency or pass-through entity review.

1) The Town must make available, upon request of the Federal awarding agency or pass-through entity, technical specifications on proposed procurements where the Federal awarding agency or pass-through entity believes such review is needed to ensure that the item or service specified is the one being proposed for acquisition. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the Town desires to have the review accomplished after a solicitation has been developed, the Federal awarding agency or pass-through entity may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

2) The Town must make available upon request, for the Federal awarding agency or pass-through entity pre-procurement review, procurement documents, such as requests for proposals or invitations for bids, or independent cost estimates, when:

   a. The Town's procurement procedures or operation fails to comply with the procurement standards in this part;

   b. The procurement is expected to exceed the Simplified Acquisition Threshold ($250,000) and is to be awarded without competition or only one bid or offer is received in response to a solicitation;

   c. The procurement, which is expected to exceed the Simplified Acquisition Threshold ($250,000), specifies a “brand name” product;

   d. The proposed contract is more than the Simplified Acquisition Threshold ($250,000) and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

   e. A proposed contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold.

I. Bonding Requirements

1) For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold ($250,000), the Federal awarding agency or pass-through entity may accept the bonding policy and requirements of the Town’s provided that the Federal awarding agency or pass-through entity has made a determination that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows:

   a. A bid guarantee from each bidder equivalent to five percent of the bid price. The “bid guarantee” must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.

   b. A performance bond on the part of the contractor for 100 percent of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

c. A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

J. Contract Provisions

In addition to other provisions required by the Federal agency or the Town, all contracts made by the Town under the Federal award must contain the following provisions as applicable.
These provisions shall be adopted as part of the "Terms and Conditions" of contracts issued under Federal Grants.

1) Contracts for more than the simplified acquisition threshold currently set at $250,000, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by 41 U.S.C. 1908, must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.

2) All contracts in excess of $10,000 must address termination for cause and for convenience by the Town including the manner by which it will be affected and the basis for settlement.

3) Equal Employment Opportunity. Except as otherwise provided under 41 CFR Part 60, all contracts that meet the definition of "federally assisted construction contract" in 41 CFR Part 60-1.3 must include the equal opportunity clause provided under 41 CFR 60-1.4(b), in accordance with Executive Order 11246, "Equal Employment Opportunity" (30 FR 12319, 12935, 3 CFR Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and implementing regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

4) Davis-Bacon Act, as amended (40 U.S.C. 3141-3148). When required by Federal program legislation, all prime construction contracts in excess of $2,000 awarded by the Town must include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 3141-3144, and 3146-3148) as supplemented by Department of Labor regulations (29 CFR Part 5, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction"). In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week. The Town must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. The Town must report all suspected or reported violations to the Federal awarding agency. The contracts must also include a provision for compliance with the Copeland "Anti-Kickback" Act (40 U.S.C. 3145), as supplemented by Department of Labor regulations (29 CFR Part 3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States"). The Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency.

5) Contract Work Hours and Safety Standards Act (40 U.S.C. 3701-3708). Where applicable, all contracts awarded by the Town in excess of $100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5). Under 40 U.S.C. 3702 of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the

work week. The requirements of 40 U.S.C. 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

6) Rights to Inventions Made Under a Contract or Agreement. If the Federal award meets the definition of "funding agreement" under 37 CFR §401.2 (a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that "funding agreement," the recipient or subrecipient must comply with the requirements of 37 CFR Part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," and any implementing regulations issued by the awarding agency.

7) Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act (33 U.S.C. 1251-1387), as amended—Contracts and subgrants of amounts in excess of $150,000 must contain a provision that requires the Town's award to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

8) Debarment and Suspension (Executive Orders 12549 and 12689)—A contract award (see 2 CFR 180.220) must not be made to parties listed on the governmentwide exclusions in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR part 1986 Comp., p. 189) and 12689 (3 CFR part 1989 Comp., p. 235), "Debarment and Suspension." SAM Exclusions contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.

9) Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)—Contractors that apply or bid for an award exceeding $100,000 must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award.

ARTICLE 10 – MISCELLANEOUS

10.1 Term Contract Architectural/Engineering Services – Project Distribution

For purchases made from term A/E contracts, the fee for any single project shall not exceed $2,500,000. The sum of all projects performed in a one-year contract term shall not exceed $10,000,000. Any unused amounts remaining for completed projects at the end of each contract term shall not be carried forward to any additional term.
The Town of Herndon may also use more than one firm when that is desirable for separate specialty categories or different construction phases.
For the purposes of identifying the thresholds below, the Town's project manager will estimate which threshold is applicable per Task Order. Should ultimate fee proposals exceed any threshold below, the Town's project manager will follow procedures to meet the new threshold.

Purchases $80,000 and Less: For projects with an A/E professional service fee of $80,000 or less, the Town may obtain a single proposal for the work from a professional, regardless of whether that professional holds a term contract with the Town of Herndon. Competition is not required.

Purchases above $80,000 but less than $2,500,000: The Town of Herndon will select the professional that the Town, in its own opinion, determines is the best technical or proficient firm for the project. This opinion may be informed by factors such as the term contract holders' proposals for the term contract, past performance, specialized experience, availability, and/or any other combination of factors. One selected firm will be asked to submit a Task Order proposal consisting of scope, cost, and schedule.

If the Town and the term contract holder cannot come to an agreeable Task Order contract (including on the basis of price), then the Town may terminate negotiations and request a Task Order proposal from another term contractor within that specialty. The Town may not compare price proposals for the purpose of selecting the most qualified firm.

If no Task Order is issued, the Town may begin a new Task Order request upon revising the project scope. This Task order request will proceed consistently with the policy outlined above.

Purchases above $2,500,000: The Town will follow competitive negotiations procedures