

# **TOWN OF HERNDON, VIRGINIA**

## **ORDINANCE**

**MAY 9, 2023**

**Ordinance-** to amend and re-enact Chapter 30 (FINANCE AND TAXATION), Article VIII (Fiscal Procedures), Division 2 (Procurement) by repealing Sec. 30-301 – Sec. 30-318 and by adding thereto new Secs. 30-301 – 30-307 relative to procurement proceedings.

**BE IT ORDAINED** by the Town Council for the Town of Herndon, Virginia, that:

1. The following sections or provision of the Herndon Town Code (2000), as amended, are repealed, replaced and re-ordained as follows:

### **CHAPTER 30 (FINANCE AND TAXATION)**

#### **Article VIII. Fiscal Procedures**

##### **Division 2. Procurement**

###### **~~Sec. 30-301. Purpose of division.~~**

~~The purpose of this division is to establish purchasing policies for the town for the procurement from nongovernmental sources of goods, materials, supplies, equipment, contracts, insurances and services necessary or desirable for the efficient and/or effective operation of the town government. It is the intent of the town council that competition is sought to the maximum practicable degree, that the rules governing contract awards be made clear in advance of the competition, that specifications reflect the procurement needs of the town rather than being drawn to favor a particular vendor, that the town and prospective vendors freely exchange information concerning what is sought to be procured and what is offered, that procurement procedures be fair and impartial with the avoidance of any impropriety, that all qualified vendors have access to the town's business, and that the town obtain high quality goods and services at a reasonable cost and, all other factors being equal, at the lowest available cost.~~

###### **~~Sec. 30-302. Applicability of division provisions.~~**

- ~~(a) Except as otherwise provided, this division shall apply to all procurements by the town from nongovernmental sources. This division does not apply to the granting of franchises, to the acquisition of real property, or to transactions involving special police work when the chief of police certifies to the procurement official that such transactions are needed for the gathering of information or evidence in undercover police operations.~~

~~(b) — Where a procurement transaction involves the expenditure of federal assistance or federal contract funds, the receipt of which is conditioned upon compliance with mandatory requirements in federal laws or regulations, not in conformance with the provisions of this division, the town may comply with such federal requirements, notwithstanding the provisions of this division and any otherwise applicable provisions of the Virginia Public Procurement Act, upon the written determination of the town council that acceptance of the grant or contract funds under the applicable conditions is in the public interest. Such determination shall state the applicable provision of this division and of the Virginia Public Procurement Act, if any, which is or are in conflict with the conditions of the grant or contract. In such cases, the procurement shall be made in accordance with the applicable mandatory federal laws or regulations.~~

### **~~Sec. 30-303. — Definitions.~~**

~~The following words, terms and phrases, when used in this division, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:~~

~~*Act* means the Virginia Public Procurement Act, Code of Virginia, § 2.2-4300 et seq.~~

~~*Alternate bid* means an additional bid submitted where the bidder knows that it differs materially from the specifications.~~

~~*Amendment* means 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 proposals and attachments, by additions, deletions or clarifications.~~

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

~~*Blanket purchase agreement* means a procurement instrument under which a purchaser contracts with a local vendor to provide for a purchaser's low or erratic usage for small order requirements items, goods, or services under the single quote limit.~~

~~*Brand name or equal specification* means a brand name specification to describe the standard of quality, performance, and other characteristics needed to meet the town's requirements and which provides for the submission of equivalent products.~~

~~*Business* means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture or any other private legal entity.~~

~~*Change order* means a written order signed by authorized personnel authorizing changes to any contract.~~

~~*Competitive negotiation* means the method of contractor selection set forth in section 30-309.~~

~~*Competitive sealed bidding* means the method of contractor selection set forth in section 30-308.~~

~~*Confidential and proprietary information* means any information which is submitted as part of a bid or proposal and noted as proprietary by the bidder or offeror.~~

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

~~*Contract* means an agreement enforceable by law, between two or more competent parties, to do or not do something not prohibited by law, for a consideration.~~

~~*Contractor* means any person having a contract with the town.~~

~~*Cost reimbursement contract* means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of this division, and a fee or profit, if any.~~

~~*Emergency* means a condition or occurrence of a sudden and unexpected nature threatening the public health, safety or welfare.~~

~~*Employment services organization* means an organization that provides employment services to individuals with disabilities that is an approved commission on the accreditations of rehabilitation facilities (CARF) accredited vendor of the department of aging and rehabilitative services.~~

