

# RESOLUTION OF THE ROANOKE REGIONAL AIRPORT COMMISSION

Adopted this 22nd day of July, 2014

No. 14-072214

A RESOLUTION adopting new Roanoke Regional Airport Commission Procurement Regulations to reflect certain amendments to the Code of Virginia (1950), as amended, and repealing in its entirety Resolution No. 03-011712, as amended, upon certain terms and conditions.

BE IT RESOLVED by the Roanoke Regional Airport Commission effective immediately that:

1. The Commission hereby adopts the following Roanoke Regional Airport Procurement Regulations to reflect certain amendments to the Code of Virginia (1950), as amended:

## ROANOKE REGIONAL AIRPORT COMMISSION

### PROCUREMENT REGULATIONS

#### Article 1. General Provisions.

##### § 1 Short Title; Purpose; Declaration of Intent.

- A. These regulations may be cited as the Roanoke Regional Airport Commission ("Commission") Procurement Regulations, including a restatement and implementation of the Virginia Public Procurement Act, Sections 2.2-4300 et seq., Code of Virginia (1950), as amended, as applied to the Commission.
- B. The purpose of this chapter is to enunciate the public policies pertaining to governmental procurement from nongovernmental sources, to include Commission procurement that 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 Commission, the contractor, or some third party is providing the consideration.
- C. To the end that the Commission obtains high quality goods and services at reasonable cost, that all procurement procedures be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety, that all qualified vendors have access to public business and that no offeror be arbitrarily or capriciously excluded, it is the intent of these regulations that competition be sought to the maximum feasible degree, that procurement procedures involve openness and administrative efficiency, that the Commission enjoy broad flexibility in fashioning details of such competition, that the rules governing contract awards be made clear in advance of the competition, that specifications reflect the procurement needs of the Commission rather than being drawn to favor a particular vendor, and that the

purchaser and vendor freely exchange information concerning what is sought to be procured and what is offered. The Commission may consider best value concepts when procuring goods and nonprofessional services, but not construction or professional services. The criteria, factors, and basis for consideration of best value and the process for the consideration of best value shall be as stated in the procurement solicitation.

(Virginia Code Reference § 2.2-4300).

## **§ 2 Definitions.**

Definitions.

As used in these regulations:

"Affiliate" means an individual or business that controls, is controlled by, or is under common control with another individual or business. A person controls an entity if the person owns, directly or indirectly, more than 10 percent of the voting securities of the entity. For the purposes of this definition "voting security" means a security that (i) confers upon the holder the right to vote for the election of members of the board of directors or similar governing body of the business or (ii) is convertible into, or entitles the holder to receive, upon its exercise, a security that confers such a right to vote. A general partnership interest shall be deemed to be a voting security.

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

"Business" means any type of corporation, partnership, limited liability company, association, or sole proprietorship operated for profit.

"Commission" means the Roanoke Regional Airport Commission, a body corporate established pursuant to the Roanoke Regional Airport Commission Act, Chapter 140, 1986 Acts of Assembly, and empowered to undertake the activities described in these regulations.

"Commission Administration" means the Executive Director of the Commission and/or an authorized designee.

"Competitive negotiation" is the method of contractor selection set forth in § 3.2.

"Competitive sealed bidding" is the method of contractor selection set forth in § 3.1.

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

"Construction management contract" means a contract in which a party is retained by the owner to coordinate and administer contracts for construction services for the benefit of the owner, and may also include, if provided in the contract, the furnishing of construction services to the owner.

"Design-build contract" means a contract between the Commission and another party in which the party contracting with the Commission agrees to both design and build the structure, roadway or other item specified in the contract.

"Employment services organization" means an organization that provides employment services to individuals with disabilities that is an approved Commission on the Accreditation of Rehabilitation Facilities (CARF) accredited vendor of the Department for Aging and Rehabilitative Services.

"Executive Director" means the Executive Director of the Roanoke Regional Airport Commission.

"Goods" means all material, equipment, supplies, printing, and automated data processing hardware and software.

"Informality" means a minor defect or variation of a bid or proposal from the exact requirements of the Invitation to Bid, or the Request for Proposal, which does not affect the price, quality, quantity or delivery schedule for the goods, services or construction being procured.

"Job order contracting" means a method of procuring construction services by establishing a book of unit prices and then obtaining a contractor to perform work as needed using the prices, quantities, and specifications in the book as the basis of its pricing. The contractor may be selected through either competitive sealed bidding or competitive negotiation depending on the needs of the Commission in procuring the construction services. A minimum amount of work may be specified in the contract. The contract term and the project amount shall not exceed the limitations specified in § 3.2 or § 4 of these regulations.

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

"Nonprofessional services" means any services not specifically identified as professional services in the definition of professional services.

"Potential bidder or offeror," for the purposes of §§ 45 and 49, means a person who, at the time the Commission negotiates and awards or proposes to award a contract, is engaged in the sale or lease of goods, or the sale of services, insurance or construction, of the type to be procured under the contract, and who at such time is eligible and qualified in all respects to perform that contract, and who would have been eligible and qualified to submit a bid or proposal had the contract been procured through competitive sealed bidding or competitive negotiation.

"Professional services" means 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. "Professional services" shall also include the services of an economist procured by the State Corporation Commission.

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

metropolitan planning organization or planning district commission which operates exclusively within the Commonwealth of Virginia.

"Public contract" means an agreement between the Commission and a nongovernmental source that is enforceable in a court of law.

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

"Responsive bidder" means a person who has submitted a bid that conforms in all material respects to the Invitation to Bid.

"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 bid opening.

"Services" means 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.

(Virginia Code Reference § 2.2-4301).

### **§ 3 Implementation**

In implementing these regulations, the Commission's duly designated officers or employees are hereby authorized to act on behalf of the Commission as set forth herein.

(Virginia Code Reference § 2.2-4302).

#### **§ 3.1 Process for Competitive Sealed Bidding**

The process for competitive sealed bidding shall include the following:

1. Issuance of a written Invitation to Bid containing or incorporating by reference the specifications and contractual terms and conditions applicable to the procurement. Unless the Commission has provided for prequalification of bidders, the Invitation to Bid shall include a statement of any requisite qualifications of potential contractors. When it is impractical to prepare initially a purchase description to support an award based on prices, an Invitation to Bid may be issued requesting the submission of unpriced offers to be followed by an Invitation to Bid limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation;
2. Public notice of the Invitation to Bid at least 10 days prior to the date set for receipt of bids by posting on the Department of General Services' central electronic procurement website or other appropriate websites. In addition, the Commission may publish in a newspaper of general circulation. The Department of General Services' central electronic procurement website provides the public with centralized visibility and access to the Commonwealth's procurement opportunities. In addition, bids may be solicited directly from potential contractors. Any additional solicitations shall include businesses

selected from a list made available by the Department of Small Business and Supplier Diversity.

