

## PURCHASING

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**[HISTORY: Adopted by the Council of the Town of Middleburg 4-14-83. Sections 20-9C and 20-15A, B, C(2) and (3) and H amended at time of adoption of Code; see Ch. 1, General Provisions, Art. I. Other amendments noted where applicable.]**

**§ 20-1. Purpose.**

The purpose of this chapter is to provide for the fair and equitable treatment of all persons involved in public purchasing by the Town of Middleburg, to maximize the purchasing value of public funds in procurement and to provide safeguards for maintaining a procurement system of quality and integrity.

**§ 20-2. Applicability.**

This chapter applies to contracts for the procurement of goods, services, insurance and construction entered into by this town.

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**§ 20-3. Effective date; effect on prior contracts.**

- A. This chapter shall become effective April 14, 1983.
- B. The provisions of this chapter shall not apply to those contracts entered into prior to January 1, 1983, which shall continue to be governed by the procurement policies and regulations of the town in effect at the time those contracts were executed.

**§ 20-4. Definitions.**

As used in this chapter, the following terms shall have the meanings indicated:

**BRAND NAME SPECIFICATION** - A specification limited to one (1) or more items by manufacturers' name or catalogue numbers.

**BUSINESS** - Any corporation, partnership, individual, sole proprietorship, joint-stock company, joint venture or any other private legal entity.

**CONSTRUCTION** - Building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavating, grading or similar work upon real property.

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

**CONTRACT** - All types of town agreements, regardless of what they may be called, for the procurement of goods, services, insurance or construction.

**CONTRACTOR** - Any person having a contract with the town or a using agency thereof.

**GOODS** - All material, equipment, supplies, printing and automated data processing hardware and software.

**GOVERNING BODY** - The Town Council.

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

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**INSURANCE** - A contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils.

**INVITATION FOR BIDS** - All documents, whether attached or incorporated by reference, utilized for soliciting sealed bids. No confidential or proprietary data shall be solicited in any invitation for bids.

**NONPROFESSIONAL SERVICES** - Any services not specifically identified as professional services as defined in this section.

**PROFESSIONAL SERVICES** - Work performed by an independent contractor within the scope of the practice of accounting, architecture, land surveying, landscape architecture, law, medicine, optometry or professional engineering.

**PUBLIC BODY** - Any legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in this chapter.

**REQUEST FOR PROPOSALS** - All documents, whether attached or incorporated by reference, utilized for soliciting proposals.

**RESPONSIBLE BIDDER OR OFFEROR** - A person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability which will assure good faith performance, and who has been prequalified, if required.

**RESPONSIVE BIDDER** - A person who has submitted a bid which conforms in all material respects to the invitation to bid.

**SERVICES** - Any work performed by an independent contractor wherein the service rendered does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials and supplies.

**SMALL BUSINESS** - A United States business which is independently owned and which is not dominant in its field of operation or an affiliate or subsidiary of a business dominant in its field of operation.

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**§ 20-5. Authority and duties of principal public purchasing official.**

- A. Designation of principal public purchasing official. The Town Administrator shall serve as the principal public purchasing official for this town and shall be responsible for the procurement of goods, services, insurance and construction in accordance with this chapter, as well as the management and disposal of supplies.
- B. Duties.
- (1) In accordance with this chapter and subject to the supervision of the Town Council, the Town Administrator shall:
    - (a) Purchase or supervise the purchasing of all goods, services, insurance and construction needed by this town.
    - (b) Exercise direct supervision over the town's central stores and general supervision over all 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 and inspection and acceptance, in cooperation with the public agencies using the goods, services and construction.
  - (2) In carrying out these duties, the Town Administrator shall have the power to:
    - (a) Purchase or contract for all goods, services, insurance and construction required except as provided herein.
    - (b) Ensure preparation and enforcement of standard specifications.
    - (c) Ensure the inspection of all deliveries of goods, services or construction purchased through him to determine their conformance with the order or contract.
    - (d) Act to procure for the town the highest quality in goods, services, insurance and construction at the least expense to the town.
    - (e) Endeavor to obtain as full and open competition as may be practicable on all purchases and sales.