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

~~*Gift* means any payment, loan, subscription, advance, and deposit of money, services or anything, present or promised, unless consideration of substantially equal or greater value is exchanged.~~

~~*Goods* means all material, equipment, supplies, printing and automated data processing hardware or software.~~

~~*Immediate family* means a spouse, child, parent, brother, sister and any other person living in the same household as the town employee or officer.~~

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

~~*Invitation to bid* means all documents, whether attached or incorporated by reference, utilized for soliciting sealed bids.~~

~~*Job order contracting* means a method of procuring construction services by establishing a book of unit prices and then obtaining a contractor to perform work as needed using the prices, quantities, and specifications in the book as the basis of its pricing. The contractor may be selected through either competitive sealed bidding or competitive negotiation depending on the needs of the public body procuring the construction services. A minimum amount of work may be specified in the contract. The contract term and the project amount shall not exceed the limitations specified in Code of Virginia, § 2.2-4303 or 2.2-4303.2.~~

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

~~*Multi-year contract* means a procurement contract that extends for longer than one year.~~

~~*Nonprofessional services* means any services not specifically identified as professional services.~~

~~*Person* means any business, individual, union, committee, club, other organization or group of individuals.~~

~~*Procurement file* means a secure file, manual or electronic, with controlled access within the Purchasing Department or end user's department.~~

~~*Professional services* means work performed by a real estate appraiser or an independent contractor within the scope of the practice of accounting, architecture, land surveying, landscape architecture, law, dentistry, medicine, optometry or professional engineering.~~

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

~~*Request for proposals* means all documents, whether attached or incorporated by reference, utilized for soliciting proposals.~~

~~*Request for quotation* means a request for quote from one or more vendors under an open market procurement where the estimated cost is less than \$50,000.00.~~

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

~~*Responsive bidder or offeror* means a person who has submitted a bid or offer which conforms in all material respects to the invitation to bid or request for proposals.~~

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

~~*Specification* means 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.~~

~~*Spot purchase* means a one-time purchase occasioned by a small requirement, an unusual or emergency circumstance, or a favorable market condition.~~

~~*Supplies, materials, equipment or commodities* mean any goods, articles or things which will be used by or furnished to the town.~~

~~*Using agency or using department* means any department, agency, commission, bureau or other unit in the town government requiring goods, supplies, services, insurance or construction.~~

### **~~Sec. 30-304. Office of the procurement official.~~**

- (a) ~~*Established.* The procurement system of the town shall operate under the direction of the town manager. The town manager shall appoint 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.~~

~~(b) —Bond. The procurement official and procurement officers shall give an official bond in the amount established by the town council.~~

~~(c) —Authority and duties of the procurement official.~~

~~(1) —The procurement official shall be responsible for the procurement of goods, services, insurance and construction for the town in accordance with this division, as well as the management and disposal of goods determined to be surplus to the needs of the town.~~

~~(2) —In accordance with this division, and subject to the supervision of the procurement official, the procurement officer shall:~~

~~a. —Purchase or supervise the purchasing of all goods, services, insurance and construction needed by the town.~~

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

~~c. —Sell, trade or otherwise dispose of surplus goods belonging to the town.~~

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

~~e. —Make and effectuate decisions on prequalifications of bidders.~~

~~f. —Make and effectuate decisions on the responsibility of bidders, in accordance with section 30-316(b)(3).~~

~~(3) —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.~~

~~(4) —The procurement official or, subject to such restrictions as the procurement official may establish as written regulations, the procurement officer, shall be 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, any multi year contract not in excess of, or expected to cost in excess of, \$100,000.00, and any purchase of goods or services acquired through cooperative procurement, regardless of dollar amount. 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, except for goods or services obtained through cooperative procurement, shall require affirmative action by the town council by means of a resolution authorizing such award.~~

~~(5) The procurement official or, subject to such restrictions as the procurement official may establish as written regulations, the procurement officer, 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 \$60,000.00.~~

~~(d) — *Delegation of authority.* 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.~~

~~(e) — *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 shall not be bound thereby.~~

