

PURCHASING

Chapter 20.1**PURCHASING****ARTICLE I – GENERAL PROVISIONS**

- § 20.1-1 Purpose
- § 20.1-2 Applicability
- § 20.1-2.1 Conflicts
- § 20.1-3 Definitions
- § 20.1-4 Effective date; effect on prior contracts
- § 20.1-5 Exemptions
- § 20.1-6 Individual Exceptions by Action of Council
- § 20.1-7 Principal Purchasing Official; Power and Duties
- § 20.1-8 Unauthorized purchases

ARTICLE II – METHODS OF PROCUREMENT; PROCEDURES

- § 20.1-9 Competitive Negotiations
- § 20.1-10 Competitive Sealed Bids
- § 20.1-11 Cooperative Procurement
- § 20.1-12 Emergency Purchases
- § 20.1-13 Sole Source Procurement
- § 20.1-14 Small Purchases

ARTICLE III – REQUIREMENTS RELATED TO PROCUREMENT

- § 20.1-15 Brand Names
- § 20.1-16 Competitive Procurement on State-Aid Project
- § 20.1-17 Employment Discrimination by Contractor Prohibited; Required Contract Provisions
- § 20.1-18 Withdrawal of Bid Due to Error
- § 20.1-19 Retainage on Construction Contracts
- § 20.1-20 Deposit of Retained Funds on Certain Contracts; Penalty for Failure to Timely Complete
- § 20.1-21 Public Construction Contract Provisions Barring Damages for Unreasonable Delays Declared Void
- § 20.1-22 Bid Bonds
- § 20.1-23 Performance and Payment Bonds
- § 20.1-24 Alternative Forms of Security
- § 20.1-25 Permitted Contract With Certain Religious Organizations; Purpose; Limitations

PURCHASING

ARTICLE IV - ETHICS IN PUBLIC CONTRACTING

- § 20.1-26 Purpose
- § 20.1-27 Proscribed Participation by Public Employees in Procurement Transactions
- § 20.1-28 Disclosure of Subsequent Employment
- § 20.1-29 Prohibition on Solicitation or Acceptance of Gifts; Gifts by Bidders, Offerors, Contractor or Subcontractors Prohibited
- § 20.1-30 Kickbacks
- § 20.1-31 Participation in bid preparation; limitation on submitting bid for same procurement
- § 20.1-32 Purchase of building materials, supplies or equipment from architect or engineer prohibited
- § 20.1-33 Certification of compliance required; penalty for false statements
- § 20.1-34 Misrepresentations prohibited
- § 20.1-35 Contributions and gifts; prohibition during procurement process
- § 20.1-35 Penalty for violation

ARTICLE V - DEBARMENT FOR UNSATISFACTORY PERFORMANCE

- § 20.1-36 Debarment
- § 20.1-37 Causes for Debarment
- § 20.1-38 Procedures for Debarment; Appeal

[HISTORY: Chapter 20 was adopted by the Council of the Town of Middleburg 4-14-83 and amended from time to time; Chapter 20 was rescinded in its entirety on 8-13-20 and Chapter 20.1 was adopted in its stead.]

ARTICLE I – GENERAL PROVISIONS**§ 20.1-1 Purpose**

The purpose of this Chapter is to establish the rules and regulations pertaining to the procurement from non-governmental sources of goods, contracts, insurance, construction and services for the Town of Middleburg, Virginia. Town employees are to follow the prescribed procedures outlined in this Chapter. All purchases must comply with the Virginia Public Procurement Act of the Code of Virginia, as may be amended from time to time, as applicable to the Town.

PURCHASING

The goal of this Chapter is to (1) obtain high quality goods and services at a reasonable cost; (2) ensure that all procurement procedures are conducted in a fair and impartial manner with the avoidance of any impropriety or appearance of impropriety; (3) ensure that all qualified vendors have access to public business; and (4) ensure that no offeror will be arbitrarily or capriciously excluded. The Town of Middleburg may, however, consider best value concepts when procuring goods and non-professional services.

§ 20.1-2 Applicability

Except as otherwise provided, this Chapter shall apply to all procurements by the Town from non-governmental sources. This Chapter does not apply to the granting of franchises, the acquisition of real property or to any grants or contracts between the Town and the Commonwealth of Virginia or other governments.

Where a procurement transaction involves the expenditure of federal funds, the receipt of which is conditioned upon compliance with mandatory federal regulations not in conformance with the provisions of this Chapter, the Town shall comply with the mandatory regulations, notwithstanding the provisions of this Chapter and any otherwise applicable provisions of the Act.