3. Public opening and announcement of all bids received;
4. Evaluation of bids based upon the requirements set forth in the Invitation to Bid, which may include special qualifications of potential contractors, life-cycle costing, value analysis, and any other criteria such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose, which are helpful in determining acceptability; and
5. Award to the lowest responsive and responsible bidder. When the terms and conditions of multiple awards are so provided in the Invitation to Bid, awards may be made to more than one bidder.

(Virginia Code Reference 2.2-4302.1)

### **3.2 Process for Competitive Negotiation**

- A. The process for competitive negotiation shall include the following:
  1. Issuance of a written Request for Proposal indicating in general terms that which is sought to be procured, specifying the factors that will be used in evaluating the proposal and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities, specifications or qualifications that will be required;
  2. Public notice of the Request for Proposal at least 10 days prior to the date set for receipt of proposals by posting on the Department of General Services' central electronic procurement website or other appropriate websites. Additionally, the Commission shall publish in a newspaper 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. The Department of General Services' central electronic procurement website provides the public with centralized visibility and access to the Commonwealth's procurement opportunities. In addition, proposals may be solicited directly from potential contractors. Any additional solicitations shall include certified businesses selected from a list made available by the Department of Minority Business Enterprise; and
  3. For goods, nonprofessional services, and insurance, selection shall be made of two or more offerors deemed to be fully qualified and best suited among those submitting proposals, on the basis of the factors involved in the Request for 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 or primary determining factor. After negotiations have been conducted with each offeror so selected, the Commission shall select the offeror which, in its opinion, has made the best proposal and provides the best value, and shall award the contract to that offeror. When the terms and conditions of multiple awards are so provided in the Request for Proposal, awards may be made to more than one offeror. Should the Commission determine in writing and in its 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; or

4. For professional services, the Commission 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. The offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. In addition, offerors shall be informed of any ranking criteria that will be used by the Commission in addition to the review of the professional competence of the offeror. The Request for Proposal shall not, however, request that offerors furnish estimates of man-hours or cost for services. At the discussion stage, the Commission may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of price for services. In accordance with § 32 proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of discussion, outlined in this subdivision, on the basis of evaluation factors published in the Request for Proposal and all information developed in the selection process to this point, the Commission shall select in the order of preference two or more offerors whose professional qualifications and proposed services are deemed most meritorious.

Negotiations shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the Commission 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.

Notwithstanding the foregoing, if the terms and conditions for multiple awards are included in the Request for Proposal, the Commission may award contracts to more than one offeror.

Should the Commission determine in writing and in its sole discretion that only one offeror is fully qualified or that one offeror is clearly more highly qualified and suitable than the others under consideration, a contract may be negotiated and awarded to that offeror.

- B. For multiple projects, a contract for architectural or professional engineering services relating to construction projects, or a contract for job order contracting, may be negotiated by the Commission, provided (i) the projects require similar experience and expertise, (ii) the nature of the projects is clearly identified in the Request for Proposal, and (iii) the contract is limited to a one-year term or when the cumulative total project fees reach the maximum cost authorized in this subsection, whichever occurs first.

Such contracts may be renewable for four additional one-year terms at the option of the Commission. The fair and reasonable prices as negotiated shall be used in determining the cost of each project performed and the sum of all projects performed in a one-year contract term shall not exceed \$500,000, except that for:

1. Those awarded for any airport as defined in § 5.1-1 of the Code of Virginia (1950), as amended and aviation transportation projects, the sum of all such projects performed in a one-year contract term shall not exceed \$1.5 million; and,

2. Job order contracting, the sum of all projects performed in a one-year contract term shall not exceed \$2 million.

Competitive negotiations for such contracts may result in awards to more than one offeror provided (i) the Request for Proposal so states and (ii) the Commission has established procedures for distributing multiple projects among the selected contractors during the contract term.

- C. For any single project, for (i) architectural or professional engineering services relating to construction projects, or (ii) job order contracting, the project fee shall not exceed \$100,000, or for architectural or engineering services for airports as defined in § 5.1-1 and aviation transportation projects, the project fee of any single project shall not exceed \$500,000, except that for:
  1. Job order contracting, the project fee shall not exceed \$400,000.
- D. For the purposes of subsections B and C, any unused amounts from the first contract term shall not be carried forward to the additional term.
- E. Multiphase professional services contracts satisfactory and advantageous to the completion of large, phased, or long term projects may be negotiated and awarded based on a fair and reasonable price for the first phase only, where the 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 entering into any such contract, the Commission shall (i) state the anticipated intended total scope of the project and (ii) determine in writing that the nature of the work is such that the best interests of the Commission require awarding the contract.

(Virginia Code Reference 2.2-4302.2)

## **Article 2. Contract Formation and Administration.**

### **§ 4 Methods of Procurement.**

- A. All public contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, or construction, shall be awarded after competitive sealed bidding, or competitive negotiation as provided in this section, unless otherwise authorized by law.
- B. Professional services shall be procured by competitive negotiation.
- C. Upon a determination made in advance by the Commission 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.

Upon a written determination made in advance by the Commission 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 set forth in § 3.2. The Commission hereby determines that neither sealed bidding nor competitive negotiation

are practicable or fiscally advantageous to the public for the procurement of insurance; therefore, 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 § 3.2. The basis for this determination is the complexity of insurance policies and coverages and their procurement, as well as the frequent need to negotiate different types of insurance policies and coverages and exceptions to coverage.

- D. 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 Commission and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, which writing shall document the basis for this determination:
1. By the Commission for the construction of highways and any draining, dredging, excavation, grading or similar work upon real property; or,
  2. As otherwise provided in § 7.
- E. Upon a determination in writing that there is only one source practicably available for that which is to be procured, a contract may be negotiated and awarded to that source without competitive sealed bidding or competitive negotiation. The writing shall document the basis for this determination. The Commission shall issue a written notice stating that only one source was determined to be practicably available, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted on the Department of General Services' central electronic procurement website or other appropriate websites, and in addition, the Commission may publish in a newspaper of general circulation on the day the Commission awards or announces its decision to award the contract, whichever occurs first. The Department of General Services' central electronic procurement website provides the public with centralized visibility and access to the Commonwealth's procurement opportunities.
- F. In case of emergency, a contract may be awarded by the Commission or the Commission Administration without competitive sealed bidding or competitive negotiation; however, such procurement shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. The Commission or the Commission Administration shall issue a written notice stating that the contract is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. This notice shall be posted on the Department of General Services' central electronic procurement website or other appropriate websites, and in addition, the Commission or the Commission Administration may publish in a newspaper of general circulation on the day the Commission or Commission Administration awards or announces its decision to award the contract, whichever occurs first, or as soon thereafter as is practicable. The Department of General Services' central electronic procurement website provides the public with centralized visibility and access to the Commonwealth's procurement opportunities. In the event of an award by the Commission Administration, the Commission shall be notified of the procurement at its next regularly scheduled meeting.