### **~~Sec. 30-305. — Cooperative and joint procurement.~~**

~~(a) — The town may participate in, sponsor, conduct or administer a cooperative procurement agreement with one or more other public bodies, or agencies of the United States or the District of Columbia, for the purpose of combining requirements to increase efficiency, to reduce costs, or to reduce administrative expenses. Except for contracts for construction, not including the installation of artificial turf and track surfaces, and architectural and engineering services, the town may purchase from another public body's contract even if the town did not participate in the request for proposal or invitation to bid, if the request for proposal or invitation to bid specified that the procurement was being conducted on behalf of other public bodies. Any procurement through cooperative purchasing will be exempt from the provisions of this division, provided that such procurement is the result of competitive bidding or negotiations whenever practical, and is not in violation of the act. This subsection applies to the installation of artificial turf or other athletic services. This subsection does not apply to contracts for construction for which the town did not directly participate in or sponsor. Nothing in this subdivision shall be construed to prohibit sole source or emergency procurements.~~

~~(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, 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.~~~~

**~~Sec. 30-306. — Methods of procurement.~~**

- ~~(a) — All town contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance or construction shall be awarded after competitive sealed bidding or competitive negotiation as provided in this 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.~~

**~~Sec. 30-307. — 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 30-308 and 30-309. The procedure for the advertising for bids or for proposals and for letting of the contract shall conform to the requirements of sections 30-308 and 30-309.~~

**Sec. 30-308. -- Procedures required for competitive sealed bidding.**

- (a) ~~Definition of competitive sealed bidding.~~ Competitive sealed bidding is a method of contractor selection that involves the process of inviting and obtaining bids submitted in sealed envelopes from competing sources in response to advertised specifications, by which an award is made to the lowest and best 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 to bid.~~ A written invitation to bid shall be prepared and a complete copy thereof provided to all persons requesting the copy. The invitation to bid shall contain or incorporate by reference the specifications and contractual terms and conditions applicable to the procurement. If the invitation to bid does not provide for prequalification of bidders, any requisite qualifications or potential contractors shall be stated therein. When it is impractical to prepare initially a purchase description to support an award based on prices, an invitation to bid may be issued requesting the submission of unpriced offers to be followed by an invitation to bid limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation. No invitation to 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 to 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 and to the town's webpage. In addition, the town may publish in a newspaper of general

~~circulation. The procurement official may 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 to 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) — Prospective contractors may be required to prequalify for particular types of goods, services, insurance or construction, and consideration of bids limited to prequalified contractors. Any prequalification procedure utilized shall be established in writing by the procurement official 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 which indicate apparent ability to complete successfully the plans and specifications of the invitation to bid.~~

~~(4) — Prequalification of a bidder shall not constitute a conclusive determination that the bidder is responsible, and such a bidder may be rejected as nonresponsible 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 which do not require prequalification.~~

~~(6) — Prequalification of bidders for construction contracts shall be in accordance with section 30-310.~~

~~(f) — *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; or~~

~~b. — The bidder shall submit to the town procurement official his original work papers, documents and materials used in the preparation of the bid within one day after the date fixed for submission of bids. The work papers shall be delivered by the bidder in person or by registered mail at or prior to the time fixed for the opening of bids. The bids shall be opened one day following the time fixed by the town for the submission of bids. Thereafter, the bidder shall have two hours after the opening of bids within which to claim in writing any mistake as defined in this section and withdraw his bid. The contract~~

~~shall not be awarded by the town until the two hour period has elapsed. Such mistake shall be proved only from the original work papers, documents and materials delivered as required herein.~~

~~The work papers, documents and materials submitted by the bidder shall, at the bidder's request, be considered trade secrets or proprietary information subject to the conditions of section 30-312(7)f.~~

- ~~(3) — No bid may be withdrawn under this subsection when the result would be the awarding of the contract on another bid of the same bidder or of another bidder in which the ownership of the withdrawing bidder is more than five percent.~~
- ~~(4) — If a bid is withdrawn under the authority of this subsection, the lowest remaining bid shall be deemed to be 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.~~

~~(g) — *Bid opening.*~~

- ~~(1) — Bids shall be submitted sealed in accordance with the instructions in the invitation to bid and shall be identified as to the nature of the bid on the envelope. Any bid which is not submitted in an envelope identified as a bid may, but need not be, considered and/or accepted by the town if misplaced or not opened at the time of the public opening of the bids.~~
- ~~(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.~~

~~(h) — 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 contracts or services;~~

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

~~f. — The sufficiency of 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;~~

~~j. — In addition, evaluation of bids shall be based upon the requirements set forth in the notice of invitation to bid. Also, special qualifications of potential contractors, life cycle costing, value analysis and any other criteria such as inspection, testing or delivery, which are helpful in determining acceptability of bids may be considered.~~