§ 20.1-2.1 Conflicts

If this ordinance conflicts with the provisions of the Virginia Public Procurement Act or other state law as mandatorily applied to towns of less than 3,500 population, then the Virginia Public Procurement Act shall control. If this ordinance conflicts with the provisions of the Virginia Public Procurement Act that, under Virginia Code § 2.2-4343(A)(9), towns of less than 3,500 population are exempt from, then this ordinance shall control.

§ 20.1-3 Definitions

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

ACT – The Virginia Public Procurement Act.

BEST VALUE CONCEPTS – The overall combination of quality, price and various elements of required services that in total are optimal to the Town's needs.

BRAND NAME - 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.

PURCHASING

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.

COUNCIL – The Town Council of the Town of Middleburg, Virginia

EMERGENCY - When a breakdown in machinery or equipment and/or a threatened termination of essential services or a dangerous condition develops, or when 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.

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

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

GOVERNING BODY - The Town Council of the Town of Middleburg, Virginia.

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

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.

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.

PURCHASING

NON-PROFESSIONAL SERVICES - Any services not specifically identified as professional services as defined in this section.

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

PECUNIARY INTEREST ARISING FROM THE PROCUREMENT – A personal interest in a contract as defined in the Virginia State and Local Government Conflicts of Interests Act.

PERSONAL INTEREST - A financial benefit or liability as defined in the Virginia State and Local Government Conflict of Interests Act.

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.

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.

PUBLIC EMPLOYEE – Any person employed by the Town of Middleburg, including elected officials or appointed members of the governing body.

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 the equipment or materials, or the rental of equipment, materials and supplies.

PURCHASING

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.

TOWN – The Town of Middleburg, Virginia and/or its authorized representatives.

TOWN EMPLOYEE – For the purposes of this Chapter, any person employed by the Town of Middleburg, including elected officials or appointed members of the governing body.

§ 20.1-4 Effective date; effect on prior contracts

- A. This Chapter shall become effective August 13, 2020.
- B. The provisions of this Chapter shall not apply to those contracts entered into prior to August 13, 2020, which shall continue to be governed by the procurement policies and regulations of the Town in effect at the time those contracts were executed.

§ 20.1-5 Exemptions

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

- A. In accordance with the Virginia Public Procurement Act Sections 2.1-4303(G)(1) and (2), the purchase of goods and services, including professional services but excluding non-transportation related construction, if the aggregate or sum of all phases is not expected to exceed \$25,000 (can be up to \$80,000 for professional services or \$100,000 for goods & services).
- B. Purchases through the Virginia State Contract or other cooperative purchases as identified in §20.1-11 of this Chapter.
- C. Legal services, expert witnesses or other services associated with actual or potential litigation or regulatory proceedings.
- D. Purchases for special police work when the Chief of Police certifies to the Town Manager that the items are needed for police operations.
- E. Transportation related construction when the aggregate or sum of all phases is not expected to exceed \$25,000.
- F. 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 such association has procured

PURCHASING

the insurance or electric utility services by use of competitive principles and provided the Town has made a determination in advance after reasonable notice to the public and set forth in writing that competitive sealed bidding and competitive negotiations are not fiscally advantageous to the public.

G. Purchases for real estate as directed by the Town Council.

§ 20.1-6 Individual Exceptions by Action of Council

To the extent permitted by Virginia law, the Town Council may, by affirmative vote, authorize procurement on competitive principles other than as set forth in this Chapter. Such authorization shall set out the goods, services, insurance or construction that is the subject of the procurement and further set out the competitive principles that will govern the solicitation of bids, offers, or proposals. Upon Council approval, that authorization shall supersede any contrary provision of this Chapter.

§ 20.1-7 Principal Purchasing Official; Power and Duties

- A. The Town Manager, or designee, shall serve as the principal purchasing official for the 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. In accordance with this Chapter and subject to the supervision of the Town Council, the Town Manager shall have the following duties:
- (1) Purchase or supervise the purchasing of all goods, services, insurance and construction needed by the Town.
 - (2) Exercise supervision over the Town's central stores and the inventories of goods belonging to the Town.
 - (3) Sell, trade or otherwise dispose of surplus goods belonging to the Town in accordance with the provisions in Town Code Chapter 5.
 - (4) 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.
- C. In carrying out these duties, the Town Manager shall have the power to:
- (1) Purchase or contract for all goods, services, insurance and construction required except as provided herein.
 - (2) Ensure preparation and enforcement of standard specifications.

PURCHASING

- (3) Ensure the inspection of the deliveries of goods, services or construction purchased by the Town to determine their conformance with the order or contract.
- (4) Procure the highest quality in goods, services, insurance and construction at the least expense to the Town.
- (5) Endeavor to obtain as full and open competition as may be practicable on all purchases and sales.
- (6) Perform such other functions and duties in keeping with good purchasing practices and such other duties as the Council may assign.