- G. The Commission may establish purchase procedures, if adopted in writing, not requiring competitive sealed bids or competitive negotiation for single or term contracts for goods and services other than professional services if the aggregate or the sum of all phases is not expected to exceed \$100,000; however, such small purchase procedures shall provide for competition wherever practicable. Such purchase procedures may allow for single or term contracts for professional services without requiring competitive negotiation, provided the aggregate or the sum of all phases is not expected to exceed \$60,000.
- H. Upon a determination made in advance by the Commission 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 auctions.
- I. 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.

(Virginia Code Reference §2.2-4303).

#### **§ 5 Cooperative Procurement.**

- A. The Commission may participate in, sponsor, conduct, or administer a cooperative procurement agreement on behalf of or in conjunction with one or more other public bodies, or public agencies or institutions or localities of the several states, of the United States or its territories, the District of Columbia, or the U.S. General Services Administration, for the purpose of combining requirements to increase efficiency or reduce administrative expenses in any acquisition of goods and services.
- B. The Commission 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, except for:
  - 1. Contracts for architectural or engineering services; or
  - 2. Construction in excess of \$200,000 by Commission from the contract of another local public body that is more than a straight line distance of 75 miles from the territorial limits of the Airport. The installation of artificial turf or other athletic surfaces shall not be subject to the limitations prescribed in this subdivision. Nothing in this subdivision shall be construed to prohibit sole source or emergency procurements awarded pursuant to subsections E and F of §4.

(Virginia Code Reference §2.2-4304).

#### **§ 6 Competitive Procurement by Commission on State-aid Projects.**

No contract for the construction of any building or for an addition to or improvement of an existing building by the Commission for which state funds of not more than \$50,000 in

the aggregate or for the sum of all phases of a contract or project either by appropriation, grant-in-aid or loan, are used or are to be used for all or part of the cost of construction shall be let except after competitive sealed bidding or after competitive negotiation as provided under subsection D of § 4. The procedure for the advertising for bids or for proposals and for letting of the contract shall conform, mutatis mutandis, to this chapter.

(Virginia Code Reference §2.2-4305).

**§ 7 Design-build or Construction Management Contracts for Commission; Eligibility Requirements; Award of Contract; Records to be Kept.**

- A. While the competitive sealed bid process remains the preferred method of construction procurement for the Commission, the Commission may enter into a contract for construction on a fixed price or not-to-exceed price design-build or construction management basis provided the Commission complies with the requirements of this section and has implemented procedures consistent with the procedures adopted by the Secretary of Administration for utilizing design-build or construction management contracts.

Prior to making a determination as to the use of design-build or construction management for a specific construction project, the Commission shall have in its employ or under contract a licensed architect or engineer with professional competence appropriate to the project who shall advise the Commission regarding the use of design-build or construction management for that project and who shall assist the Commission with the preparation of the Request for Proposal and the evaluation of such proposals.

Prior to issuing a Request for Proposal for any design-build or construction management contract for a specific construction project, the Commission shall:

1. Have adopted, by ordinance or resolution, written procedures governing the selection, evaluation and award of design-build and construction management contracts. Such procedures shall be consistent with those described in this chapter for the procurement of nonprofessional services through competitive negotiation. Such procedures shall also require Requests for Proposals to include and define the criteria of such construction project in areas such as site plans; floor plans; exterior elevations; basic building envelope materials; fire protection information plans; structural, mechanical (HVAC), and electrical systems; and special telecommunications; and may define such other requirements as the Commission determines appropriate for that particular construction project. Such procedures for:
  - a. Design-build construction projects shall include a two-step competitive negotiation process consistent with the standards established by the Division of Engineering and Buildings of the Department of General Services for state agencies.
  - b. Construction management projects shall include selection procedures and required construction management contract terms consistent with the procedures as adopted by the Secretary of Administration.
2. Have documented in writing that for a specific construction project (i) a design-build or construction management contract is more advantageous than a

competitive sealed bid construction contract; (ii) there is a benefit to the Commission by using a design-build or construction management contract; and (iii) competitive sealed bidding is not practical or fiscally advantageous.

- B. The contract shall be awarded to the fully qualified offeror who submits an acceptable proposal determined to be the best value in response to the Request for Proposal.

(Virginia Code Reference § 2.2-4308).

**§ 7.1 (Effective December 1, 2013) Registration and use of federal employment eligibility verification program required; debarment.**

- A. For purposes of this section, "E-Verify program" means the electronic verification of work authorization program of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208), Division C, Title IV, 403(a), as amended, operated by the U.S. Department of Homeland Security, or a successor work authorization program designated by the U.S. Department of Homeland Security or other federal agency authorized to verify the work authorization status of newly hired employees under the Immigration Reform and Control Act of 1986 (P.L. 99-603).
- B. If the Commission has more than an average of 50 employees for the previous 12 months and enters into a contract in excess of \$50,000 with any agency of the Commonwealth to perform work or provide services pursuant to such contract, the Commission shall register and participate in the E-Verify program to verify information and work authorization of its newly hired employees performing work pursuant to such public contract.

(Virginia Code Reference § 2.2-4308.2).

**§ 8 Modification of the Contract.**

- A. A contract may include provisions for modification of the contract during performance, but no fixed-price contract may be increased by more than twenty-five percent of the amount of the contract or \$50,000 whichever is greater, without the advance written approval of the Commission. In no event may the amount of any contract, without adequate consideration, be increased for any purpose, including, but not limited to, relief of an offeror from the consequences of an error in its bid or offer.
- B. The Commission or the Executive Director may extend the term of an existing contract for services to allow completion of any work undertaken but not completed during the original term of the contract.
- C. Nothing in this section shall prevent the Commission or Commission Administration from placing greater restrictions on contract modifications.

(Virginia Code Reference §2.2-4309).