~~(2) — At the same time the bids are evaluated, using the relevant criteria set out in this subsection (g), the procurement officer shall determine in writing whether the apparent low bidder is responsible. If the procurement officer so determines, then the town may proceed with an award in accordance with subsection (h) of this section. If the procurement officer determines that the apparent low bidder is not responsible, he shall proceed as in section 30-316(b)(3).~~

~~(i) — *Contract award.*~~

~~(1) — Contracts, when awarded, shall be awarded to the responsive bidder who is determined to be the lowest responsible bidder. Except as otherwise permitted in this section, no award may be made without prior approval by the town council by means of a resolution approving the award. Except as otherwise permitted in this section, when the terms and conditions of multiple bids are so provided in the invitation to bid, awards may be made to more than one bidder.~~

~~(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.~~

~~(j) — *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.~~

~~(k) — *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 in the office of the procurement official.

**~~Sec. 30-309. Competitive negotiation.~~**

- ~~(a) — *Definition of competitive negotiation.* Competitive negotiation is a method of contractor selection which involves individual discussions between the town and at least two of the offerors (if available) deemed to be 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 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. In addition, the procurement official or officer may solicit proposals directly from potential contractors.~~
- ~~(c) — *Request for proposals.* Requests for proposals shall be in writing and shall indicate in general terms the good, service or item intended for acquisition through the procurement process, specifying the factors that will be 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 which will be 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 to be filed pursuant to subsection D of Code of Virginia, § 38.2-1913.~~
- ~~(d) — *Professional services; costs.* Except as otherwise provided in this division, professional services shall be procured by competitive negotiation. However, where the aggregate cost or sum of all phases of the professional services does not exceed or is not expected to exceed, \$60,000.00, procurement may be accomplished by other than competitive negotiation~~

if, in the opinion of the procurement official 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 30-312(7)f., 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 shall then be 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) ~~Reserved.~~



- ~~(f) — *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, insurance may be procured through a licensed agent or broker selected in the manner provided for the procurement of goods or services other than professional services in subsection (h) of this section. The basis for this determination shall be documented in writing.~~
- ~~(g) — *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 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.~~
- ~~(h) — *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. 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.~~

- ~~(i) — *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 \$60,000.00; 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 \$60,000.00. 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, a contract may be negotiated and awarded to that offeror.~~

~~(j) — 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 four 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 \$750,000.00.~~

~~(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.~~

~~(4) — The fee for any single project shall not exceed \$150,000.00.~~

~~(5) — For the purposes of subsection (2), any unused amounts from one contract term shall not be carried forward to any additional term.~~

~~(k) — Multiphase professional services contracts satisfactory and advantageous to the town to the completion of large, phased, or long term projects may be negotiated and awarded based on a fair and reasonable price for the first phase only, 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.~~

~~(l) — 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 two 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 \$5,000,000.00. Individual job orders shall not exceed \$500,000.00.~~
- ~~(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.~~

**~~Sec. 30-310. — Prequalification of bidders for construction contractors.~~**

- ~~(a) 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.~~
- ~~(b) 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 be consistent with the provisions of this section and the application form used in the prequalification process shall set forth the criteria upon which the qualifications of prospective contractors will be evaluated. The application form shall request of prospective contractors only such information as is appropriate for an objective evaluation of all prospective contractors pursuant to such criteria. Such form shall allow the prospective contractor~~

~~seeking prequalification to request, by checking the appropriate box, that all information voluntarily submitted by the contractor pursuant to this section shall be considered a trade secret or proprietary information subject to the provisions of section 30-312(7)f. and the Virginia Freedom of Information Act.~~

- ~~(c) 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.~~
- ~~(d) 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 which 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.~~
- ~~(e) 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.~~
- ~~(f) The procurement officer may deny prequalification to any contractor only if the procurement officer 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 officer 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 within the past ten years for the breach of contracts for governmental or nongovernmental construction including, but not limited to, design-build or construction management.~~

