

COUNTY CODE, CHAPTER 22

PROCUREMENT

ARTICLE I. IN GENERAL

- Sec. 22-1.** Establishment, composition and general responsibilities of Central Purchasing.
- Sec. 22-2.** Appointment, general powers and duties of the Purchasing Manager.
- Sec. 22-3.** General procedure.
- Sec. 22-4.** Definitions.
- Sec. 22-5.** Requisitions and estimates from departments.
- Sec. 22-6.** Department reports of obsolete or unused property; transfer or trade of such property.
- Sec. 22-7.** Methods of procurement.
- Sec. 22-8.** Alternative method of procurement; reverse auctioning.
- Sec. 22-9.** Open market small purchase procedures for purchases and sales of fifty thousand dollars or less.
- Sec. 22-10.** Competitive bidding state-aid projects.
- Sec. 22-11.** Contracts or purchases not to be subdivided to avoid requirements of chapter.
- Sec. 22-12.** Certain contracts and expenditures prohibited.
- Sec. 22-13.** Emergency purchases.
- Sec. 22-14.** Modification of contract.
- Sec. 22-15.** Inspection and testing of supplies or contractual services.
- Sec. 22-16.** Discrimination prohibited.
- Sec. 22-17.** Required contract provisions: unauthorized aliens; employment discrimination by contractor prohibited; drug-free workplace to be maintained by contractor.
- Sec. 22-18.** Public inspection of certain records.
- Sec. 22-19.** Exemptions.
- Sec. 22-20.** Purchase of handguns by retired officers.

ARTICLE II. COMPETITIVE BIDDING

- Sec. 22-21.** Prequalification generally; prequalification for construction.
- Sec. 22-22.** Use of brand names.
- Sec. 22-23.** Notice inviting bids.
- Sec. 22-24.** Pre-bid conferences.
- Sec. 22-25.** Submission, opening and tabulation of bids.

- Sec. 22-26. Bid evaluation.
- Sec. 22-27. Withdrawal of bid due to error.
- Sec. 22-28. Bid bonds.
- Sec. 22-29. Bonds for other than construction contracts.
- Sec. 22-30. Award of contract to lowest, responsive, responsible bidder.
- Sec. 22-31. Award of contract to other than low bidder.
- Sec. 22-32. Negotiation with lowest responsible bidder.
- Sec. 22-33. Bid deposits.
- Sec. 22-34. Cancellation, rejection of bids; waiver of informalities.
- Sec. 22-35. Tie bids.
- Sec. 22-36. Performance and payment bonds.
- Sec. 22-37. Action on performance bond.
- Sec. 22-38. Actions on payment bonds.
- Sec. 22-39. Alternative forms of security.
- Sec. 22-40. Construction contract provisions barring damages for unreasonable delays declared void.
- Sec. 22-41. Retainage on construction contracts.
- Sec. 22-42. Deposit of certain retained funds on certain contracts; penalty for failure to timely complete.
- Sec. 22-43. Multi-term contracts.

ARTICLE III. COMPETITIVE NEGOTIATION

- Sec. 22-44. Competitive negotiation generally.
- Sec. 22-45. Request for proposals.
- Sec. 22-46. Public notice.
- Sec. 22-47. Receipt of proposals.
- Sec. 22-48. Evaluation factors.
- Sec. 22-49. Discussion with responsible offerors, and revision of proposals.
- Sec. 22-50. Award.
- Sec. 22-51. Contracting for professional services.
- Sec. 22-52. Contracting for other than professional services.

ARTICLE IV. DEBARMENT

- Sec. 22-53. Authority to debar or suspend.
- Sec. 22-54. Decision to debar or suspend.
- Sec. 22-55. Notice of decision.
- Sec. 22-56. Finality of decision.

ARTICLE V. APPEALS AND REMEDIES FOR BID PROTESTS

- Sec. 22-57.** Ineligibility of bidder, offeror or contractor.
- Sec. 22-58.** Appeal of denial or withdrawal of bid.
- Sec. 22-59.** Determination of non-responsibility.
- Sec. 22-60.** Protest of award or decision to award.
- Sec. 22-61.** Effect of appeal upon contract.
- Sec. 22-62.** Stay of award during protest.
- Sec. 22-63.** Contractual disputes.
- Sec. 22-64.** Legal actions.
- Sec. 22-65.** Administrative appeals procedure.

ARTICLE VI. ETHICS IN PUBLIC CONTRACTING

- Sec. 22-66.** Purpose.
- Sec. 22-67.** Definitions.
- Sec. 22-68.** Proscribed participation by public employees in procurement transaction.
- Sec. 22-69.** Solicitation or acceptance of gifts.
- Sec. 22-70.** Disclosure of subsequent employment.
- Sec. 22-71.** Gifts by bidders, offerors, contractors or subcontractors.
- Sec. 22-72.** Kickbacks.
- Sec. 22-73.** Purchase of building materials, etc., from architect or engineer
- Sec. 22-74.** Participation in bid preparation; limitation on submitting bid for same procurement.
- Sec. 22-75.** Penalty for violation.

ARTICLE I. IN GENERAL

Sec. 22-1. Establishment, composition and general responsibilities of Central Purchasing.

- (a) Pursuant to section 2-19 of the Gloucester County Code, the County Administrator is the Purchasing Agent for the county and may delegate this responsibility to the Purchasing Manager of the Central Purchasing Department. The Purchasing Agent, or his/her designee, is authorized to execute all contracts, agreements and purchase orders on behalf of the county for purchases made by it in accordance with this chapter.
- (b) There is hereby established a Central Purchasing Department, which shall consist of the Purchasing Manager and such other employees as may be assigned to the department by the county.

- (c) Central Purchasing shall be responsible for buying, in the best interest of the county, all materials, supplies, services and equipment for all county departments, agencies, and schools. In addition, it will be responsible for centralized control and disposal of excess, obsolete and salvageable materials and equipment.

Sec. 22-2. Appointment, general powers and duties of the Purchasing Manager.

The Purchasing Manager shall be the head of Central Purchasing and shall have general management and control of the section and other units of the organization that may evolve. The Purchasing Manager shall have the power and it shall be his/her duty to:

- (1) Endeavor to obtain as full and open competition as possible on all purchases and sales.
- (2) Establish and amend, when necessary, such rules and regulations as he/she deems necessary for the internal management and operation of Central Purchasing.
- (3) Prepare, adopt and maintain a bidder's registration file. This file is to contain contact information and data related to the provider's commodities, if available.
- (4) Maintain a bidders' list containing the names of all responsible prospective suppliers, including small businesses and businesses owned by women and minorities, who have requested their names to be included on such list, and to remove prospective bidders from such list when the public interest will be served thereby.
- (5) Exploit the possibilities of buying "in bulk" so as to take full advantage of discounts.
- (6) Disqualify vendors who default on their quotations from receiving any business from the county.
- (7) Participate in, sponsor, conduct or administer a cooperative procurement agreement on behalf of or in conjunction with one (1) or more other public bodies, agencies, institutions, localities of the several states, territories of the United States, or the District of Columbia, for the purpose of combining requirements to increase efficiency or reduce administrative expenses in any acquisition of goods and services. Except for contracts for professional services, a public body may purchase from another public body'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 specified that the procurement was being conducted on behalf of other public bodies. In entering into a cooperative procurement agreement with a county, city or town whose governing body has adopted alternative policies and procedures pursuant to the Virginia Public Procurement Act, the Purchasing Manager shall comply with said alternative policies and procedures so adopted by said governing body of such county, city or town as designated in the cooperative agreement.