**§ 9 Discrimination Prohibited; Participation Of Small, Women-Owned, Minority-Owned, And Service Disabled Veteran-Owned Business.**

- A. In the solicitation or awarding of contracts, the Commission shall not discriminate against a bidder or offeror 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. Whenever solicitations are made, the Commission shall include businesses selected from a list made available by the Department of Small Business and Supplier Diversity.
- B. The Commission shall establish programs consistent with this chapter to facilitate the participation of small businesses and businesses owned by women, minorities, and service disabled veterans in procurement transactions. The programs established shall be in writing and shall comply with applicable law.
- C. As used in this section:

"Minority individual" means an individual who is a citizen of the United States or a legal resident alien and who satisfies one or more of the following definitions:

1. "African American" means a person having origins in any of the original peoples of Africa and who is regarded as such by the community of which this person claims to be a part.
2. "Asian American" means a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands, including but not limited to Japan, China, Vietnam, Samoa, Laos, Cambodia, Taiwan, Northern Mariana Islands, the Philippines, a U.S. territory of the Pacific, India, Pakistan, Bangladesh, or Sri Lanka and who is regarded as such by the community of which this person claims to be a part.
3. "Hispanic American" means a person having origins in any of the Spanish-speaking peoples of Mexico, South or Central America, or the Caribbean Islands or other Spanish or Portuguese cultures and who is regarded as such by the community of which this person claims to be a part.
4. "Native American" means a person having origins in any of the original peoples of North America and who is regarded as such by the community of which this person claims to be a part or who is recognized by a tribal organization.

"Minority-owned business" means a business that is at least 51 percent owned by one or more minority individuals who are U.S. citizens or legal resident aliens, or in the case of a corporation, partnership, or limited liability company or other entity, at least 51 percent of the equity ownership interest in the corporation, partnership, or limited liability company or other entity is owned by one or more minority individuals who are U.S. citizens or legal resident aliens, and both the management and daily business operations are controlled by one or more minority individuals.

"Service disabled veteran" means a veteran who (i) served on active duty in the United States military ground, naval, or air service, (ii) was discharged or released under conditions other than dishonorable, and (iii) has a service-connected disability rating fixed by the United States Department of Veterans Affairs.

"Service disabled veteran business" means a business that is at least 51 percent owned by one or more service disabled veterans or, in the case of a corporation, partnership, or limited liability company or other entity, at least 51 percent of the equity ownership interest in the corporation, partnership, or limited liability company or other entity is owned by one or more individuals who are service disabled veterans and both the management and daily business operations are controlled by one or more individuals who are service disabled veterans.

"Small business" means a business, independently owned and controlled by one or more individuals who are U.S. citizens or legal resident aliens, and together with affiliates, has 250 or fewer employees, or annual gross receipts of \$10 million or less averaged over the previous three years. One or more of the individual owners shall control both the management and daily business operations of the small business.

"State agency" means any authority, board, department, instrumentality, institution, agency, or other unit of state government. "State agency" shall not include any county, city, or town.

"Women-owned business" means a business that is at least 51 percent owned by one or more women who are U.S. citizens or legal resident aliens, or in the case of a corporation, partnership, or limited liability company or other entity, at least 51 percent of the equity ownership interest is owned by one or more women who are U.S. citizens or legal resident aliens, and both the management and daily business operations are controlled by one or more women.

(Virginia Code Reference § 2.2-4310).

**§ 10 Employment Discrimination by Contractor Prohibited; Required Contract Provisions.**

The Commission shall include in every contract of more than \$10,000 the following provisions:

1. During the performance of this contract, the contractor agrees as follows:
  - a. The contractor will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, or other basis prohibited by state law relating to discrimination in employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.
  - b. The contractor, in all solicitations or advertisements for employees placed by or on behalf of the contractor, will state that such contractor is an equal opportunity employer.
  - c. Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for the purpose of meeting the requirements of this section.

2. The contractor will include the provisions of the foregoing paragraphs a, b and c in every subcontract or purchase order of over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.

(Virginia Code Reference 2.2-4311).

**§ 10.1 Compliance with Federal, State, and Local Laws and Federal Immigration Law; Required Contract Provisions.**

The Commission shall provide in every written 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.

(Virginia Code Reference 2.2-4311.1).

**§ 10.2 Compliance with State Law; Foreign and Domestic Businesses Authorized to Transact Business in the Commonwealth.**

- A. The Commission shall include in every written contract a provision that a contractor organized as a stock or nonstock corporation, limited liability company, business trust, or limited partnership or registered as a registered limited liability partnership shall be authorized to transact business in the Commonwealth as a domestic or foreign business entity if so required by Title 13.1 or Title 50 or as otherwise required by law.
- B. Pursuant to competitive sealed bidding or competitive negotiation, Commission shall include in the solicitation a provision that requires a bidder or offeror organized or authorized to transact business in the Commonwealth pursuant to Title 13.1 or Title 50 to include in its bid or proposal the identification number issued to it by the State Corporation Commission. Any bidder or offeror that is not required to be authorized to transact business in the Commonwealth as a foreign business entity under Title 13.1 or Title 50 or as otherwise required by law shall include in its bid or proposal a statement describing why the bidder or offeror is not required to be so authorized.
- C. Any bidder or offeror described in subsection B that fails to provide the required information shall not receive an award unless a waiver of this requirement and the administrative policies and procedures established to implement this section is granted by the Executive Director.
- D. Any business entity described in subsection A that enters into a contract with the Commission pursuant to this chapter shall not allow its existence to lapse or its certificate of authority or registration to transact business in the Commonwealth, if so required under Title 13.1 or Title 50, to be revoked or cancelled at any time during the term of the contract.
- E. The Commission may void any contract with a business entity if the business entity fails to remain in compliance with the provisions of this section.

(Virginia Code Reference 2.2-4311.2).

**§ 11 Drug-free Workplace to be Maintained by Contractor; Required Contract Provisions.**

The Commission shall include in every contract over \$10,000 the following provisions:

During the performance of this 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 \$10,000, so that the provisions will be binding upon each subcontractor or vendor.

For the purposes of this section, "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 these regulations, 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.

(Virginia Code Reference 2.2-4312).

**§ 12 Use of Brand Names.**

Unless otherwise provided in the Invitation to Bid, the name of a certain brand, make or manufacturer shall not restrict bidders to the specific brand, make or manufacturer named and shall be deemed to convey the general style, type, character, and quality of the article desired. Any article that the Commission in its sole discretion determines to be the equal of that specified, considering quality, workmanship, economy of operation, and suitability for the purpose intended, shall be accepted.

(Virginia Code Reference 2.2-4315).

**§ 13 Comments Concerning Specifications.**

The Commission Administration shall establish procedures whereby comments concerning specifications or other provisions in Invitations to Bid or Requests for Proposal can be received and considered prior to the time set for receipt of bids or proposals or award of the contract.

(Virginia Code Reference 2.2-4316).