- ~~(4) — The contractor has been in substantial noncompliance with the terms and conditions of prior construction contracts with a public body without good cause. If the 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.~~
- ~~(5) — The contractor, or any officer, director, owner, project manager, procurement manager or chief financial official thereof, has been convicted within the past ten years of a crime related to governmental or nongovernmental construction or contracting including, but not limited to, a violation of 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.~~
- ~~(6) — The contractor, or any officer, director or owner thereof, is currently debarred pursuant to an established debarment procedure from bidding or contracting by any public body, agency of another state or agency of the federal government.~~
- ~~(7) — The contractor failed to provide to the procurement official or officer, in a timely manner, any information requested by the procurement official or officer relevant to subsections (f)(1) through (f)(6) of this section.~~

**~~Sec. 30-311. — 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 negotiations. Contract requirements shall not be artificially divided so as to constitute small purchases for the purpose of qualifying under this provision.~~

~~(2) — Under small purchase procedures, quotations shall be solicited by 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 quotes 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.~~

~~(3) — Contracts or purchase orders to any single vendor not exceeding \$5,000.00 per order with a maximum amount of \$50,000.00 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.~~

~~(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.* The following transactions are hereby exempt from the competitive procurement requirements of this division:~~



- ~~(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.~~

**~~Sec. 30-312. — Procurement transactions.~~**

~~Where applicable, the following provisions, unless specifically excluded, shall be 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.~~

~~(1) — *Contract pricing arrangements.*~~

- ~~a. — 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.~~

- b. ~~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.~~
  - e. ~~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.~~
- (2) ~~*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.~~
- (3) ~~*Cancellation or rejection of bids; waiver of informalities.*~~
- a. ~~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, by the procurement official or officer, when it is determined that it is in the best interests of the town to do so. The reasons for cancellation or rejection shall be made part of the contract file.~~
  - b. ~~The town has the right in its sole discretion to waive informalities in bids or proposals.~~
- (4) ~~*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 therefor. 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. The town shall have no liability for lost profits, termination costs or other damages of any sort arising from or related to such cancellation.~~

~~(5) — *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 20 percent of the amount of the contract or \$50,000.00, whichever is less, 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.~~

~~(6) — *Contractual disputes.*~~

~~a. — 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.~~

~~b. — 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.~~

~~c. — 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.~~

~~d. 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 section 30-316, or in the alternative by instituting legal action as provided in [Code of Virginia,] § 2.2-4364.~~

~~(7) Public access to procurement information.~~

~~a. Except as provided in this section, all proceedings, records, contracts and other public records relating to procurement transactions shall be open to the inspection of any citizen, or any interested person, in accordance with the Virginia Freedom of Information Act (Code of Virginia, § 2.1-340 et seq.).~~

~~b. Cost estimates relating to the proposed procurement transaction prepared by or for the town shall not be open to public inspection.~~

~~c. Any competitive sealed bidding bidder, upon request, shall be afforded the opportunity to inspect bid records within a reasonable time after the opening of all bids but prior to award, except 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.~~

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

~~e. 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.~~

~~f. 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.~~

~~(8) — Discrimination. In the solicitation or awarding of contracts, the town shall not discriminate because of race, religion, color, sex or national origin of the bidder or offeror.~~

~~(9) — Employment discrimination by contractor. Every contract of over \$10,000.00 shall include the following provisions:~~

~~a. — During the performance of the contract, the contractor agrees as follows:~~

~~1. — 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.~~

~~2. — 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.~~

~~3. — 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.~~

~~b. — The contractor shall include the provisions of subsections (9)a.1, 2 and 3 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.~~

~~(10) — Bonds.~~

~~a. — 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 \$250,000.00 and partially or wholly funded by the commonwealth shall be accompanied by a bid bond from a surety company, selected by the bidder 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.~~

- ~~1. — 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.~~
- ~~2. — 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.~~
- ~~3. — 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 \$250,000.00 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.~~
- ~~4. — 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 30-310.~~

~~b. — *Performance and payment bonds.*~~

- ~~1. — Except as provided in subsection (10)b.4., 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.~~
- ~~2. 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.~~
  - ~~3. 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.~~
  - ~~4. The performance and payment bond requirements of subsection (10)b.1. 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.~~

~~c. — Bonds generally.~~

- ~~1. — Bonds shall be made payable to the Town of Herndon.~~
- ~~2. — Each of the bonds filed shall be filed with the procurement official, in a form acceptable to the procurement official.~~
- ~~3. — 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.~~

~~d. — Alternative forms of security.~~

- ~~1. — 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.~~
- ~~2. — 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.~~

~~e. — 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.~~

~~f. — 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. Any shorter time for commencement of an action or additional notice requirements affecting a right of action on the bond which appear in the bond form shall be void and of no effect.~~



~~g. — Actions on payment bonds.~~

- ~~1. — Subject to the provisions of subsection (10)g.2. of this section, 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 therefor 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.~~
- ~~2. — 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 (10)g.3 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.~~
- ~~3. — 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.~~
- ~~4. — 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.