§ 20.1-8 Unauthorized purchases

Except as herein provided, no elected official, appointed official or Town employee shall purchase or contract for any goods, services, insurance or construction on behalf of the Town other than through the Town Manager. Any purchase order or contract made contrary to these provisions is not approved and the Town shall not be bound thereby.

ARTICLE II – METHODS OF PROCUREMENT; PROCEDURES**§ 20.1-9 Competitive Negotiation**

Unless an exemption otherwise applies, when procuring professional services as defined in this Chapter, the following procedures will apply:

- A. Request for Proposals. Request for Proposals shall be issued in writing and indicate in general terms that which is sought to be procured, the evaluation factors, and all applicable contractual terms and conditions.
- B. Public notice. At least ten (10) days prior to the date set for receipt of proposals, public notice shall be given by posting the Request for Proposals on the State Procurement website, in a public area normally used for posting of public notices, by publication in a newspaper of general circulation in which the contract is to be performed or any combination thereof. In addition, proposals may be solicited directly from potential contractors. Any changes or additions to the Request for Proposals shall be issued in writing in the same manner as the initial posting and furnished to all known prospective offerors.
- C. Acceptance of Proposals. A public opening shall not be required for the acceptance of proposals. If the Request for Proposals states that there will be a public opening, the names of the offerors will be the only information that will be required to be read aloud.

PURCHASING

- D. Discussion and award. The Town Manager 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, on the basis of evaluation factors published in the Request for Proposals and all information developed in the selection process, the Town Manager shall select in the order of preference two (2) or more offerors whose professional qualifications and proposed services are deemed most meritorious. Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the 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 a contract can be negotiated at a fair and reasonable price. Should the Town Manager determine in writing and when approved by the Town Council that only one (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. Contracts in amounts greater than \$25,000 must be awarded by the Town Council. Contracts in lesser amounts may be awarded by the Town Manager, provided funding is available.

§ 20.1-10 Competitive Sealed Bidding

Unless an exemption otherwise applies, all purchases for supplies, goods or non-professional services, shall be based on competitive sealed bidding when the amount of a single order or contract exceeds \$25,000. No contract or purchase may be subdivided for the purposes of avoiding the competitive sealed bid requirement. When soliciting competitive sealed bids, the following procedures shall apply:

- A. Invitations for Bids. An Invitation for Bids shall be issued in writing and shall identify the supplies, goods or non-professional services for which bids are being sought.
- B. Public Notice. At least ten (10) days prior to the date set for receipt of bids, public notice shall be given by posting the Invitation for Bids on the State Procurement website, in a public area normally used for posting of public notices, by publication in a newspaper of general circulation in which the contract is to be performed or a combination thereof. In addition, bids may be solicited directly from potential contractors. Any changes or additions to the Invitation for

PURCHASING

Bids shall be issued in writing in the same manner as the initial posting and furnished to all known prospective contractors.

- C. Bid Forms. Bids shall be submitted sealed, on the Town form, in accordance with the instructions in the Invitation for Bids.
- D. Acceptance of Bids. Bids shall be opened in public at the date, time and place stated in the notice or bid forms. A tabulation of all bids received shall be made available to anyone interested.
- E. Award of Bid. Award shall be made to the lowest responsive and responsible bidder. Awards may be made to more than one offeror or bidder. Prompt payment discounts or other favorable terms may be considered in determining the low bid. If bids received are for the same total amount or unit price, quality and service being equal, first consideration shall be given to the local bidder. Purchases in amounts greater than \$25,000 must be awarded by the Town Council. Purchases in lesser amounts may be awarded by the Town Manager, provided funding is available.
- E. Responsive and Responsible Bidder. In determining the “lowest responsive and responsible bidder”, in addition to price, the following may be considered:
 - 1. The ability, capacity and skill of the bidder to perform the contract;
 - 2. Whether the bidder can perform the contract promptly or within the time specified;
 - 3. The character, integrity, reputation, judgement, experience and efficiency of the bidder;
 - 4. The quality of performance of previous contracts;
 - 5. The previous and existing compliance by the bidder with the laws and ordinances relating to the contract;
 - 6. The sufficiency of the financial resources and ability of the bidder to perform the contract;
 - 7. The ability of the bidder to provide future maintenance for the use of the subject of the contract;
 - 8. The number and scope of conditions attached to the bid.
- F. Uniform Bidding. Uniform bidding as the result of an agreement or understanding with other bidders, which evidences fraud or deceit, will be the basis for removal of such bidder(s) responsible from consideration for all current and future bid solicitations.
- G. Rejection of Bids. The Town Manager shall have the authority to reject any and all bids or parts of all bids for any one or more supplies or contractual services included in the Invitation for Bids. However, bidders shall have the right to qualify their bid on an “all or none” basis.