**§ 14 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 by the Commission Administration 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 Commission. The process shall be consistent with the provisions of this section.

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. The 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 provisions of subsection D of § 32.

In all instances in which the Commission or the Commission administration 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 subsection 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 Commission Administration shall advise in writing each contractor who submitted an application whether that contractor has been prequalified. In the event that a contractor is denied prequalification, the written notification to the contractor shall state the reasons for the denial of prequalification and the factual basis of such reasons.

A decision by the Commission Administration denying prequalification under the provisions of this subsection shall be final and conclusive unless the contractor appeals the decision as provided in § 42.

- C. The Commission Administration may deny prequalification to any contractor only if the Commission Administration 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 Commission Administration shall be sufficient to establish the financial ability of the contractor to perform the contract resulting from such procurement;
  2. The contractor does not have appropriate experience to perform the construction project in question;
  3. The contractor or any officer, director or owner thereof has had judgments entered against him within the past ten years for the breach of contracts for governmental or nongovernmental construction, including, but not limited to, design-build or construction management;
  4. The contractor has been in substantial noncompliance with the terms and conditions of prior construction contracts with the Commission without good



cause. If the Commission has not contracted with a contractor in any prior construction contracts, the Commission Administration 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 Commission Administration 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 (i) Article 6 (§ 2.2-4367 et seq.) of the Code of Virginia (1950), as amended, (ii) the Virginia Governmental Frauds Act (§ 18.2-498.1 et seq. Code of Virginia (1950), as amended), (iii) Chapter 4.2 (§ 59.1-68.6 et seq.) of Title 59.1 Code of Virginia (1950), as amended, 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 Commission in a timely manner any information requested by the Commission Administration relevant to subdivisions 1 through 6 of this subsection.
- D. If the Commission has a prequalification procedure that provides for minority participation in municipal construction contracts, the Commission may also deny prequalification based on minority participation criteria. However, nothing herein shall authorize the adoption or enforcement of minority participation criteria except to the extent that such criteria, and the adoption and enforcement thereof, are in accordance with the Constitution and laws of the United States and the Commonwealth.

(Virginia Code Reference 2.2-4317).

### **§ 15 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 Commission Administration may negotiate with the apparent low bidder to obtain a contract price within available funds. However, the negotiation may be undertaken only under conditions and procedures described in writing and approved by the Commission Administration prior to issuance of the Invitation to Bid and summarized therein.

(Virginia Code Reference § 2.2-4318).

**§ 16 Cancellation, Rejection of Bids; Waiver of Informalities.**

- A. An Invitation to Bid, a Request for Proposal, any other solicitation, or any and all bids or proposals, may be canceled or rejected. The reasons for cancellation or rejection shall be made part of the contract file. The Commission shall not cancel or reject an Invitation to Bid, a Request for Proposal, any other solicitation, bid or proposal pursuant to this section solely to avoid awarding a contract to a particular responsive and responsible bidder or offeror.
- B. The Commission may waive informalities in bids.

(Virginia Code Reference § 2.2-4319).

**§ 17 Exclusion of Insurance Bids Prohibited.**

Notwithstanding any other provision of law, no insurer licensed to transact the business of insurance in the Commonwealth or approved to issue surplus lines insurance in the Commonwealth shall be excluded from presenting an insurance bid proposal to the Commission in response to a request for proposal or an invitation to bid. Nothing in this section shall preclude the Commission from debaring a prospective insurer pursuant to § 18.

(Virginia Code Reference 2.2-4320).

**§ 18 Debarment.**

Prospective contractors may be debarred from contracting for particular types of supplies, services, insurance or construction, for specified periods of time. The Commission's debarment procedure shall be as follows:

A. General Authority

- 1. After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the Executive Director, after consulting with the General Counsel, is authorized to debar a person, firm or entity, for cause, from consideration for award of contracts. The debarment shall not be for a period of more than three (3) years.
- 2. After consultation with the General Counsel, the Executive Director is authorized to suspend a person, firm or entity, from consideration for award of contracts, if there is probable cause to believe that the person, firm or entity, has engaged in any activity which might lead to debarment. The suspension shall not be for a period exceeding three (3) months.

B. Grounds for debarment

The causes or grounds for debarment, as authorized by this section include:

- 1. Conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract.
- 2. Conviction under state and 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 Commission contractor.

3. Conviction under state or federal antitrust statutes arising out of the submission of bids or proposals.
4. Violation of contract provisions, as set forth below, of a character which is regarded by the Commission Administration to be so serious as to justify debarment action:
  - a. Deliberate failure, without good cause, to perform in accordance with the specifications or within the time limit provided in the contract; or
  - b. 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.
5. Any other cause the Executive Director determines to be so serious and compelling as to affect responsibility as a Commission contractor, including unsatisfactory performance for a public body or debarment by another governmental entity for any cause and violation of any applicable ethical standards.

C. Written decision required; contents of decision

The Executive Director shall issue a written decision to debar or suspend pursuant to this article. The decision shall state the reasons for the action taken and inform the debarred or suspended person or entity involved of its rights concerning judicial review. A copy of the decision required herein shall be mailed or otherwise furnished immediately to the debarred or suspended person or entity and to the Commission Secretary for submittal to the Commission at its next regularly scheduled meeting.

D. Finality of decision

A decision to debar or suspend made pursuant to this article shall be final and conclusive, unless the debarred or suspended person within thirty (30) days after receipt of the decision commences a timely action in court in accordance with applicable law.

(Virginia Code Reference § 2.2-4321.)

**§ 19 Preference for Virginia Products with Recycled Content and for Virginia Firms.**

- A. In the case of a tie bid, preference shall be given to goods produced in Virginia, goods or services or construction provided by Virginia persons, firms or corporations; otherwise 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 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 price-matching preference, a like preference shall be allowed to responsive and responsible bidders who are residents of Virginia. If the lowest bidder is a resident contractor of a state with an absolute preference, the bid shall not be considered. The Department of General Services shall post and maintain an updated list on its website of all states with an absolute preference for their resident contractors and those states that allow their resident contractors a percentage preference, including the respective percentage amounts. For purposes of compliance with this section, the Commission may rely upon the accuracy of the information posted on this website.

- 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.
- D. For the purposes of this section, a Virginia person, firm, or corporation shall be deemed to be a resident of Virginia if such person, firm or corporation has been organized pursuant to Virginia law or maintains a principal place of business within Virginia.

(Virginia Code Reference § 2.2-4324).