- (8) Standardize and establish specifications to reduce commodities to a minimum and assure the quality of goods.
- (9) Award contracts within the purview of this chapter.

Sec. 22-3. General procedure.

- (a) The purpose of this chapter is to enunciate the public policies pertaining to governmental procurement from nongovernmental sources, to include governmental procurement which may or may not result in monetary consideration for either party. This chapter shall apply whether the consideration is monetary or non-monetary and regardless of whether the county, the contractor, or some third party is providing the consideration.
- (b) All single or term contracts for goods and services, other than professional services, when the estimated cost is expected to exceed fifty thousand dollars (\$50,000.00) shall be purchased from the lowest responsive, responsible bidder, after due notice inviting bids.

Sec. 22-4. Definitions.

For the purposes of this chapter, the following words and phrases shall have the meanings respectively ascribed to them by this section, unless a different meaning clearly appears from the context:

- (1) *Best Value.* As predetermined in the solicitation, the overall combination of quality, price, and various elements of required services that in total are optimal relative to the county's needs.
- (2) *Brand name specification.* A specification limited to one or more items by manufacturers' names or catalogue numbers.
- (3) *Board of Supervisors.* The elected governing board of Gloucester County.
- (4) *Competitive negotiation.* A method of contractor selection utilizing a written request for proposal, followed by discussions with responsive, responsible offerors.

- (5) *Competitive sealed bidding.* A method of contractor selection utilizing a written invitation to bid, public opening and announcement of all bids received, evaluation of bids based upon the requirements set forth in the invitation, and award to the lowest responsive, responsible bidder.
- (6) *Construction.* Building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavating, grading or similar work upon real property.
- (7) *Contract.* All types of agreements, regardless of what they may be called, for the procurement of goods, services, insurance or construction.
- (8) *Contractor.* Any person having a contract with the county.
- (9) *County Administrator.* The statutory Purchasing Agent for the county or designee.
- (10) *Direct or indirect participation.* Involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or acting in any other similar capacity.
- (11) *Goods.* All material, equipment, supplies, printing and automated data processing hardware and software.
- (12) *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 and does not give a competitive advantage as a result thereof.
- (13) *Insurance.* A contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils.
- (14) *Invitation for Bids.* All documents, whether attached or incorporated by reference, utilized for soliciting sealed bids.
- (15) *Multiphase professional services contract.* 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.

- (16) *Nominal value.* So small, slight or the like, in comparison to what might properly be expected, as scarcely to be entitled to the term, but in no case to be more than ten dollars (\$10.00).
- (17) *Nonprofessional services.* Any services not specifically identified as professional services.
- (18) *Professional services.* Work performed by an independent contractor within the scope of the practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law, dentistry, medicine, optometry, pharmacy or professional engineering.
- (19) *Person.* Any corporation, partnership, business, individual, union, committee, club, other organization or group of individuals.
- (20) *Public contract.* An agreement between the county and a nongovernmental source that is enforceable in a court of law.
- (21) *Purchasing Manager.* The head of the Central Purchasing Department of the County of Gloucester, or his/her designee.
- (22) *Request for Proposals.* All documents, whether attached or incorporated by reference, utilized for soliciting proposals.
- (23) *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.
- (24) *Responsive bidder.* A person who has submitted a bid which conforms in all material respects to the invitation to bid.
- (25) *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.
- (26) *Specification.* Any description of the physical or functional characteristics or of the nature of a good, service or construction item. It may include a description of any requirement for inspecting, testing or preparing a good, service or construction item for delivery.

Sec. 22-5. Requisitions and estimates from departments.

All county departments, either by or with the authorization of the head of the department, shall file with the Purchasing Manager detailed requisitions or estimates of

their requirements in supplies and contractual services in such manner, at such times and for such future periods as the Purchasing Manager shall prescribe.

Sec. 22-6. Department reports of obsolete or unused property; transfer or trade of such property.

- (a) All departments shall submit to the Purchasing Manager at such times and in such form as such Agent shall prescribe reports showing stocks of all supplies, materials and equipment which are no longer used or which have become obsolete, worn out or scrapped. The Purchasing Manager may sell such property by competitive bidding or at public auction, may transfer it to other departments or governmental agencies, or exchange it for or trade it in on new supplies or equipment.
- (b) All sales of such property, when the estimated value is not expected to exceed fifty thousand dollars (\$50,000), may be sold by the Purchasing Manager in accordance with rules and regulations established by him; these sales need not follow the competitive bidding or public auction process and such property may be sold without newspaper advertisement and without observing the procedures prescribed by articles II and III of this chapter, unless the Purchasing Manager determines that the public interest demands such procedure.

Sec. 22-7. Methods of procurement.

- (a) All county 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 chapter, unless otherwise authorized by law.
- (b) Professional services, whether for single or term contracts, may, but need not, be procured by competitive negotiation when the aggregate or sum of all phases is not expected to exceed fifty thousand dollars (\$50,000.00). Such small purchase procedures shall provide for competition wherever practicable. Professional services shall be procured by competitive negotiation when the cost of the professional service is expected to exceed fifty thousand dollars (\$50,000.00).
- (c) Upon a determination made in advance by the Purchasing Manager and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, goods, services, or insurance may be procured by competitive negotiation. The writing shall document the basis for this determination.
- (d) Upon a written determination made in advance by the Purchasing Manager 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 things other than professional services in section 22-52. The basis for this determination shall be documented in writing.

- (e) Upon a determination in writing by the Purchasing 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 sealed bidding or competitive negotiation. The writing shall document the basis for this determination.
- (f) 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 Purchasing Manager 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: (i) for the construction, alteration, repair, renovation or demolition of buildings or structures when the contract is not expected to cost more than one million dollars (\$1,000,000.00); (ii) on a fixed price design-build basis or construction management basis under section 2.2-4308 of the Code of Virginia; or (iii) for the construction of highways and any draining, dredging, excavation, grading or similar work upon real property.
- (g) Upon a determination made in advance by the Purchasing Manager and set forth in writing that the purchase of goods, products or commodities from a 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. However, bulk purchases of commodities used in road and highway construction and maintenance, and aggregates shall not be made by online public auction.
- (h) The Purchasing Manager may provide for incentive contracting that offers a contractor whose bid is accepted the opportunity to share in any cost savings realized by the locality when the project's costs are reduced by such contractor, without affecting project quality, during the construction of the project. The fee, if any, charged by the project engineer or architect for determining such cost savings shall be paid as a separate cost and shall not be calculated as part of any cost savings. Such provisions, including the percentage of cost sharing, shall be included in the language of the contract or may be added by change order with the agreement of both parties.

Sec. 22-8. Alternative method of procurement; reverse auctioning.

- (a) The purchase of goods or nonprofessional services, but not construction or professional services, may be made by reverse auctioning. However, bulk purchases of commodities used in road and highway construction and maintenance, and aggregates shall not be made by reverse auctioning.