PURCHASING

- H. Waiver of Technical Requirements. The Town Manager may waive any technical requirements imposed by this Chapter when it is deemed to be in the best interest of the Town.

§ 20.1-11 Cooperative Procurement

The Town Manager has the duty to develop, to the maximum extent possible, a program for the joint or cooperative purchasing of common-use supplies with 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.

§ 20.1-12 Emergency Purchases

In the case of an 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 Manager of the basis of the emergency and for the selection of the particular contractor shall be included in the contract file.

§ 20.1-13 Sole Source Procurement

Upon a determination in writing by the Town Manager 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. In the event the contract amount exceeds \$25,000, approval of the Town Council of the sole source designation shall be required.

§ 20.1-14 Small Purchases

All purchases of goods, contractual services, professional services, insurance and capital improvements estimated to be less than \$25,000 in value shall not be subject to the requirements of competitive bidding or competitive negotiation provisions of this Chapter; provided, however, that the Town Manager shall, whenever the amount thereof exceeds \$15,000, but is less than \$25,000, secure two (2) or more proposals in the commodity area of the transaction.

PURCHASING

ARTICLE III
Requirements Related to Procurement**§ 20.1-15 Brand Names**

In accordance with Virginia Code § 2.2-4315, as may amended from time to time, unless otherwise provided in the Invitation to Bid, the name of a certain brand, make or manufacturer shall not restrict bidders to the specific brand, make or manufacturer named and shall be deemed to convey the general style, type, character, and quality of the article desired. Any article that the public body 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.

§ 20.1-16 Competitive Procurement on State-Aid Project

In accordance with Virginia Code § 2.2-4305, as may be amended from time to time, no contract for the construction of any building or for an addition to or improvement of an existing building by the Town for which State funds of not more than \$50,000 in the aggregate or for the sum of all phases of a contract or project either by appropriation, grant-in-aid or loan, are used or are to be used for all or part of the cost of construction shall be let except after competitive sealed bidding or after competitive negotiation as provided under Subsection D of §2.2-4303 or Chapter 43.1 (§2.2-4378 et seq.) of the Code of Virginia. The procedure for the advertising for bids or for proposals and for letting of the contract shall conform, mutatis mutandis, to Chapter 43.1 of the Code of Virginia, as may be amended from time to time.

§ 20.1-17 Employment Discrimination by Contractor Prohibited; Required Contract Provisions

In accordance with Virginia Code § 2.2-4311, as may be amended from time to time, the Town shall include in every contract of more than \$10,000 the following provisions:

1. During the performance of this contract, the contractor agrees as follows:
 - a. The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, or other basis prohibited by state law relating to discrimination in employment, except where there 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.

PURCHASING

- b. The contractor, in all solicitations or advertisements for employees placed by or on behalf of the contractor, will state that such contractor is an equal opportunity employer.
 - c. Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for the purpose of meeting the requirements of this section.
2. The contractor will include the provisions of the foregoing paragraphs a, b and c in every subcontract or purchase order of over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.

§ 20.1-18 Withdrawal of Bid Due to Error

- A. All advertisements for bids for a public construction contract, other than a contract for the construction or maintenance of public highways, shall include the following statement of procedure for the withdrawal of a bid:

“Withdrawal of Bids – If a bidder wishes to withdraw his bid, he shall submit to the Town Manager his original work papers, documents and materials used in the preparation of the bid at or prior to the time fixed for the opening of bids. The work papers shall be delivered by the bidder in person or by registered mail. The bidder shall have two hours after the opening of bids within which to claim in writing any mistake as defined herein and withdraw his bid.”

- B. In accordance with Virginia Code § 2.2-4330, as may be amended from time to time, a bidder for a public construction contract, other than a contract for the construction or maintenance of public highways, may be allowed to withdraw his bid from consideration based upon the following:

- (1) If the price bid was substantially lower than the other bids due solely to a mistake in the bid, provided the bid was submitted in good faith, and the mistake was a clerical mistake as opposed to a judgment mistake, and was actually due to an unintentional arithmetic error or an unintentional omission of a quantity of work, labor or material made directly in the compilation of 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; or
- (2) If the bid contains both clerical and judgment mistakes and 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

PURCHASING

from inspection of original work papers, documents and materials used in the preparation of the bid sought to be withdrawn.