### **19.1 Energy Forward Pricing Mechanisms.**

- A. As used in this section, unless the context requires a different meaning:
  - "Energy" means natural gas, heating oil, propane, diesel fuel, unleaded fuel, and any other energy source except electricity.
  - "Forward pricing mechanism" means either: (i) a contract or financial instrument that obligates a public body to buy or sell a specified quantity of energy at a future date at a set price or (ii) an option to buy or sell the contract or financial instrument.
- B. Notwithstanding any other law to the contrary but subject to available appropriation, the Commission may use forward pricing mechanisms for budget risk reduction.
- C. Forward pricing mechanism transactions shall be made only under the following conditions:
  - 1. The quantity of energy affected by the forward pricing mechanism shall not exceed the estimated energy use for the Commission for the same period, which shall not exceed 48 months from the trade date of the transaction; and
  - 2. A separate account shall be established for operational energy for the Commission when using a forward pricing mechanism.

- D. Before exercising the authority under this section, the Commission shall develop written policies and procedures governing the use of forward pricing mechanisms and disclosure of the same to the public.
- E. Before exercising authority under subsection B, the Commission shall establish an oversight process that provides for review of the Commission's use of forward pricing mechanisms. The oversight process shall include internal or external audit reviews; annual reports to, and review by, an internal investment committee; and internal management control.

(Virginia Code Reference § 2.2-4329.1).

## **§ 20 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 in the bid, provided the bid was submitted in good faith, and the mistake was a clerical mistake as opposed to a judgment mistake, and was actually due to an unintentional arithmetic error or an unintentional omission of a quantity of work, labor or material made directly in the compilation of a bid, which unintentional arithmetic error or unintentional omission can be clearly shown by objective evidence drawn from inspection of original work papers, documents and materials used in the preparation of the bid sought to be withdrawn.

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

The following procedure for withdrawal of a bid is selected by the Commission and shall be stated in the advertisement for bids:

The bidder shall give notice in writing of its claim of right to withdraw its bid within two business days after the conclusion of the bid opening procedure and shall submit original work papers with such notice. The work papers, documents and materials submitted by the bidder shall, at the bidder's request, be considered trade secrets or proprietary information subject to the conditions of subsection F of § 32. The mistake shall be proved only from the original work papers, documents and materials delivered as required herein.

- B. The procedure for the withdrawal of bids other than construction contracts shall be the same as those for construction contract.
- C. No bid shall 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 percent.

- D. If a bid is withdrawn in accordance with 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 whom the contract is awarded or otherwise benefit, directly or indirectly, from the performance of the project for which the withdrawn bid was submitted.
- F. The Executive Director shall notify the bidder in writing within five business days of the decision regarding the bidder's request to withdraw its bid. If the Executive Director denies the withdrawal of a bid under the provisions of this section, the Executive Director shall state in such notice the reasons for the Commission's decision and award the contract to such bidder at the bid price, provided such bidder is a responsible and responsive bidder. At the same time that the notice is provided, the Commission shall return all work papers and copies thereof that have been submitted by the bidder.

(Virginia Code Reference § 2.2-4330).

**§ 21 Contract Pricing Arrangements.**

- A. Except as prohibited in this section, Commission contracts may be awarded on a fixed price or cost reimbursement basis, or on any other basis that is not prohibited.
- B. Except in case of emergency affecting the public health, safety or welfare, no public contract shall be awarded on the basis of cost plus a percentage of cost.
- C. The following contract pricing arrangements shall not be prohibited by this section:
  - 1. A policy or contract of insurance or prepaid coverage having a premium computed on the basis of claims paid or incurred, plus the insurance carrier's administrative costs and retention stated in whole or part as a percentage of such claims; or
  - 2. A cost plus a percentage of the private investment made by a private entity as a basis for the procurement of commercial or financial consulting services related to a qualifying transportation facility under the Public-Private Transportation Act of 1995 (§ 56-556 et seq.) or a qualifying project under the Public-Private Education Facilities and Infrastructure Act of 2002 (§ 56-575.1 et seq.) where the commercial or financial consulting services are sought to solicit or to solicit and evaluate proposals for the qualifying transportation facility or the qualifying project. As used in this section, "private entity" and "qualifying transportation facility" mean the same as those terms are defined in § 56-557 and "qualifying project" means the same as that term is defined in § 56-575.1.

(Virginia Code Reference §2.2-4331).

**§ 22 Workers' Compensation Requirements for Construction Contractors and Subcontractors.**

- A. No contractor shall perform any work on a construction project of the Commission unless it (i) has obtained, and continues to maintain for the duration of the work, workers' compensation coverage required pursuant to the provisions of Chapter 8 (§ 65.2-800 et seq.) of Title 65.2 and (ii) provides prior to the award of contract, on a form furnished by the Commission evidence of such coverage.
- B. No subcontractor shall perform any work on a construction project of the Commission unless it has obtained, and continues to maintain for the duration of such work, workers' compensation coverage required pursuant to the provisions of Chapter 8 (§ 65.2-800 et seq.) of Title 65.2.

(Virginia Code Reference § 2.2-4332).

**§ 23 Retainage on Construction Contracts.**

- A. In any Commission contract for construction that provides for progress payments in installments based upon an estimated percentage of completion, the contractor shall be paid at least ninety-five percent of the earned sum when payment is due, with no more than five percent being retained to ensure faithful performance of the contract, except for contracts funded with Airport Improvement Program funds which shall be subject to 10% retainage in accordance with federal requirements. All amounts withheld may be included in the final payment.
- B. Any subcontract for a Commission project that provides for similar progress payments shall be subject to the provisions of this section.

(Virginia Code Reference § 2.2-4333).

**§ 24 Deposit of Certain Retained Funds on Certain Contracts with the Commission; Penalty for Failure to Timely Complete.**

- A. When contracting directly with contractors for public contracts of \$200,000 or more for construction of highways, roads, streets, bridges, parking lots, demolition, clearing, grading, excavating, paving, pile driving, miscellaneous drainage structures, and the installation of water, gas, sewer lines and pumping stations where portions of the contract price are to be retained, or when contracting for construction paid in whole or part with federal AIP funds, the Commission Administration shall include in the Bid Proposal an option for the contractor to use an escrow account procedure for utilization of the Commission's retainage funds by so indicating in the space provided in the proposal documents. In the event the contractor elects to use the escrow account procedure, the escrow agreement form included in the Bid Proposal and Contract shall be executed and submitted to the Commission Administration within fifteen calendar days after notification. If the escrow agreement form is not submitted within the fifteen-day period, the contractor shall forfeit its rights to the use of the escrow account procedure.
- B. In order to have retained funds paid to an escrow agent, the contractor, the escrow agent, and the surety shall execute an escrow agreement form. The contractor's escrow agent shall be a trust company, bank or savings institution with its principal office located in the Commonwealth. The escrow agreement and all regulations

adopted by the Commission Administration shall be substantially the same as that used by the Virginia Department of Transportation.