- (b) As used in this section, the term ‘reverse auctioning’ means a procurement method wherein bidders are invited to bid on specified goods or nonprofessional services through real-time electronic bidding, with the award being made to the lowest responsive and responsible bidder. During the bidding process, bidders’ prices are revealed and bidders shall have the opportunity to modify their bid prices for the duration of the time period established for electronic bidding.

Sec. 22-9. Open market small purchase procedures for purchases and sales of fifty thousand dollars or less.

- (a) All purchases of goods and services, when the estimated value is fifty thousand dollars (\$50,000.00) or less, may be made in the open market, without newspaper advertisement and without observing the procedures prescribed by articles II and III of this chapter, unless the Purchasing Manager determines that the public interest demands such procedure. Purchases under this subsection that are expected to exceed five thousand dollars (\$5,000.00) shall require, whenever possible, the informal solicitation of a minimum of four bidders or offerors and shall be awarded to the lowest responsive, responsible bidder in accordance with the standards set forth in section 22-30.
- (b) Small purchase of items in an amount not exceeding two thousand dollars (\$2,000.00) may be purchased directly by a department in accordance with rules and regulations established by the Purchasing Manager; these purchases need not follow the competitive bidding process. Maximum limits may be established for each department by the Purchasing Manager up to, but not exceeding, five thousand dollars (\$5,000.00).
- (c) In making a purchase or sale under this section, when bidding is required, the Purchasing Manager shall solicit bids, by mail, electronic means, telephone, or in person from prospective vendors or purchasers.

Sec. 22-10. Competitive bidding state-aid projects.

No contract shall be entered into for the construction of any building or for an addition to or improvement of an existing building by the county for which state funds of not more than thirty thousand dollars (\$30,000.00) 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 except after competitive sealed bidding or competitive negotiation. The procedure for the advertising for bids and for executing the contract shall conform to this chapter.

Sec. 22-11. Contracts or purchases not to be subdivided to avoid requirements of chapter.

No contract or purchase shall be subdivided to avoid the requirements of this chapter.

Sec. 22-12. Certain contracts and expenditures prohibited.

No officer, department or agency shall, during any budget year, expend or contract to expend any money or incur any liability, or enter into any contract which by its terms involves the expenditure of money, for any purpose, in excess of the amounts appropriated for that general classification of expenditure. Any contract, verbal or written, made in violation of the appropriation shall be null and void. Any officer or employee of this county who willfully violates this section shall be guilty of a misdemeanor and, upon conviction thereof, shall cease to hold his office or employment. Nothing contained in this section shall prevent the making of contracts or the spending of money for capital improvements to be financed in whole or in part by the issuance of bonds, nor the making of contracts of lease or for services for a period extending beyond the budget year in which such contract is made, when such contract is permitted by law.

Sec. 22-13. Emergency purchases.

- (a) In case of an emergency which requires immediate purchase of supplies or contractual services, the Purchasing Manager shall have the authority to secure as practicable under the circumstances, by the open market procedure set forth in section 22-9, at the lowest obtainable price, any supplies or contractual services, regardless of the amount of the expenditure. A full report of the circumstances of an emergency purchase so made shall be filed by the affected department head with the Purchasing Manager.
- (b) The Purchasing Manager may prescribe, by rules and regulations, the procedure under which emergency purchases by heads of departments may be made outside of normal county business hours.

Sec. 22-14. Modification of contract.

No contract or purchase order may be modified or changed by amendment, change order, or any other agreement without the prior approval of the Purchasing Manager or designee unless (i) such modifications, in the aggregate, do not increase the amount of the contract by more than twenty-five (25) percent of the original amount of the contract or fifty thousand dollars (\$50,000.00), whichever is greater, (ii) such changes are the result of unforeseen circumstances or changed conditions encountered during the progress of the performance of the contract, and (iii) such changes are directly related to the performance of the purpose of the contract. Extensions of time to perform a contract may be granted without prior approval of the Purchasing Manager or designee provided such extensions involve no increase in cost to the county. In no event shall the aggregate of all modifications increase the cost of the contract beyond the appropriated project amount.

Sec. 22-15. Inspection and testing of supplies or contractual services.

- (a) The Purchasing Manager shall inspect or supervise the inspection of all deliveries of supplies or contractual services to determine their conformance with the specifications set forth in the order or contract.
- (b) The Purchasing Manager shall have the authority to authorize departments having the staff and facilities for adequate inspection to inspect all deliveries made to such departments under rules and regulations which the Purchasing Manager shall prescribe.
- (c) The Purchasing Manager shall have the authority to require chemical and physical tests of samples submitted with bids and samples of deliveries, which are necessary to determine the quality and conformance of such samples with the specifications. In the performance of such tests, the Purchasing Manager shall have the authority to make use of laboratory facilities of any department of the county government or any outside laboratory.

Sec. 22-16. Discrimination prohibited.

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

Sec. 22-17. Required contract provisions: unauthorized aliens; employment discrimination by contractor prohibited; drug-free workplace to be maintained by contractor.

- (a) The county shall include in every contract that the contractor does not, and shall not during the performance of the contract for goods and services in the Commonwealth, knowingly employ an unauthorized alien as defined in the federal Immigration Reform and Control Act of 1986, as amended.
- (b) The County shall include in every contract of over ten thousand dollars (\$10,000.00) the provisions in (1), (2), and (3) herein:
 - (1) During the performance of this contract, the contractor agrees as follows:
 - i. 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.
- ii. 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.
 - iii. 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 (b) (1) (i) and (ii) in every subcontract or purchase order of over ten thousand dollars (\$10,000.00) so that the provisions will be binding upon each subcontractor or vendor.
- (3) During the performance of the contract, the contractor agrees to (i) provide a drug-free workplace for the contractor's employees; (ii) post in conspicuous places, available to employees and applicants for employment, a statement notifying employees that the unlawful manufacture, sale, distribution, dispensation, possession, or use of a controlled substance or marijuana is prohibited in the contractor's workplace and specifying the actions that will be taken against employees for violations of such prohibition; (iii) state in all solicitations or advertisements for employees placed by or on behalf of the contractor that the contractor maintains a drug-free workplace; and (iv) include the provisions of the foregoing clauses in every subcontract or purchase order of over ten thousand dollars (\$10,000.00), so that the provisions will be binding upon each subcontractor or vendor.

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

Sec. 22-18. Public inspection of certain records.

- (a) Except as provided herein, all proceedings, records, contracts and other public records relating to procurement transactions shall be open to the inspection of any citizen, or any interested person, firm or corporation, in accordance with the Virginia Freedom of Information Act.
- (b) Cost estimates relating to a proposed procurement transaction prepared by or for the county 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 in the event that the Purchasing Manager decides not to accept any of the bids and to reopen the contract. Otherwise, bids 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 in the event that the Purchasing Manager 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 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 or prequalification application submitted pursuant to section 22-21 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. Information leading to the decision to award, including prices and other factors, shall be made public.

Sec. 22-19. Exemptions.