- C. The contract shall not be awarded by the Town until the two-hour period has elapsed.
- D. No bid shall be withdrawn 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.
- E. If a bid is withdrawn in accordance with this Section, the lowest remaining bid shall be deemed to be the low bid.
- F. No bidder who is permitted to withdraw a bid shall, for compensation, supply any material or labor to or perform any subcontract or other work agreement for the person or firm to whom the contract is awarded or otherwise benefit, directly or indirectly, from the performance of the project for which the withdrawn bid was submitted.
- G. The Town Manager shall notify the bidder in writing within five (5) business days of his decision regarding the bidder's request to withdraw its bid. If the Town Manager denies the withdrawal of a bid under the provisions of this Section, he shall state in such notice the reasons for his decision and award the contract to such bidder at the bid price, provided such bidder is a responsible and responsive bidder. At the same time that the notice is provided, the Town Manager shall return all work papers and copies thereof that have been submitted by the bidder.

§ 20.1-19 Retainage on Construction Contracts

- A. In any public contract for construction that provides for progress payments in installments based upon an estimated percentage of completion, the contractor shall be paid at least ninety-five percent (95%) of the earned sum when payment is due, with no more than five percent (5%) being retained to ensure faithful performance of the contract. All amounts withheld may be included in the final payment.
- B. Any subcontract for a public project that provides for similar progress payments shall be subject to the provisions of this section.

PURCHASING

§ 20.1-20 Deposit of Retained Funds on Certain Contracts; Penalty for Failure to Timely Complete

- A. The Bid Proposal shall include an option for the contractor to use an escrow account procedure for the utilization of the Town's retainage funds when contracting directly with contractors for public contracts of \$200,000 or more for construction of highways, roads, streets, bridges, parking lots, demolition, clearing, grading, excavating, paving, pile driving, miscellaneous drainage structures, and the installation of water, gas, sewer lines and pumping stations where portions of the contract price are to be retained. In the event the contractor elects to use the escrow account procedure, an escrow agreement form shall be included in the Bid Proposal and the Contract shall be executed and submitted to the Town within fifteen calendar days after notification. If the escrow agreement form is not submitted within the fifteen-day period, the contractor shall forfeit his rights to the use of the escrow account procedure.
- B. In order to have retained funds paid to an escrow agent, the contractor, the escrow agent, and the surety shall execute an escrow agreement form. The contractor's escrow agent shall be a trust company, bank or savings institution with its principal office located in the Commonwealth. The escrow agreement and all regulations adopted by the Town shall be substantially the same as that used by the Virginia Department of Transportation.
- C. Any such public contract for construction with the Town 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.
- D. Any subcontract for such public project that provides for similar progress payments shall be subject to the provisions of this Section.

§ 20.1-21 Public Construction Contract Provisions Barring Damages for Unreasonable Delays Declared Void

- A. Any provision contained in any Town construction contract that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages for unreasonable delay in performing such contract, either on his behalf or on behalf of his subcontractor if and to the extent the delay is caused by acts or omissions of the public body, its agents or employees and due to causes within their control shall be void and unenforceable as against public policy.

PURCHASING

- B. Subsection A above shall not be construed to render void any provision of a public construction contract that:
1. Allows the Town to recover that portion of delay costs caused by the acts or omissions of the contractor, or its subcontractors, agents or employees;
 2. Requires notice of any delay by the party claiming the delay;
 3. Provides for liquidated damages for delay; or
 4. Provides for arbitration or any other procedure designed to settle contract disputes.
- C. A contractor making a claim against the Town for costs or damages due to the alleged delaying of the contractor in the performance of its work under any public construction contract shall be liable to the Town and shall pay it for a percentage of all costs incurred by the Town in investigating, analyzing, negotiating, litigating and arbitrating the claim, which percentage shall be equal to the percentage of the contractor's total delay claim that is determined through litigation or arbitration to be false or to have no basis in law or in fact.
- D. If the Town denies a contractor's claim for costs or damages due to the alleged delaying of the contractor in the performance of work under any public construction contract and it is determined through litigation or arbitration to have been made in bad faith, the Town shall be liable to and shall pay such contractor a percentage of all costs incurred by the contractor to investigate, analyze, negotiate, litigate and arbitrate the claim. The percentage paid by the Town shall be equal to the percentage of the contractor's total delay claim for which the Town's denial is determined through litigation or arbitration to have been made in bad faith.