- C. This section shall not apply to public contracts for construction for railroads, public transit systems, runways (unless funded in whole or part with federal AIP funds), 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 Commission, 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 project that provides for similar progress payments shall be subject to the provisions of this section.

(Virginia Code Reference § 2.2-4334).

**§ 25 Commission Construction Contract Provisions Barring Damages for Unreasonable Delays Declared Void.**

- A. Any provision contained in any Commission construction contract that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages for unreasonable delay in performing such contract, either on his behalf or on behalf of his subcontractor if and to the extent the delay is caused by acts or omissions of the Commission, its agents or employees and due to causes within their control shall be void and unenforceable as against public policy.
- B. Subsection A shall not be construed to render void any provision of a Commission construction contract that:
  - 1. Allows the Commission to recover that portion of delay costs caused by the acts or omissions of the contractor, or its subcontractors, agents or employees;
  - 2. Requires notice of any delay by the party claiming the delay;
  - 3. Provides for liquidated damages for delay; or
  - 4. Provides for arbitration or any other procedure designed to settle contract disputes.
- C. A contractor making a claim against the Commission for costs or damages due to the alleged delaying of the contractor in the performance of its work under any public construction contract shall be liable to the Commission and shall pay it for a percentage of all costs incurred by the Commission in investigating, analyzing, negotiating, litigating and arbitrating the claim, which percentage shall be equal to the percentage of the contractor's total delay claim that is determined through litigation or arbitration to be false or to have no basis in law or in fact.



- D. If the Commission denies a contractor's claim for costs or damages due to the alleged delaying of the contractor in the performance of work under any public construction contract, 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 public body shall be equal to the percentage of the contractor's total delay claim for which the Commission's denial is determined through litigation or arbitration to have been made in bad faith.

(Virginia Code Reference § 2.2-4335).

**§ 26 Bid Bonds.**

- A. Except in cases of emergency, all bids or proposals for construction contracts in excess of \$500,000 shall be accompanied by a bid bond from a surety company selected by the bidder that is authorized to do business in Virginia, as a guarantee that if the contract is awarded to the bidder, it will enter into the contract for the work mentioned in the bid. The amount of the bid bond shall not exceed five percent of the amount bid.
- B. For construction contracts in excess of \$100,000 but less than \$500,000, where bid bond requirements are waived, prospective contractors shall be prequalified for each individual project in accordance with section 14.
- C. No forfeiture under a bid bond shall exceed the lesser of (i) the difference between the bid for which the bond was written and the next low bid, or (ii) the face amount of the bid bond.
- D. Nothing in this section shall preclude the Commission or Commission Administration from requiring bid bonds to accompany bids or proposals for construction contracts anticipated to be less than \$500,000.

(Virginia Code Reference § 2.2-4336).

**§ 27 Performance and Payment Bonds.**

- A. Except as provided in subsection H, upon the award of any (i) public construction contract exceeding \$500,000 awarded to any prime contractor; (ii) construction contract exceeding \$500,000 awarded to any prime contractor requiring the performance of labor or the furnishing of materials for buildings, structures or other improvements to real property owned or leased by the Commission; (iii) construction contract exceeding \$500,000 in which the performance of labor or the furnishing of materials will be paid with public funds; or (iv) transportation-related projects exceeding \$350,000 that are partially or wholly funded by the Commonwealth, the contractor shall furnish to the Commission 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, in a form and amount satisfactory to the Commission.

2. A payment bond in the sum of the contract amount. The bond shall be for the protection of claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded, or to any subcontractors, in furtherance of the work provided for in the contract, and shall be conditioned upon the prompt payment for all materials furnished or labor supplied or performed in the furtherance of the work and shall be in a form and amount satisfactory to the Commission.

"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. For nontransportation-related construction contracts in excess of \$100,000 but less than \$500,000, where the bid bond requirements are waived, prospective contractors shall be prequalified for each individual project in accordance with § 14.
- C. Each of the bonds shall be executed by one or more surety companies selected by the contractor that are authorized to do business in Virginia.
- D. Bonds required for the contracts of the Commission shall be payable to the Commission.
- E. Each of the bonds shall be filed with the Commission Administration.
- F. Nothing in this section shall preclude the Commission administration from requiring payment or performance bonds for construction contracts below \$500,000 for nontransportation-related projects.
- G. Nothing in this section shall preclude the contractor from requiring each subcontractor to furnish a payment bond with surety thereon in the sum of the full amount of the contract with such subcontractor conditioned upon the payment to all persons who have and fulfill contracts that are directly with the subcontractor for performing labor and furnishing materials in the prosecution of the work provided for in the subcontract.
- H. The performance and payment bond requirements of subsection A for transportation-related projects that are valued in excess of \$250,000 but less than \$350,000 may only be waived by the Commission if the bidder provides evidence, satisfactory to the public body, that a surety company has declined an application from the contractor for a performance or payment bond.

(Virginia Code Reference § 2.2-4337).

#### **§ 28 Alternative Forms of Security.**

- A. In lieu of a bid, payment, or performance bond, a bidder may furnish a certified check, cashier's check, or cash escrow in the face amount required for the bond, unless prohibited by applicable federal requirements.

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

(Virginia Code Reference § 2.2-4338).

### **§ 29 Bonds on Other than Construction Contracts.**

The Commission Administration may require bid, payment, or performance bonds for contracts for goods or services if provided in the Invitation to Bid or Request for Proposal.

(Virginia Code Reference §2.2-4339).

### **§ 30 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 that gave rise to the action.

(Virginia Code Reference § 2.2-4340).

### **§ 31 Actions on Payment Bonds; Waiver of Right to Sue.**

- A. Any claimant who has a direct contractual relationship with the contractor and who has performed labor or furnished material in accordance with the contract documents in furtherance of the work provided in any contract for which a payment bond has been given, and who has not been paid in full before the expiration of ninety days after the day on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment, may bring an action on the payment bond to recover any amount due him for the labor or material. The obligee named in the bond need not be named a party to the action.
- B. Any claimant who has a direct contractual relationship with any subcontractor but who has no contractual relationship, express or implied, with the contractor, may bring an action on the contractor's payment bond only if he has given written notice to the contractor within 90 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. 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 its office is regularly maintained for the transaction of business. Claims for sums withheld as retainage 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 shall be brought within one year after the day on which the person bringing such action last performed labor or last furnished or supplied materials.

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

(Virginia Code Reference §2.2-4341).