- (a) The provisions of articles I, II, III, IV and V of this chapter, except for section 22-17, shall not apply to contracts for the printing of ballots, statements of results or other materials essential to the conduct of an election. The provisions of article VI of this chapter shall be applicable to such contracts.
- (b) The following transactions are hereby exempt from the provisions of articles I, II, III, IV and V of this chapter, except for section 22-17:
 - (1) Purchases on state contracts, cooperative contracts, from the state penitentiary and from the state purchasing department warehouse.
 - (2) Legal services, law books and supplies for the County Attorney and the Commonwealth's Attorney, and expert witnesses and other services associated with actual or potential litigation and administrative proceedings.

- (3) Purchases of services or goods (i) which are performed or produced by persons, or in schools or workshops, under the supervision of the Virginia Department for the Blind and Vision Impaired or (ii) which are performed or produced by nonprofit sheltered workshops or other nonprofit organizations that offer transitional or supported employment services for the handicapped.
- (c) In the administration of public assistance and social services programs, goods and personal services may be procured for direct use by the recipients of such programs without competitive sealed bidding or competitive negotiations if the procurement is made for an individual recipient. Contracts for the bulk procurement of goods or services for the use of recipients are not exempted from the requirements of this chapter.
- (d) The county may enter into contracts without competitive sealed bidding or competitive negotiation for insurance if purchased through an association of which it 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 the insurance by use of competitive principles and provided that the Purchasing Manager 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. 22-20. Purchase of handguns by retired officers.

The Purchasing Manager, with the consent of the Sheriff, may allow any fulltime sworn law enforcement officer who retires after at least twenty-five (25) years of service and any auxiliary police officer who has served the county as an auxiliary police officer for at least twenty-five (25) years to purchase the service handgun issued by the county at a cost of one dollar (\$1.00) for the weapon.

ARTICLE II. COMPETITIVE BIDDING

Sec. 22-21. Prequalification generally; prequalification for construction.

- (a) Prospective contractors may be prequalified for particular types of supplies, services, insurance or construction, and consideration of bids or proposals limited to prequalified contractors. Any prequalification procedure shall be established in writing and sufficiently in advance of its implementation to allow potential contractors a fair opportunity to complete the process.
- (b) Any prequalification of prospective contractors for construction shall be pursuant to a prequalification process for construction projects adopted by the Purchasing Manager. The application form used in such 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 subsection shall be considered a trade secret or proprietary information subject to the provision of section 22-18 (f).

In all instances in which the Purchasing Manager requires prequalification of potential contractors for construction projects, advance notice shall be given 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 so as to allow the procedures set forth in this section to be accomplished.

At least thirty days prior to the date established for submission of bids or proposals under the procurement of the contract for which the prequalification applies, the Purchasing Manager shall advise in writing each contractor which submitted an application whether that contractor has been prequalified. In the event that a contractor is denied prequalification, the written notification to such contractor shall state the reasons for such denial of prequalification and the factual basis of such reasons.

A decision by the Purchasing Manager denying prequalification under the provisions of this subsection shall be final and conclusive unless the contractor appeals the decision as provided in section 22-57.

The Purchasing Manager may deny prequalification to any contractor only if he 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 county 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 contract 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 the county without good cause. If the county has not contracted with a contractor in any prior construction contracts, the Purchasing Manager 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 Purchasing Manager may not utilize this provision to deny prequalification unless the facts underlying such substantial noncompliance were documented in writing in the prior construction project file and such information relating 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 the following portions of the Code of Virginia, 1950, as amended: (i) Article 6 (§2.2-4367 et seq.) of Chapter 43 of Title 2.2, (ii) the Virginia Governmental Frauds Act (§18.2-498.1 et seq.), (iii) Chapter 4.2 (§59.1-68.6 et seq.) of Title 59.1, or (iv) 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; and
- (7) The contractor failed to provide to the Purchasing Manager in a timely manner any information requested by the Purchasing Manager relevant to subdivisions 1 through 6 of this subsection.

Sec. 22-22. Use of brand names.

Unless otherwise provided in the invitation to bid, 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 article desired; and any article which the Purchasing Manager in his 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.

Sec. 22-23. Notice inviting bids.

- a. The notice inviting bids referred to in section 22-3 shall be posted on a public bulletin board at Central Purchasing, or published in a newspaper of general circulation, or both, and may be posted on a website normally used for such

postings, at least ten (10) days prior to the date set for the receipt of bids. Such notice shall include a general description of the articles to be purchased or sold and shall state where bid forms and specifications may be secured and the time and place for opening bids. Such notice shall state the procedure for the withdrawal of a bid due to error.

- b. In addition to the notice referred to in subsection (a) above, the Purchasing Manager may solicit bids by mail from vendors in the business of providing the commodity or service desired.

Sec. 22-24. Pre-bid conferences.

For complex equipment, supplies, repairs or construction projects, pre-bid conferences with prospective bidders may be called, when deemed necessary by the Purchasing Manager.

Sec. 22-25. Submission, opening and tabulation of bids.

Bids shall be submitted, sealed, to the Purchasing Manager and should be identified as bids on the envelope. Such bids shall be opened in public at the time and place stated in the public notices, and a tabulation of all bids received shall be available for public inspection.

Sec. 22-26. Bid evaluation.

Evaluation of bids shall be based upon the requirements set forth in the invitation, which may include special qualifications of potential contractors and any other criteria such as inspection, testing, quality, workmanship, delivery and suitability for a particular purpose, which are helpful in determining acceptability. The county 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 stated in the procurement solicitation.

Sec. 22-27. Withdrawal of bid due to error.

- (a) A bidder for a public construction 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 therein, 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 the 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. The bidder shall give notice in writing of his claim of right to withdraw his bid within two (2) business days after the conclusion of the bid opening procedure and shall submit original work papers with such notice. Such mistake shall be proved only from the original work papers, documents and materials delivered as required herein.

- (b) A bidder for a non-construction contract may withdraw his bid from consideration in accordance with the procedures set forth in subsection (a) above.
- (c) No bid may be withdrawn under this section 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 (5) percent.
- (d) If a bid is withdrawn under the authority of this section, the lowest remaining bid shall be deemed to be the low bid.
- (e) 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 which the contract is awarded or otherwise benefit, directly or indirectly, from the performance of the project for which the withdrawn bid was submitted.
- (f) If the Purchasing Manager denies the withdrawal of a bid under the provisions of this section, he/she shall notify the bidder in writing, stating the reasons for his/her decision.

Sec. 22-28. Bid bonds.

- (a) Except in cases of emergency, all bids or proposals for construction contracts in excess of one hundred thousand dollars (\$100,000.00) shall be accompanied by a bid bond from a surety company selected by the bidder which is legally authorized to do surety business in Virginia, as a guarantee that if the contract is awarded to such bidder, that bidder will enter into the contract for the work mentioned in the bid. The amount of the bid bond shall not be required to exceed five (5) percent of the amount bid.
- (b) 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.
- (c) Nothing in this section shall preclude the Purchasing Manager from requiring bid bonds for construction contracts for one hundred thousand dollars (\$100,000.00) or less.

Sec. 22-29. Bonds for other than construction contracts.

- (a) At the discretion of the Purchasing Manager, bidders may be required to submit with their bid a bid bond, or a certified check, in an amount to be determined by the Purchasing Manager and specified in the invitation to bid, which shall be forfeited to the county as liquidated damages upon the bidder's failure to execute within ten (10) days a non-construction contract awarded to him or upon the bidder's failure to furnish any required performance or payment bonds in connection with a contract awarded to him as specified in the request for bids.
- (b) The Purchasing Manager may require successful bidders to furnish a performance bond and a payment bond at the expense of the successful bidder, in amounts to be determined by the Purchasing Manager and specified in the invitation to bid, to ensure the satisfactory completion of the work for which a contract and/or purchase order is awarded.