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- (f) Perform such other functions and duties in keeping with good purchasing practices and such other duties as the Council may assign.

**§ 20-6. Unauthorized purchases. [Amended 3-8-1990]**

Except as herein provided, no official elected or appointed or any employee shall purchase or contract for any goods, services, insurance or construction within the purview of this chapter other than through the Town Administrator, and any purchase order or contract made contrary to the provisions hereof is not approved, and the town shall not be bound thereby.

**§ 20-7. Cooperative procurement.**

The Town Administrator has the duty to develop, to the maximum extent possible, a program for the joint or cooperative purchasing of common-use supplies with the surrounding governing bodies, the Commonwealth of Virginia and other public agencies in the surrounding area and to endeavor to arrange for a program of standardization of common-use supplies. Items so procured under a cooperative agreement with other jurisdictions shall be exempted from the provisions of this chapter, provided that such procurements are the result of competitive bidding wherever practicable.

**§ 20-8. Competitive bidding procedures.**

- A. Conditions for use. All public contracts with nongovernmental contractors for the purchase or lease of goods or for the purchase of services, insurance or construction shall be awarded after competitive bidding when directed by the Town Council. The procurement of all professional services as defined herein shall be by competitive negotiation.
- B. Competitive bidding on state-aid projects. No contract for the construction of any building or for an addition to or improvement of an existing building for which state funds of one hundred thousand dollars (\$100,000.) or more, either by appropriation, grant-in-aid or loan, are used or are to be used for all or part of the cost of construction shall be let except after competitive bidding. No person or firm shall be eligible to bid on any such contract nor have the same awarded to him or anyone who has been engaged as architect or engineer for the same project.
- C. Public access to procurement information. Except as provided herein, all proceedings, records, contracts or other public records relating to procurement transactions shall be open to the inspection of any citizen or any interested person, firm, or corporation, in accordance with the Virginia

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Freedom of Information Act.<sup>1</sup> Cost estimates relating to a proposed transaction prepared by or for the town shall not be open to public inspection. Any bidder or offeror, upon request, shall be afforded the opportunity to inspect bid and proposal records within a reasonable time after the opening of all bids but prior to award, except in the event that the town decides not to accept any of the bids and to reopen the contract. Otherwise, bid and proposal records shall be open to public inspection only after award of the contract. Any inspection of procurement transaction records under this section shall be subject to reasonable restrictions to ensure the security and integrity of the records. 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.

- D. Employment discrimination by contractor prohibited. Every contract of over ten thousand dollars (\$10,000.) shall include the provisions in Subsection D(1) and (2) below:
- (1) During the performance of this contract, the contractor agrees as follows:
    - (a) The contractor will not discriminate against employee or applicant for employment because of race, religion, color, sex or national origin, except where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.
    - (b) The contractor, in all solicitation or advertisements for employees placed by or on behalf of the contractor, will state that such contractor is an equal opportunity employer.
    - (c) Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be

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<sup>1</sup> Editor's Note: See §§ 2.1-340 to 2.1-346.1, Code of Virginia

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deemed sufficient for the purpose of meeting the requirements of this section.

- (2) The contractor will include the provisions of the foregoing Subsection D(1)(a), (b) and (c) in every subcontract or purchase order of over ten thousand dollars (\$10,000.), so that the provisions will be binding upon each subcontractor or vendor.

**§ 20-9. Competitive negotiation procedures.**

- A. Conditions for use. When procuring professional services as defined herein, the following procedures will apply.
- B. Request for proposals. Request for proposals shall be in writing and indicate in general terms that which is sought to be procured, specifying the factors which will be used in evaluating the proposal and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities or qualifications which will be required of the contractor.
- C. Public notice. At least ten (10) days prior to the date set for receipt of proposals, public notice shall be given by posting in a public area normally used for posting of public notices or by publication in a newspaper of general circulation in the in which the contract is to be performed, or both. In addition, proposals may be solicited directly from potential contractors. Whenever solicitations are made, businesses selected from a list made available by the Office of Minority Business Enterprises shall be included.<sup>2</sup>
- D. Discussion and award. The Town Administrator shall engage in individual discussions with all offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence, to provide the required services. Repetitive informal interviews shall be permissible. Such offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project as well as alternative concepts. These discussions may encompass nonbinding estimates of total project costs, including, where appropriate, design, construction and life-cycle costs. Methods to be utilized in arriving at price for services may also be discussed. Proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of discussion, outlined herein, on the basis of evaluation factors published in the request for proposal and all information developed in the selection process to this point, the Town Administrator shall select in the order of preference two