§ 20.1-22 Bid Bonds

- A. Except in cases of emergency, all bids or proposals for non-transportation related construction contracts in excess of \$500,000 or transportation-related projects authorized under Article 2 (§ 33.2-208 et seq.) of Chapter 2 of Title 33.2 of the Code of Virginia, as may be amended from time to time, that are in excess of \$250,000 and partially or wholly funded by the Commonwealth shall be accompanied by a bid bond from a surety company selected by the bidder that is authorized to do business in Virginia, as a guarantee that if the contract is awarded to the bidder, he will enter into the contract for the work mentioned in the bid. The amount of the bid bond shall not exceed five percent of the amount bid.
- B. (Effective until July 1, 2021) For non-transportation related construction contracts in excess of \$100,000 but less than \$500,000, where the bid bond requirements are waived, prospective contractors shall be prequalified for each individual

PURCHASING

project in accordance with Virginia Code § 2.2-4317. However, the Town may waive the requirement for prequalification of a bidder with a current Class A contractor license for contracts in excess of \$100,000 but less than \$300,000 upon a written determination made in advance by the Town that waiving the requirement is in the best interests of the Town.

(Effective July 1, 2021) For non-transportation related construction contracts in excess of \$100,000 but less than \$500,000, where the bid bond requirements are waived, prospective contractors shall be prequalified for each individual project in accordance with Virginia Code § 2.2-4317.

- C. No forfeiture under a bid bond shall exceed the lesser of (i) the difference between the bid for which the bond was written and the next low bid, or (ii) the face amount of the bid bond.
- D. Nothing in this section shall preclude the Town from requiring bid bonds to accompany bids or proposals for construction contracts anticipated to be less than \$500,000 for non-transportation related projects or \$250,000 for transportation-related projects authorized under Article 2 (§ 33.2-208 et seq.) of Chapter 2 of Title 33.2 of the Code of Virginia and partially or wholly funded by the Commonwealth.

§ 20.1-23 Performance and Payment Bonds

(Effective through June 30, 2021)

- A. Except as provided in Subsection H below, upon the award of any (i) public construction contract exceeding \$500,000 awarded to any prime contractor; (ii) construction contract exceeding \$500,000 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; (iii) construction contract exceeding \$500,000 in which the performance of labor or the furnishing of materials will be paid with public funds; or (iv) transportation-related projects exceeding \$350,000 that are partially or wholly funded by the Commonwealth, the contractor shall furnish to the Town the following bonds:
 - 1. A performance bond in the sum of the contract amount conditioned upon the faithful performance of the contract in strict conformity with the plans, specifications and conditions of the contract. For transportation-related projects authorized under Article 2 (§ 33.2-208 et seq.) of Chapter 2 of Title 33.2 of the Code of Virginia, such bond shall be in a form and amount satisfactory to the Town.
 - 2. A payment bond in the sum of the contract amount. The bond shall be for the protection of claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded, or to any subcontractors, in furtherance of the work provided for in the contract,

PURCHASING

and shall be conditioned upon the prompt payment for all materials furnished or labor supplied or performed in the furtherance of the work. For transportation-related projects authorized under Article 2 (§ 33.2-208 et seq.) of Chapter 2 of Title 33.2 of the Code of Virginia and partially or wholly funded by the Commonwealth, such bond shall be in a form and amount satisfactory to the Town.

- B. For non-transportation related construction contracts in excess of \$100,000 but less than \$500,000, where the performance and payment bond requirements are waived, prospective contractors shall be prequalified for each individual project in accordance with Virginia Code § 2.2-4317. However, the Town may waive the requirement for prequalification of a contractor with a current Class A contractor license for contracts in excess of \$100,000 but less than \$300,000 upon a written determination made in advance by the Town that waiving the requirement is in the best interests of the Town.
- C. Each of the bonds shall be executed by one or more surety companies selected by the contractor that are authorized to do business in Virginia.
- D. Each of the bonds shall be filed with the Town Manager.
- E. Nothing in this section shall preclude the Town from requiring payment or performance bonds for construction contracts below \$500,000 for non-transportation related projects or \$350,000 for transportation-related projects authorized under Article 2 (§ 33.2-208 et seq.) of Chapter 2 of Title 33.2 of the Code of Virginia and partially or wholly funded by the Commonwealth.
- F. Nothing in this section shall preclude the 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 that are directly with the subcontractor for performing labor and furnishing materials in the prosecution of the work provided for in the subcontract.
- G. The performance and payment bond requirements of Subsection A above for transportation-related projects that are valued in excess of \$250,000 but less than \$350,000 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.
- H. The performance and payment bond requirements of subsection A for transportation-related projects that are valued in excess of \$250,000 but less than \$350,000 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.