Sec. 22-30. Award of contract to lowest, responsive, responsible bidder.

The Purchasing Manager shall award contracts governed by this article to the lowest responsive, responsible bidder. Any purchase that exceeds the approved county budget will require the contract to be awarded by the Board of Supervisors.

In determining the lowest responsive, responsible bidder, in addition to price, the Purchasing Manager shall consider:

- (1) The ability, capacity and skill of the bidder to perform the contract or provide the service required.
- (2) Whether the bidder can perform the contract or provide the service promptly or within the time specified, without delay or interference.
- (3) The character, integrity, reputation, judgment, experience and efficiency of the bidder.
- (4) The quality of performance of previous contracts or service.
- (5) The previous and existing compliance by the bidder with laws and ordinances relating to the contract or service.
- (6) The sufficiency of the financial resources and ability of the bidder to perform the contract or provide the service.
- (7) The quality, availability and adaptability of the supplies or contractual services to the particular use required.

- (8) The ability of the bidder to provide future maintenance and service for the use of the subject of the contract.
- (9) The number and scope of conditions attached to the bid.

Sec. 22-31. Award of contract to other than low bidder.

- (a) When the award of a contract under this article is not given to the lowest bidder, a full and complete statement of the reasons therefor shall be prepared by the Purchasing Manager and filed with the other papers relating to the transaction.
- (b) Whenever the lowest responsive and responsible bidder is a resident of any other state and such state under its laws allows a resident contractor of that state a percentage preference, a like preference shall be allowed to the lowest responsive and responsible bidder who is a resident of Virginia and is the next lowest bidder. If the lowest bidder is a resident contractor of a state with an absolute preference, the bid shall not be considered.
- (c) Notwithstanding the provisions of subsections a and b, in the case of a tie bid 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.

Sec. 22-32. Negotiation with lowest responsible bidder.

Unless canceled or rejected, a responsive bid from the lowest responsible bidder shall be accepted as submitted; except that if the bid from the lowest responsible bidder exceeds available funds, the Purchasing Manager may negotiate with the apparent low bidder to obtain a contract price within available funds.

Sec. 22-33. Bid deposits.

When deemed necessary by the Purchasing Manager, bid deposits shall be prescribed in the public notices inviting bids. Unsuccessful bidders shall be entitled to return of the surety where the Purchasing Manager has required such. A successful bidder may be required to forfeit any surety required by the Purchasing Manager upon failure on his part to enter into a contract and provide all required documents within ten (10) days after the award or as otherwise provided by the Purchasing Manager.

Sec. 22-34. Cancellation, rejection of bids; waiver of informalities.

- (a) An invitation to bid, a request for proposal, any other solicitation, and any and all bids or proposals, and parts thereof, may be cancelled or rejected. The reasons for cancellation or rejection shall be made part of the contract file.
- (b) The Purchasing Manager may waive informalities in bids.

Sec. 22-35. Tie bids.

- (a) In the case of a tie bid, after taking into consideration cash discounts for early payment, if any, preference shall be given to goods, services and construction produced in Gloucester County or provided by Gloucester County persons, if such a choice is available; otherwise to a Virginia person, if such choice is available; if no such choices are available, then the tie shall be decided by lot.
- (b) Whenever the lowest responsive and responsible bidder is a resident of any other state and such state under its laws allows a resident contractor of that state a percentage preference, a like preference shall be allowed to the lowest responsive and responsible bidder who is a resident of Virginia and is the next lowest bidder. If the lowest bidder is a resident contractor of a state with an absolute preference, the bid shall not be considered. For purposes of compliance with this section, Gloucester County will rely upon the accuracy of the information published by the Virginia Department of General Services as it relates to a listing of states that have an absolute preference for their resident contractors.
- (c) Notwithstanding the provisions of subsections a and b, in the case of a tie bid 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.

Sec. 22-36. Performance and payment bonds.

- (a) Upon the award of any (i) public construction contract exceeding one hundred thousand dollars (\$100,000.00) awarded to any prime contractor; (ii) construction contract exceeding one hundred thousand dollars (\$100,000.00) 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 by the county; or (iii) construction contract exceeding \$100,000 in which the performance of labor or the furnishing of materials will be paid with public funds, such contractor shall furnish to the county 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.
 - (2) A payment bond in the sum of the contract amount. Such 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 the prosecution 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 prosecution of the work. Labor or materials shall include public utility

services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site.

- (b) Each of such bonds shall be executed by one or more surety companies selected by the contractor which are legally authorized to do surety business in Virginia.
- (c) Such bonds shall be payable to the County of Gloucester.
- (d) Each of the bonds shall be filed with the County of Gloucester, or a designated officer or official thereof.
- (e) Nothing in this section shall preclude the Purchasing Manager from requiring payment or performance bonds for construction contracts for one hundred thousand dollars (\$100,000.00) or less.
- (f) Nothing in this section shall preclude such 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.

Sec. 22-37. Action on performance bond.

No action against the surety on a performance bond shall be brought unless within one year after (i) completion of the contract, including the expiration of all warranties and guarantees, or (ii) discovery of the defect or breach of warranty, if the action be for such.

Sec. 22-38. Actions on payment bonds.

- (a) Subject to the provisions of subsection (b) hereof, any claimant who has performed labor or furnished material in accordance with the contract documents in the prosecution 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 ninety (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 such labor or material, and may prosecute such action to final judgment and have execution on the judgment. The Obligee named in the bond need not be named a party to such action.
- (b) Any claimant who has a direct contractual relationship with any subcontractor from whom the contractor has not required a subcontractor payment bond 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 one hundred eighty (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 with 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 but who has no contractual relationship, express or implied, with such contractor, may bring an action on the subcontractor's payment bond. Notice to the contractor shall be served by registered or certified mail, postage prepaid, in an envelope addressed to such contractor at any place where his office is regularly maintained for the transaction of business. Claims for sums withheld as retainages with respect to labor performed or materials furnished shall not be subject to the time limitations stated in this subsection.

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

Sec. 22-39. Alternative forms of security.

- (a) In lieu of a bid, payment, or performance bond, a bidder may furnish a certified check or cash escrow in the face amount required for the bond.
- (b) If approved by the County Attorney, a bidder may furnish a bank or savings and loan association's irrevocable letter of credit on certain designated funds in the face amount required for the bid bond. Approval shall be granted only upon a determination that the alternative form of security proffered affords protection to the county at least equivalent to a corporate surety's bond.

Sec. 22-40. Construction contract provisions barring damages for unreasonable delays declared void.