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<sup>2</sup> Editor's Note: Amended at time of adoption of Code; see Ch. 1, General Provisions, Art. 1.

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(2) or more offerors whose professional qualifications and proposed services are deemed most meritorious. Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the town can be negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable price. Should the Town Administrator determine in writing and when approved by the Town Council that only (1) offeror is fully qualified or that one (1) offeror is clearly more highly qualified and suitable than the others under consideration, a contract may be negotiated and awarded to that offeror.

**§ 20-10. Sole source procurement.**

Upon a determination in writing by the Town Administrator, when approved by the Town Council, that there is only one (1) source practicably available for that which is to be procured, a contract may be negotiated and awarded to that source without competitive bidding or competitive negotiation. The writing shall document the basis for this determination.

**§ 20-11. Emergency purchases.**

- A. In case of emergency, a contract may be awarded without competitive bidding or competitive negotiation; however, such procurement shall be made with such competition as is practicable under the circumstances. A written determination by the Town Administrator of the basis of the emergency and for the selection of the particular contractor shall be included in the contract file.
- B. An emergency shall be deemed to exist when a breakdown in machinery or equipment and/or a threatened termination of essential services or a dangerous condition develops, or when any unforeseen circumstances arise causing curtailment or diminution of an essential service or where materials or services are needed to prevent loss of life or property.

**§ 20-12. Small purchases.**

- A. All purchases of goods, contractual services, professional services, insurance and capital improvements estimated to be less than fifteen thousand dollars (\$15,000.) in value shall not be subject to the requirements of competitive bidding or competitive negotiation provisions of this chapter; provided, however, that the Town Administrator shall, whenever the amount thereof exceeds five hundred (\$500.), secure two (2) or more proposals in the commodity area of the transaction.

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- B. No purchase by a town employee of twenty-five dollars (\$25.) or more shall be made without the prior approval of the Town Administrator.

**§ 20-13. Exempt transactions.**

The following transactions are hereby exempt from the provisions of this chapter:

- A. Purchases from the state penitentiary or state contracts from the State Purchasing Department warehouse.
- B. Legal services associated with actual or potential litigation.
- C. Purchases for special police work when the Chief of Police certifies to the Town Administrator that items are needed for police operations.

**§ 20-14. Discrimination prohibited.**

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.

**§ 20-15. Ethics in public contracting.**

- A. Purpose. The provisions of this section supplement, but do not supersede other provisions of law, including but not limited to the State and Local Government Conflict of Interest Act (Code of Virginia, § 2.1-599 et seq.), the Virginia Governmental Frauds Act (Code of Virginia § 18.2-498.1 et seq.) and Articles 2 and 3 of Chapter 10 of Title 18.2 of the Code of Virginia. The provisions of this section apply notwithstanding the fact that the conduct described may not constitute a violation of the State and Local Government Conflict of Interests Act.<sup>3</sup>
- B. Definitions. The words defined in this subsection shall have the meanings set forth below throughout this section:

**IMMEDIATE FAMILY** - A spouse, children, parents, brothers and sisters and any other person living in the same household as the employee.

**OFFICIAL RESPONSIBILITY** - Administrative or operating authority whether immediate or final, to initiate, approve, disapprove or otherwise affect a procurement transaction, or any claim resulting therefrom.

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<sup>3</sup> Editor's Note: Amended at time of adoption of Code; see Ch. 1, General Provisions, Art. I

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**PERSONAL INTEREST** - A financial benefit or liability as defined in the State and Local Government Conflict of Interests Act.<sup>4</sup>

**PROCUREMENT TRANSACTION** - All functions that pertain to the obtaining of any goods, services or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract and all phases of contract administration.