~~(11) — 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, piling, 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 (11) 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 which provides for similar progress payments shall be subject to the provisions of this section.~~

~~(12) — *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.~~

~~(13) — *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 Code of Virginia tit. 13.1 or tit. 50 or as otherwise required by law.~~

~~b. — Pursuant to competitive sealed bidding or competitive negotiation, the town shall include in the solicitation a provision that requires a bidder or offeror organized or authorized to transact business in the commonwealth pursuant to Code of Virginia tit. 13.1 or tit. 50 to include in its bid or proposal the identification number issued to it by the state corporation commission. Any bidder or offeror that is not required to be authorized to transact business in the commonwealth as a foreign business entity under Code of Virginia tit. 13.1 or tit. 50 or as otherwise required by law shall include in its bid or proposal a statement describing why the bidder or offeror is not required to be so authorized.~~

~~e. — 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 subsection (13)a. above 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 tit. 13.1 or tit. 50 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.~~

**~~Sec. 30-313. — 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.~~

**~~Sec. 30-314. — 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. The procurement official or officer may require sealed bids in his discretion.~~

**~~Sec. 30-315. Debarment.~~**

~~(a) Authority to debar or suspend.~~

~~(1) 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.~~

~~(2) 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, as set forth in this subsection (a)(2)d, 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.~~

~~(b) — *Decision to debar or suspend.*~~

~~(1) — 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.~~

~~(2) — 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.~~

**~~Sec. 30-316. — Decisions, appeals and protests.~~**

~~(a) — *Finality of decisions of procurement official; review by town council.*~~

~~(1) — Decisions of the procurement official or officer regarding:~~

~~a. — Debarment or suspension;~~

~~b. — Withdrawal of bids;~~

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

- d. ~~A refusal to prequalify a potential contractor for a particular contract when prequalification is a requirement of the procurement;~~
- e. ~~Contract modifications or involving contract claims or disputes; and~~
- f. ~~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.~~

~~(2) 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.~~

~~(3) 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.~~

~~(4) 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.~~

~~(5) — Decisions by town council. Decisions on protests of awards or of decisions to award shall be scheduled for the next available meeting of the town council after the date the 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. 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.~~

~~(b) — Remedies on appeal.~~

~~(1) — Decisions affecting eligibility.~~

~~a. — 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.~~

~~b. — 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.~~

~~c. — 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.~~



- d. ~~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.~~
- e. ~~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.~~

~~(2) 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 pursuant to subsection (a)(5) of this section to the county circuit court.~~
- 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.~~

~~(3) 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.~~
- e. ~~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. ~~A bidder contesting a determination that the bidder is not a responsible bidder for a particular contract shall proceed under this subsection (b)(3), and may not protest the award under subsection (b)(4) of this section.~~
- f. ~~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.~~
- g. ~~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 or directed award as provided in Code of Virginia, § 11-70A. If it is determined that the decision of the public body was not an honest exercise of discretion, but rather was arbitrary or capricious or not in accordance with the state constitution, applicable~~

~~state law or regulation, or the terms or conditions of the invitation to bid, and an award of the contract has been made, the relief shall be as set forth in Code of Virginia, § 11-6(B).~~

~~(4) — 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 subsection (a)(5) of this section to the county circuit court.~~

~~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, the 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 section 30-317, the town, procurement official or court may enjoin the award of the contract to a particular bidder.~~

~~(5) — 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 filed.~~

~~(6) — 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.~~

- ~~(7) — Legal action. The town adopts the standards of proof and other elements set out in Code of Virginia, § 11-70, with necessary changes, for the conduct of legal actions under this division.~~

**~~Sec. 30-317. — Ethics in public contracting.~~**

~~The provisions of article 4, ethics in public contracting, of the Virginia Public Procurement Act, Code of Virginia, § 11-72 et seq., are hereby incorporated in this section and adopted by reference.~~

**~~Sec. 30-318. — Faith-based organizations.~~**

- ~~(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."~~

### **Sec. 30-301. Purpose.**

It is the intent of the town to maintain high public confidence in purchasing by the town, to encourage the maximum feasible competition in public purchasing among vendors and/or contractors, to administer fairly and equitably purchasing policies among all participants in the procurement process and to obtain high quality goods and services at reasonable cost.