- (a) Any provision contained in any public contract for construction 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 such delay is caused by acts or omissions of the county, its agents or employees and due to causes within their control is against public policy and is void and unenforceable.
- (b) Subsection (a) shall not be construed to render void any provision of a public contract for construction that:
 - (1) Allows the county 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 another procedure for settling contract disputes.
- (c) A contractor making a claim against the county for costs or damages due to the alleged delaying of the contractor in the performance of its work under any public contract for construction shall be liable to the county and shall pay for a percentage of all costs incurred by the county in investigating, analyzing, negotiating, litigating and arbitrating the claim, which percentage shall be equal to the percentage of the contractor's total delay claim which is determined through litigation or arbitration to be false or to have no basis in law or in fact.
- (d) If the county 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 contract for construction, it 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 county shall be equal to the percentage of the contractor's total delay claim for which the county's denial is determined through litigation or arbitration to have been made in bad faith.

Sec. 22-41. Retainage on construction contracts.

- (a) In any public contract for construction which provides for progress payments in installments based upon an estimated percentage of completion, the contractor shall be paid at least ninety-five (95) percent of the earned sum when payment is due, with not more than five (5) percent being retained to assure faithful performance of the contract. All amounts withheld may be included in the final payment.
- (b) Any subcontract for a public project which provides for similar progress payments shall be subject to the provisions of this section.

Sec. 22-42. Deposit of certain retained funds on certain contracts; penalty for failure to timely complete.

- (a) The county, when contracting directly with contractors for public contracts of two hundred thousand dollars (\$200,000.00), 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, shall include in the bid an option for the contractor to use an escrow account procedure for utilization of the county's retainage funds by so indicating in the space provided in the bid documents. In the event the contractor elects to use the escrow account procedure, the "escrow

agreement” form included in the bid and contract shall be executed and submitted to the county within fifteen (15) 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 promulgated by the county entering into the contract shall be substantially the same as those used by the Commonwealth of Virginia Department of Transportation.
- (c) This section shall not apply to public 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, telegraph or signal systems for public utilities and the construction or maintenance of solid waste or recycling facilities and treatment plants.
- (d) Any such public contract for construction with the county, 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.
- (e) Any subcontract for such public project which provides for similar progress payments shall be subject to the provisions of this section.

Sec. 22-43. Multi-term contracts.

- (a) 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 county provided 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.
- (b) When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be cancelled.

ARTICLE III. COMPETITIVE NEGOTIATION

Sec. 22-44. Competitive negotiation generally.

Competitive negotiation is a method of source selection which involves individual discussions between the county and the offeror on the basis of responses to the county's request for proposals. The source selection methods of competitive negotiation incorporates sections 22-18, 22-21, 22-22, and 22-24, 22-34, and 22-42, in addition to the provisions of this article.

Sec. 22-45. Request for proposals.

A 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.

Sec. 22-46. Public notice.

At least ten (10) days prior to the date set for receipt of proposals, public notice shall be given by posting on a public bulletin board at the Central Purchasing, and by publication in a newspaper or newspapers of general circulation in the area in which the contract is to be performed so as to provide reasonable notice to the maximum number of offerors that can be reasonably anticipated to submit proposals in response to the particular request. In addition, proposals may be solicited directly from potential contractors.

Sec. 22-47. Receipt of proposals.

No proposals shall be handled so as to permit disclosure of the identity of any offeror or the contents of any proposal during the process of evaluation and negotiation.

Sec. 22-48. Evaluation factors.

The request for proposals shall state the relative importance of price and other evaluation factors.

Sec. 22-49. Discussion with responsible offerors and revision of proposals.

As provided in the request for proposals, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and conformance to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals and such revisions may be permitted after submissions and prior to award for the

purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of the identity of competing offerors or of any information derived from proposals submitted by competing offerors.

Sec. 22-50. Award.

Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the county taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made. When the terms and conditions for multiple awards are provided in the request for proposal, awards may be made to more than one (1) offeror.

Sec. 22-51. Contracting for professional services.

- (a) *Competitive negotiation procedure.* The Purchasing Manager shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence to provide the required services. Repetitive informal interviews shall be permissible. 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. The request for proposal shall not, however, request that offerors furnish estimates of man-hours or cost for services. 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 discussions, outlined herein, on the basis of evaluation factors published in the request for proposals and all information developed in the selection process to this point, the Purchasing 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 that is satisfactory and advantageous to the county 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 Purchasing Manager determine in writing and in his/her 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. Once formally terminated, negotiations may not be reopened with any offeror.
- (b) *Multiphase contracts.* Multiphase professional services contracts satisfactory and advantageous to the county for environmental, location, design and

inspection work regarding highways and bridges 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 county 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 county require awarding the contract.

- (c) *Contracting for multiple projects.* A contract for architectural or professional engineering services relating to construction projects may be negotiated by the county, for multiple projects provided (i) the projects require similar experience and expertise, (ii) the nature of the projects is clearly identified in the request for proposals, and (iii) the contract term is limited to one (1) year or when the cumulative total project fees reach the maximum cost authorized in this paragraph, whichever occurs first. Such a contract may be renewable for four (4) additional one-year terms at the option of the county. Under such contract, (a) the fair and reasonable prices, as negotiated, shall be used in determining the cost of each project performed; (b) the sum of all projects performed in one (1) contract term shall not exceed five hundred thousand dollars (\$500,000.00) and (c) the project fee of any single project shall not exceed one hundred thousand dollars (\$100,000.00). Any unused amounts from the first contract term shall not be carried forward to the additional term. Competitive negotiation for such contracts may result in awards to more than one (1) offeror provided (1) the request for proposals so states and (2) the county has established procedures for distributing multiple projects among the selected contractors during the contract term.

Sec. 22-52. Contracting for other than professional services.

Selection shall be made of two (2) 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 proposal, including price if so stated in the request for proposal. 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 Purchasing Manager shall select the offeror which, in his/her opinion, has made the best proposal, and shall award the contract to that offeror. Should the Purchasing Manager determine in writing and in his/her sole discretion that only one offeror is fully qualified, or that one offeror is clearly more highly qualified than the others under consideration, a contract may be negotiated and awarded to that offeror.

ARTICLE IV. DEBARMENT

Sec. 22-53. Authority to debar or suspend.

After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the Purchasing Manager is authorized to debar a person for cause from consideration for award of contracts. The debarment shall not be for a period of more than three (3) years. The Purchasing Manager is authorized to 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. The suspension shall not be for a period of more than three (3) months. The causes for debarment include:

- (a) Conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract, subcontract, or in the performance of such contract or subcontract;
- (b) 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 currently, seriously and directly affects responsibility as a county 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 below, of a character which is regarded by the Purchasing Manager to be so serious as to justify debarment action:
 - i. Deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or
 - ii. A recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided, that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment.
- (e) Any other cause the Purchasing Manager determines to be so serious and compelling as to affect responsibility as a county contractor, including debarment by another governmental entity for any cause mentioned in this section, or for violation of the ethical standards set forth in article VI of this chapter.

Sec. 22-54. Decision to debar or suspend.

If the Purchasing Manager shall debar or suspend a person, he shall issue a written decision to debar or suspend. The decision shall state the reasons for the action taken and inform the debarred or suspended person involved of his rights concerning judicial or administrative review.

Sec. 22-55. Notice of decision.

A copy of the decision required by section 22-54 of this article shall be mailed or otherwise furnished immediately to the debarred or suspended person.

Sec. 22-56. Finality of decision.

A decision under section 22-54 of this article shall be final and conclusive, unless the debarred or suspended person within ten (10) days after receipt of the decision takes an appeal to the Purchasing Manager pursuant to section 22-65.