**PUBLIC EMPLOYEE** - Any person employed by a governing body, including elected officials or appointed members of governing bodies.

- C. Proscribed participation by public employees in procurement transactions. No public employee having official responsibility for a procurement transaction shall participate in that transaction on behalf of the governing body when the employee knows that:
- (1) The employee is contemporaneously employed by a bidder, offeror or contractor involved in the procurement transaction.
  - (2) The employee, the employee's partner or any member of the employee's immediate family holds a position with a bidder, offeror or contractor, such as an officer, director, trustee, partner or the like, or is employed in a capacity involving personal and substantial participation in the procurement transaction, or owns or controls an interest of more than three percent (3%).<sup>5</sup>
  - (3) The employee, the employee's partner or member of the employee's immediate family has a personal interest arising from the procurement transaction.<sup>6</sup>
  - (4) The employee, the employee's partner or any member of the employee's immediate family is negotiating or has an arrangement concerning prospective employment with a bidder, offeror or contractor.
- D. Solicitation or acceptance of gifts. No public employee having official responsibility for a procurement transaction shall solicit, demand, accept or agree to accept from a bidder, offeror, contractor or subcontractor any payment, loan, subscription, advance, deposit of money, services or anything of more than nominal or minimal value, present or promised,

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<sup>4</sup> Editor's Note: Amended at time of adoption of Code; see Ch. 1, General Provisions, Art. I

<sup>5</sup> Editor's Note: Amended at time of adoption of Code; see Ch. 1, General Provisions, Art. I

<sup>6</sup> Editor's Note: Amended at time of adoption of Code; see Ch. 1, General Provisions, Art. I

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unless consideration of substantially equal or greater value is exchanged. The town may recover the value of anything conveyed in violation of this section.

- E. Disclosure of subsequent employment. No public employee or former public employee having official responsibility for procurement transactions shall accept employment with any bidder, offeror or contractor with whom the employee or former employee dealt in an official capacity concerning procurement transactions for a period of one (1) year from the cessation of employment by the town unless the employee or former employee provides written notification to the Town Council prior to commencement of employment by that bidder, offeror or contractor.
- F. Gifts by bidders, offerors, contractors or subcontractors. No bidder offeror, contractor or subcontractor shall confer upon any public employee having official responsibility for a procurement transaction any payment, loan, subscription, advance, deposit of money, services or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is exchanged.
- G. Kickbacks.
  - (1) No contractor or subcontractor shall demand or receive from any of his suppliers or his subcontractors, as an inducement for the award of a subcontract or order, any payment, loan subscription, advance, deposit of money, services or anything, present or promised, unless consideration of substantially equal or greater value is exchanged.
  - (2) No subcontractor or supplier shall make or offer to make kickbacks as described in this section.
  - (3) No person shall demand or receive any payment, loan, subscription, advance, deposit of money, services or anything of value in return for an agreement not to compete on a public contract.
  - (4) If a subcontractor or supplier makes a kickback or other prohibited payment as described in this section, the amount thereof shall be conclusively presumed to have been included in the price of the subcontract or order and ultimately borne by the town and will be recoverable from both the maker and recipient. Recovery from one offending party shall not preclude recovery from other offending parties.

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- H. Purchase of building materials, etc., from architect or engineer prohibited. Except in cases of emergency, no building materials, supplies or equipment for any building or structure constructed by or for the town shall be sold by or purchased from any person employed as an independent contractor by the town to furnish architectural or engineering services, but not construction, for such building or structure, or from any partnership, association or corporation in which such architect or engineer has a personal interest.<sup>7</sup>
- I. Penalty for violation. Willful violation of any provisions of this section shall constitute a Class 1 misdemeanor. Upon conviction, any public employee, in addition to any other fine or penalty provided by law, shall forfeit his employment.

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<sup>7</sup> Editor's Note: Amended at time of adoption of Code; see Ch. 1, General Provisions, Art. I