PURCHASING

(Effective July 1, 2021)

- A. Except as provided in Subsection H below, upon the award of any (i) public construction contract exceeding \$500,000 awarded to any prime contractor; (ii) construction contract exceeding \$500,000 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; (iii) construction contract exceeding \$500,000 in which the performance of labor or the furnishing of materials will be paid with public funds; or (iv) transportation-related projects exceeding \$350,000 that are partially or wholly funded by the Commonwealth, the contractor shall furnish to the Town the following bonds:
1. A performance bond in the sum of the contract amount conditioned upon the faithful performance of the contract in strict conformity with the plans, specifications and conditions of the contract. For transportation-related projects authorized under Article 2 (§ 33.2-208 et seq.) of Chapter 2 of Title 33.2 of the Code of Virginia, such bond shall be in a form and amount satisfactory to the Town.
 2. A payment bond in the sum of the contract amount. The bond shall be for the protection of claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded, or to any subcontractors, in furtherance of the work provided for in the contract, and shall be conditioned upon the prompt payment for all materials furnished or labor supplied or performed in the furtherance of the work. For transportation-related projects authorized under Article 2 (§ 33.2-208 et seq.) of Chapter 2 of Title 33.2 of the Code of Virginia and partially or wholly funded by the Commonwealth, such bond shall be in a form and amount satisfactory to the Town.
- B. For non-transportation related construction contracts in excess of \$100,000 but less than \$500,000, where the bid bond requirements are waived, prospective contractors shall be prequalified for each individual project in accordance with § 2.2-4317 of the Code of Virginia.
- C. Each of the bonds shall be executed by one or more surety companies selected by the contractor that are authorized to do business in Virginia.
- D. Each of the bonds shall be filed with the Town Manager.
- E. Nothing in this section shall preclude the Town from requiring payment or performance bonds for construction contracts below \$500,000 for non-transportation related projects or \$350,000 for transportation-related projects authorized under Article 2 (§ 33.2-208 et seq.) of Chapter 2 of Title 33.2 of the Code of Virginia and partially or wholly funded by the Commonwealth.

PURCHASING

- F. Nothing in this section shall preclude the 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 that are directly with the subcontractor for performing labor and furnishing materials in the prosecution of the work provided for in the subcontract.
- G. The performance and payment bond requirements of Subsection A above for transportation-related projects that are valued in excess of \$250,000 but less than \$350,000 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.
- H. The performance and payment bond requirements of subsection A for transportation-related projects that are valued in excess of \$250,000 but less than \$350,000 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.

§ 20.1-24 Alternative Forms of Security

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

§ 20.1-25 Permitted Contract With Certain Religious Organizations; Purpose; Limitations

- 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.

PURCHASING

- 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 public bodies 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 religious 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. (§ 2000 e-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."

PURCHASING

ARTICLE IV
ETHICS IN PUBLIC CONTRACTING**§ 20.1-26 Purpose**

The provisions of this Article supplement, but shall not supersede, other provisions of law including, but not limited to, the Virginia State and Local Government Conflict of Interests Act, the Virginia Governmental Frauds Act and Articles 2 and 3 of Chapter 10 of Title 18.2 of the Code of Virginia. The provisions of this Article shall apply notwithstanding the fact that the conduct described may not constitute a violation of the State and Local Government Conflict of Interests Act.

§ 20.1-27 Proscribed Participation by Public Employees in Procurement Transactions

Except as may be specifically allowed by Subdivisions B(1), (2), and (3) of § 2.2-3112 of the Code of Virginia, as may be amended from time to time, no public employee having official responsibility for a procurement transaction shall participate in that transaction on behalf of the Town 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 five percent;
3. The employee, the employee's partner, or any member of the employee's immediate family has a pecuniary interest arising from the procurement transaction; or
4. The employee, the employee's partner, or any member of the employee's immediate family is negotiating, or has an arrangement concerning, prospective employment with a bidder, offeror or contractor.

§ 20.1-28 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 year from the cessation of employment by the Town unless the employee or former employee provides written notification to the Town Manager prior to commencement of employment by that bidder, offeror or contractor.

PURCHASING

§ 20.1-29 Prohibition on Solicitation or Acceptance of Gifts; Gifts by Bidders, Offerors, Contractor or Subcontractors Prohibited

- A. 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, unless consideration of substantially equal or greater value is exchanged. The Town may recover the value of anything conveyed in violation of this Subsection.
- B. No bidder, offeror, contractor or subcontractor shall confer upon any 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.