ARTICLE V. APPEALS AND REMEDIES FOR BID PROTESTS

Sec. 22-57. Ineligibility of bidder, offeror or contractor.

- (a) Any bidder, offeror or contractor, other than one who has been debarred pursuant to article IV of this chapter, refused permission to, or disqualified from participating in, public contracts shall be notified in writing. Prior to the issuance of a written determination of disqualification or ineligibility, the county shall (i) notify the bidder in writing of the results of the evaluation, (ii) disclose the factual support for the determination, and (iii) allow the bidder an opportunity to inspect any documents that relate to the determination, if so requested by the bidder within five business days after receipt of notice. Within ten business days after receipt of the notice, the bidder may submit rebuttal information challenging the evaluation. The county shall issue its written determination of disqualification or ineligibility based on all information in the possession of the county, including any rebuttal information, within five business days of the date the county received such rebuttal information. If the evaluation reveals that the bidder, offeror or contractor should be allowed permission to participate in the public contract, the county 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 county shall so notify the bidder, offeror or contractor. The notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within ten days after receipt of notice by invoking the administrative appeal procedure established by the Purchasing Manager, if any, or in the alternative by instituting legal action as provided in section 22-64 of this article.

- (b) If, upon appeal, it is determined that the action taken was arbitrary or capricious, or not in accordance with the Constitution of Virginia, statutes or regulations, the sole relief shall be restoration of eligibility.

Sec. 22-58. Appeal of denial or withdrawal of bid.

- (a) A decision denying withdrawal of bid under the provisions of section 22-27 shall be final and conclusive unless the bidder appeals the decision within ten (10) days after receipt of the decision by invoking the administrative procedures established by the Purchasing Manager, if any, or in the alternative by instituting legal action as provided in section 22-64 of this article.
- (b) If no bid bond was posted, a bidder refused withdrawal of a bid under the provisions of section 22-27 prior to appealing shall deliver to the Purchasing Manager a certified check or cash bond in the amount of the difference between the bid sought to be withdrawn and the next lowest 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 arbitrary or capricious, the sole relief shall be withdrawal of the bid.

Sec. 22-59. Determination of non-responsibility.

- (a) Following public opening and announcement of bids received on an invitation for bids, the Purchasing Manager shall evaluate the bids. At the same time the Purchasing Manager shall determine whether the apparent low bidder is responsible. If the Purchasing Manager so determines, then he/she may proceed with an award in accordance with the provisions of section 22-30. If the Purchasing Manager determines that the apparent low bidder is not responsible, he/she shall proceed as follows:
 - (1) Prior to the issuance of a written determination of non-responsibility, the Purchasing Manager shall (i) notify the apparent low bidder in writing of the results of the evaluation, (ii) disclose the factual support for the determination, and (iii) allow the apparent low bidder an opportunity to inspect any documents which relate to the determination, if so requested by the bidder within five (5) business days after receipt of the notice.
 - (2) Within ten (10) business days after receipt of the notice, the bidder may submit rebuttal information challenging the evaluation. The Purchasing Manager shall issue his written determination of responsibility based on all information in his possession, including any rebuttal information, within five (5) business days of the date he received such rebuttal information. At the same time, the Purchasing Manager shall notify the bidder in writing of his/her determination.

- (3) Such notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision with ten (10) days by invoking the administrative procedures as provided in section 22-65 or in the alternative by instituting legal action as provided in section 22-64.
- (4) The provisions of this subsection shall not apply to procurements involving the prequalification of bidder and the rights of any potential bidder under such prequalification to appeal a decision that such bidders are not responsible.
- (b) If, upon appeal pursuant to section 22-64 or section 22-65, it is determined that the decision of the Purchasing Manager was arbitrary or capricious, and the award of the contract in question has not been made, the sole relief shall be a finding that bidder is a responsible bidder for the contract in question. If it is determined the decision of the Purchasing Manager was arbitrary or capricious and an award of the contract has been made, the relief shall be as set forth in section 22-60 (b).
- (c) A bidder contesting a determination that he is not a responsible bidder for a particular contract shall proceed under this section, and may not protest the award or proposed award under section 22-60.
- (d) Nothing contained in this section shall be construed to require the county when procuring by competitive negotiation to furnish a statement of the reasons why a particular proposal was not deemed to be the most advantageous.

Sec. 22-60. Protest of award or decision to award.

- (a) Any bidder or offeror may protest the award or decision to award a contract by submitting such protest in writing to the Purchasing Manager no later than ten (10) days after the award or the announcement of the decision to award, whichever occurs first. 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 Purchasing Manager shall issue a decision in writing within ten (10) days stating the reasons for the action taken. This decision shall be final unless the bidder or offeror appeals within ten (10) days of the written decision by invoking the administrative procedures established by the Purchasing Manager, if any, or in the alternative by instituting legal action as provided in section 22-64 of this article.
- (b) If prior to an award it is determined that the decision to award is arbitrary or capricious, then the sole relief shall be a finding to that effect. The awarding authority (County Board of Supervisors or Purchasing Manager) shall cancel the proposed award or revise it to comply with the law. If, after an award, it is determined that an award of a contract was arbitrary or capricious, then the sole

relief shall be as hereinafter provided. Where the award has been made but performance has not begun, the performance of the contract may be enjoined by the court. Where the award has been made and performance has begun, the awarding authority (County Board of Supervisors or Purchasing Manager) 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. A decision to award may be deemed to be arbitrary and capricious only if it is not in accordance with the Constitution of Virginia, applicable law or regulation, or the terms and conditions of the invitation to bid or request for proposal. Nothing in this subsection shall be construed to permit a bidder to challenge the validity of the terms and conditions of the invitation to bid or request for proposal.

- (c) Where the awarding authority (County Board of Supervisors or Purchasing Manager) determines, after a hearing held by it, or its designee, following reasonable notice to all bidders, that there is probable cause to believe that a decision to award was based on fraud or corruption or on an act in violation of the ethics in public contracting as set forth in article VI of this chapter, the County Board of Supervisors or the Purchasing Manager, as the case may be, shall not award the contract to the offending bidder.

Sec. 22-61. 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 chapter shall not be affected by the fact that a protest or appeal has been filed.

Sec. 22-62. 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 as provided in section 22-60, or the filing of a timely legal action as provided in section 22-64, no further action to award the contract shall be taken unless there is a written determination by the Purchasing Manager that proceeding without delay is necessary to protect the public interest or unless the bid or offer would expire.

Sec. 22-63. Contractual disputes.

- (a) Contractual claims, whether for money or other relief, shall be submitted in writing no later than sixty (60) days after final payment; however, written notice of the contractor's intention to file such claim shall have been given at the time of the occurrence or beginning of the work upon which the claim is based. Nothing herein shall preclude a contract from requiring submission of an invoice for final payment within a certain time after completion and

acceptance of the work or acceptance of the goods. Pendency of claims shall not delay payment of amounts agreed due in the final payment.