### **Sec. 30-302. Purchasing Procedure.**

In furtherance of the foregoing purpose, the town shall adopt a Purchasing Policy and Procedures by Resolution, as permitted by and in accordance with the Virginia Public Procurement Act, Virginia Code Annotated, § 2.2-4300, et seq. (the "Act"), as the same may be amended, except as expressly modified in or supplemented by this division. The procurement process in the town shall be governed by the provisions of such Purchasing Policy and Procedures and as otherwise provided in this division. The Town Manager shall have the authority to supplement and amend the Purchasing Policy and Procedures from time to time as necessary to the extent that it is consistent with and does not exceed the authority and limitations of the Act.

**Sec. 30-303. Application.**

- (a) This division applies to contracts for the procurement of goods, services, insurance and construction entered into by the town involving every expenditure for public purchasing from non- governmental sources.
- (b) When the procurement involves the expenditure of federal assistance or contract funds, the procurement shall be conducted in accordance with any applicable mandatory federal law and regulations. Nothing in this division shall prevent the town from complying with the terms and conditions of any grant, gift, or bequest which are otherwise consistent with laws.

**Sec. 30-304. Effective date of division.**

The provisions of this division shall be effective June 1, 2023. The provisions of this division shall not apply to those contracts entered into prior to the effective date of this division, which shall continue to be governed by the Purchasing Policy and Procedures, ordinances and regulations of the town in effect at the time those contracts were executed.

**Sec. 30-305. Establishment of purchasing system.**

There is hereby created a purchasing system to operate under the direction of the town manager. The town manager shall appoint 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.

**Sec. 30-306. Office of the procurement official.**

- (a) Established. 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.
- (b) Authority and duties of the procurement official.
  - (1) The procurement official shall be responsible for the procurement of goods, services, insurance, and construction for the town in accordance with this division, as well as the management and disposal of goods determined to be surplus to the needs of the town.
  - (2) In accordance with this division, and subject to the supervision of the procurement official, a procurement officer shall:
    - a. Purchase or supervise the purchasing of all goods, services, insurance and construction needed by the town.

- b. Exercise supervision or control over central stores and supervise other inventories of goods belonging to the town.
  - c. Sell, trade or otherwise dispose of surplus goods belonging to the town.
  - d. Establish and maintain programs for specifications development, contract administration, inspection and acceptance, in cooperation with the using agencies of goods, services, and construction.
  - e. Make and effectuate decisions on prequalifications of bidders.
  - f. Make and effectuate decisions on the responsibility of bidders, in accordance with current Purchasing Policy and Procedures.
- (3) With the approval of the procurement official, a procurement officer may adopt operational procedures relating to the execution of the duties of a procurement officer which are consistent with this division.
- (4) The procurement official or, subject to such restrictions as the procurement official may establish as written regulations, a procurement officer, shall be 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, any multi-year contract not in excess of, or expected to cost in excess of, \$100,000.00, and any purchase of goods or services acquired through cooperative procurement, regardless of dollar amount. 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, except for goods or services obtained through cooperative procurement, shall require affirmative action by the town council by means of a resolution authorizing such award.
- (5) The procurement official or, subject to such restrictions as the procurement official may establish as written regulations, a procurement officer, 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.

**Sec. 30-306. Delegation of authority.**

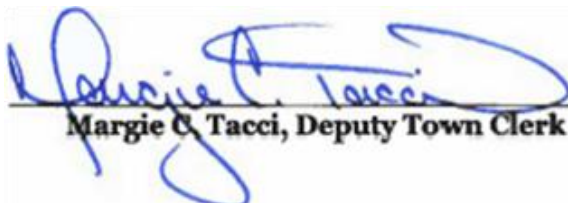
The procurement official may delegate authority to purchase certain goods, services, or construction to other town employees if such delegation is deemed necessary by the procurement official for the effective or efficient procurement of those items.

**Sec. 30-307. 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 contrary with the provisions of this division, and any purchase order or contract so made is not approved and the town shall not be bound thereby.

2. This ordinance shall be effective on June 1, 2023.

**This is certified to be a true and accurate copy of Ordinance 23-O-13 adopted at a legally convened meeting of the Town Council of the Town of Herndon on May 9, 2023.**

  
Margie C. Tacci, Deputy Town Clerk