§ 20.1-30 Kickbacks

- A. No contractor or subcontractor shall demand or receive from any of his suppliers or his subcontractors, as an inducement for the award of a subcontract or order, any payment, loan, subscription, advance, deposit of money, services or anything, present or promised, unless consideration of substantially equal or greater value is exchanged.
- B. No subcontractor or supplier shall make, or offer to make, kickbacks as described in this Section.
- C. No person shall demand or receive any payment, loan, subscription, advance, deposit of money, services or anything of value in return for an agreement not to compete on a public contract.
- D. If a subcontractor or supplier makes a kickback or other prohibited payment as described in this Section, the amount thereof shall be conclusively presumed to have been included in the price of the subcontract or order and ultimately borne by the public body and shall be recoverable from both the maker and recipient. Recovery from one offending party shall not preclude recovery from other offending parties.

PURCHASING

§ 20.1-31 Participation in bid preparation; limitation on submitting bid for same procurement

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

§ 20.1-32 Purchase of building materials, supplies or equipment from architect or engineer prohibited

- A. No building materials, supplies or equipment for any building or structure constructed by or for the Town shall be sold by or purchased from any person employed as an independent contractor by the Town to furnish architectural or engineering services, but not construction, for such building or structure or from any partnership, association or corporation in which such architect or engineer has a personal interest as defined in Virginia Code § 2.2-3101, as may be amended from time to time.
- B. No building materials, supplies or equipment for any building or structure constructed by or for the Town shall be sold by or purchased from any person who has provided or is currently providing design services specifying a sole source for such materials, supplies or equipment to be used in the building or structure to the independent contractor employed by the Town to furnish architectural or engineering services in which such person has a personal interest as defined in Virginia Code § 2.2-3101, as may be amended from time to time.
- C. The provisions of subsections A and B above shall not apply in cases of emergency.

§ 20.1-33 Certification of compliance required; penalty for false statements

- A. The Town Council may require Town employees having official responsibility for procurement transactions in which they participated to annually submit for such transactions a written certification that they complied with the provisions of this Article.
- B. Any Town employee required to submit a certification as provided in subsection A above who knowingly makes a false statement in the certification shall be punished as provided in § 20.1-35 below.

PURCHASING

§ 20.1-34 Misrepresentations prohibited

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

§ 20.1-35 Penalty for violation

Any person convicted of a willful violation of any provision of this Article shall be guilty of a Class 1 misdemeanor. Upon conviction, any Town employee, in addition to any other fine or penalty provided by law, shall forfeit his/her employment.

ARTICLE V**DEBARMENT FOR UNSATISFACTORY PERFORMANCE****§ 20.1-36 Debarment**

In the event a contractor's performance has been unsatisfactory, as identified in § 20.1-37, the Town Manager may take action to exclude the contractor from contracting with the Town for particular types of goods or non-professional services for a period of not more than five (5) years. Debarment does not relieve the contractor of responsibility for existing obligations.

§ 20.1-37 Causes for Debarment

The following shall be causes for debarment under this Article:

1. A recent record of failure to perform or of unsatisfactory performance in accordance with the terms of the contract.
2. Deliberate failure to perform in accordance with the contractual specifications or within the time limit provided in the contract.
3. Conviction under State or Federal statutes of a criminal offense where there was an attempt to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract.
4. Conviction under State or Federal statutes of embezzlement; theft; forgery; bribery; falsification or destruction of records; receiving stolen property; or any other offense indicating a lack of business integrity or business honesty, which would affect the contractor's responsibility as a contractor with the Town.

PURCHASING

§ 20.1-38 Procedures for Debarment; Appeal

- A. A contractor being considered for debarment from contracting with the Town shall be notified of such by the Town Manager in writing stating the reasons for the proposed action.
- B. Following receipt of written notice as identified in Subsection A above, the contractor shall have five (5) business days to file a request for hearing by notifying the Town Manager in writing of his desire to be heard, otherwise, the debarment shall become effective at the conclusion of the five business day period with no further notice required.
- C. If the contractor files a request for a hearing, the hearing shall be scheduled between the Town Manager and the contractor within five (5) business days of the Town's receipt of the hearing request at a date and time mutually agreeable to both parties.
- D. Within three (3) business days of the hearing, the Town Manager shall issue a decision and submit it in writing to the contractor.
- E. Within five (5) business days of receipt of the Town Manager's decision, the contractor may file an appeal to the Town Council of said decision. This appeal shall be submitted in writing to the Town Clerk.
- F. Upon receipt of the appeal notice, the Town Clerk shall place an item on the next regular Council agenda and the Council shall hear the contractor's appeal at that time.
- G. The Town Council shall render a decision on the appeal at the next regular Town Council meeting following the meeting in which the appeal was heard. The Town Clerk shall notify the contractor in writing of the Council's decision. The Town Council's decision shall be final.