- (b) A procedure for consideration of contractual claims may be included in each contract. Such procedure, which may be incorporated into the contract by reference, shall establish a time limit for a final decision in writing by the Purchasing Manager.
- (c) A contractor may not invoke the administrative procedures established by the Purchasing Manager, if any, or institute legal action as provided in section 22-64 of this article, prior to receipt of the decision on the claim, unless the Purchasing Manager fails to render such decision within the time specified in the contract.
- (d) The decision of the Purchasing Manager shall be final and conclusive unless the contractor appeals within six (6) months of the date of the final decision on the claim by the Purchasing Manager by invoking the administrative procedures established by the Purchasing Manager, if any, or in the alternative by instituting legal action as provided in section 22-64 of this article.

Sec. 22-64. Legal actions.

- (a) A bidder or offeror, actual or prospective, who is refused permission or disqualified from participation in bidding or competitive negotiation, or who is determined not to be a responsible bidder or offeror for a particular contract, may bring an action in the circuit court for the County of Gloucester challenging that decision, which shall be reversed only if the petitioner establishes that the decision was arbitrary or capricious, or, in the case of denial of prequalification, that the decision to deny prequalification was not based upon the criteria for denial of prequalification as set forth in subsection 22-21 (b).
- (b) A bidder denied withdrawal of a bid under section 22-58 of this Code may bring an action in the Circuit Court for the County of Gloucester challenging that decision, which shall be reversed only if the bidder or offeror establishes that the decision was not (i) an honest exercise of discretion, but rather was arbitrary or capricious or (ii) in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation for Bids.
- (c) A bidder, offeror or contractor may bring an action in the Circuit Court for the County of Gloucester challenging a proposed award or the award of a contract, which shall be reversed only if the petitioner establishes that the proposed award or the award is not an honest exercise of discretion, but rather is arbitrary or capricious or not in accordance with the Constitution of Virginia, statutes, regulations or the terms and conditions of the invitation to bid or

request for proposal. In the event the apparent low bidder, having been previously determined by the Purchasing Manager to be not responsible, is found by the court to be responsible, the court may direct the award of the contract to such bidder in accordance with the requirements of this section and the invitation to bid or request for proposal. The provisions of subsection 22-60 (b) shall apply to any such award.

- (d) If injunctive relief is granted, the court, upon request of the county, shall require the posting of reasonable security to protect the county.
- (e) The exclusive judicial venue for any contract dispute with the county shall be the Circuit Court for the County of Gloucester.
- (f) A bidder, offeror or contractor need not utilize administrative procedures meeting the standards of section 22-65 of this chapter, if available; but if those procedures are invoked by the bidder, offeror or contractor, the procedures shall be exhausted prior to instituting legal action concerning the same procurement transaction unless the county agrees otherwise.
- (g) Nothing herein shall be construed to prevent the county from instituting legal action against a contractor.

Sec. 22-65. Administrative appeals procedure.

- (a) The Purchasing Manager shall establish an administrative procedure for hearing protests of a decision to award or an award, appeals from refusals to allow withdrawal of bids, appeals from disqualifications and determinations of non-responsibility, and appeals from decisions on disputes arising during the performance of a contract, or any of these. Such administrative procedure shall provide for a hearing before a disinterested person or panel, the opportunity to present pertinent information and the issuance of a written decision containing findings of fact. The disinterested person shall not be an employee of the county and no member of the panel shall be an employee of the county. The findings of fact shall be final and conclusive and shall not be set aside unless the same are fraudulent or arbitrary or capricious, or so grossly erroneous as to imply bad faith, or in the case of denial of prequalification, such findings were not based upon the criteria for denial of prequalification as set forth in subsection 22-21 (b). No determination on an issue of law shall be final if appropriate legal action is instituted in a timely manner.
- (b) Any party to the administrative procedure, including the county, shall be entitled to institute judicial review if such action is brought within thirty (30) days of receipt of the written decision.

ARTICLE VI. ETHICS IN PUBLIC CONTRACTING

Sec. 22-66. Purpose.

The provisions of this article supplement, but do not supersede, other provisions of law, including, but not limited to, the State and Local Government Conflict of Interests Act (section 2.2-3100 et seq.), the Virginia Governmental Frauds Act (section 18.2-498.1 et seq.), and Articles 2 and 3 of Chapter 10 of Title 18.2 of the Code of Virginia, 1950, as amended. The provisions of this article apply notwithstanding the fact that the conduct described may not constitute a violation of the State and Local Government Conflict of Interests Act.

Sec. 22-67. Definitions.

For the purposes of this article, the following words and phrases shall have the meanings respectively ascribed to them by this section, unless a different meaning clearly appears from the context:

- (a) *County employee* shall mean any person employed by the county, including elected officials or appointed members of governing bodies.
- (b) *Immediate family* shall mean a spouse, children, parents, brothers and sisters, and any other person living in the same household as the employee.
- (c) *Official responsibility* shall mean administrative or operating authority, whether intermediate or final, to initiate, approve, and disapprove or otherwise affect a procurement transaction, or any claim resulting there from.
- (d) *Pecuniary interest arising from the procurement* shall mean a personal interest in a contract as defined in the State and Local Government Conflict of Interests Act (section 2.2-3100 et seq.).
- (e) *Procurement transaction* shall mean 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.

Sec. 22-68. Proscribed participation by public employees in procurement transaction.

Except as may be specifically allowed by provisions of the State and Local Government Conflict of Interests Act, no county employee having official responsibility for a procurement transaction shall participate in that transaction on behalf of the county when the employee knows that:

- (1) The employee is contemporaneously employed by a bidder, offeror or contractor involved in the procurement transaction; or

- (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 (5) percent of the bidder's, offeror's or contractor's firm; or
- (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.

Sec. 22-69. Solicitation or acceptance of gifts.

No county 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 county may recover the value of anything conveyed in violation of this section.

Sec. 22-70. Disclosure of subsequent employment.

No county employee or former county 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 with the county unless the employee or former employee provides written notification to the Board of Supervisors prior to commencement of employment by that bidder, offeror or contractor.

Sec. 22-71. Gifts by bidders, offerors, contractors or subcontractors.

No bidder, offeror, contractor or subcontractor shall confer upon any county 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.

Sec. 22-72. 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

subcontractor 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 county 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 county and will be recoverable from both the maker and recipient. Recovery from one offending party shall not preclude recovery from other offending parties.

Sec. 22-73. Purchase of building materials, etc., from architect or engineer prohibited.

- (a) No building materials, supplies or equipment for any building or structure constructed by or for the county shall be sold by or purchased from any person employed as an independent contractor by the public body 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 section 2.2-3101, Code of Virginia, 1950, as amended.
- (b) No building materials, supplies or equipment for any building or structure constructed by or for the county 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 such building or structure to the independent contractor employed by the county to furnish architectural or engineering services in which such person has a personal interest as defined in section 2.2-3101, Code of Virginia, 1950, as amended.
- (c) The provisions of subsections (a) and (b) shall not apply in cases of emergency.

Sec. 22-74. 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 county 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 which is not available to the public. However, the Purchasing Manager may permit such person to submit a bid or proposal for that procurement or any portion thereof if he/she determines that the exclusion of such a person would limit the number of potential qualified bidder or offerors in a manner contrary to the best interests of the county.

Sec. 22-75. Penalty for violation.

Willful violation of any provision of this article shall constitute a Class I misdemeanor. Upon conviction, any county employee, in addition to any other fine or penalty provided by law, shall forfeit his employment.