**§ 32 Public inspection of Certain Records.**

- A. Except as provided in this section, all proceedings, records, contracts and other public records relating to procurement transactions shall be open to the inspection and copying of any citizen, or any interested person, firm or corporation, in accordance with the Virginia Freedom of Information Act ("FOIA" § 2.2-3700 et seq.) and by submitting a bid or proposal, a business or person is deemed to consent to the copying of all submitted documents and to waive any right, claim, or cause of action related to such copying, including, without limitation, those based on copyright and/or intellectual property law.
- B. Cost estimates relating to a proposed procurement transaction prepared by or for the Commission 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 Commission decides not to accept any of the bids and to reopen the contract. Otherwise, bid records shall be open to public inspection only after award of the contract.
- D. Any competitive negotiation offeror, upon request, shall be afforded the opportunity to inspect proposal records within a reasonable time after the evaluation and negotiations of proposals are completed but prior to award, except in the event that the Commission 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 subsection B of § 14 shall not be subject to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.); however, the bidder, offeror or contractor shall (i) invoke the protections of this section prior to or upon submission of the data or other materials, (ii) identify the data or other materials to be protected, and (iii) state the reasons why protection is necessary.

(Virginia Code Reference §2.2-4342).

**Article 3.  
Exemptions and Limitations.**

**§ 33 Compliance with Conditions on Federal Grants or Contracts.**

Where a procurement transaction involves the expenditure of federal assistance or contract funds, the receipt of which is conditioned upon compliance with mandatory requirements in federal laws or regulations not in conformance with the provisions of the Virginia Public Procurement Act and/or these regulations, the Commission may comply with such federal requirements, notwithstanding the provisions of the Virginia Public Procurement Act and/or these regulations, the Commission hereby determining that acceptance of the grant or contract funds under the applicable conditions is in the public interest. Such determination for the specific procurement transaction shall state the specific provision of this chapter in conflict with the conditions of the grant or contract.

The Commission hereby determines that acceptance of federal Airport Improvement Program (AIP) grant funds under the applicable grant conditions and mandatory requirements is in the public interest and, without limitation, sections or portions of Sections 2.2-4301 Definitions, 2.2-4303 Methods of Procurement, 2.2-4319 Cancellation, rejection of bids; waiver of informalities, 2.2-4331 Contract pricing arrangements, 2.2-4344 Exemptions from competition for certain transactions, 2.2-4317 Prequalification generally; prequalification for construction, 2.2-4324 Preference for Virginia products with recycled content and for Virginia firms, 2.2-4318 Negotiation with lowest responsible bidder, 2.2-4330 Withdrawal of bid due to error, 2.2-4309 Modification of the contract, 2.2-4333 Retainage on Construction Contracts, 2.2-4338 Alternative forms of security, 2.2-4339 Bonds on other than construction contracts, of the Virginia Public Procurement Act Code of Virginia (1950), as amended, conflict with the conditions and requirements of federal grants.

(Virginia Code Reference § 2.2-4343).

#### **§ 34 Permitted Contracts with Certain Religious Organizations**

The Commission may enter into contracts with faith-based organizations in accordance with applicable law. The Commission shall ensure that all contracts prominently display a nondiscrimination statement indicating that the Commission does not discriminate against faith-based organizations.

(Virginia Code Reference § 2.2-4343.1).

#### **§ 35 Exemptions from Competition for Certain Transactions.**

A. The Commission may enter into contracts without competition for:

1. The purchase of goods or services that are produced or performed by:

- a. Persons, or in schools or workshops, under the supervision of the Virginia Department for the Blind and Vision Impaired; or
- b. Employment services organizations that offer transitional or supported employment services serving individuals with disabilities.

B. The Commission, or its General Counsel with the appropriate coordination with the Commission Chairman or the Commission, may enter into contracts without competition for the purchase of legal services, provided that the pertinent provisions of Chapter 5 (§ 2.2-500 et seq.) of the Virginia Code remain applicable, or expert witnesses or other services associated with litigation or regulatory proceedings.

(Virginia Code Reference §2.2-4344).

**§ 36 Exemptions from Competitive Sealed Bidding and Competitive Negotiation for Certain Transactions; Limitations.**

- A. The Commission may enter into contracts without competitive sealed bidding or competitive negotiation for insurance or electric utility services 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 or electric utility services by use of competitive principles and provided that the Commission 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.
- B. No contract for the construction of any building or for an addition to or improvement of an existing building by the Commission for which state funds of not more than \$50,000 in the aggregate or for the sum of all phases of a contract or project either by appropriation, grant-in-aid or loan, are used or are to be used for all or part of the cost of construction shall be let except after competitive sealed bidding or after competitive negotiation as provided under of subsection D of § 4. The procedure for the advertising for bids or for proposals and for letting of the contract shall conform, mutatis mutandis, to this chapter.

(Virginia Code Reference § 2.2-4345).

**Article 4.  
Prompt Payment.**

**§ 37 Definitions.**

As used in this article, unless the context requires a different meaning:

"Contractor" means the entity that has a direct contract with the Commission.

"Payment date" means either; (i) the date on which payment is due under the terms of a contract for provision of goods or services; or (ii) if such date has not been established by contract, (a) forty-five days after receipt by the Commission or its agent responsible under the contract for approval of such invoices for the amount of payment due; or (b) forty-five days after receipt by the local government, whichever is later.

"Subcontractor" means any entity that has a contract to supply labor or materials to the contractor to whom the contract was awarded or to any subcontractor in the performance of the work provided for in such contract.

(Virginia Code Reference § 2.2-4347).

**§ 38 Retainage to Remain Valid.**

Notwithstanding the provisions of this article, the provisions of § 23 relating to retainage shall remain valid.

(Virginia Code Reference § 2.2-4349).

**§ 39 Prompt Payment of Bills**

When the Commission acquires goods or services, or conducts any other type of contractual business with a nongovernmental, privately owned enterprise, the Commission shall promptly pay for the completed delivered goods or services by the required payment date. The required payment date shall be either: (i) the date on which payment is due under the terms of the contract for the provision of the goods or services; or (ii) if a date is not established by contract, not more than forty-five days after goods or services are received or not more than forty-five days after the invoice is rendered, whichever is later.

Separate payment dates may be specified for contracts under which goods or services are provided in a series of partial executions or deliveries to the extent that the contract provides for separate payment for partial execution or delivery.

Within twenty days after the receipt of the invoice or goods or services, the Commission shall notify the supplier of any defect or impropriety that would prevent payment by the payment date. Unless otherwise provided under the terms of the contract for the provision of goods or services, if the Commission fails to pay by the payment date, the Commission shall pay any finance charges assessed by the supplier that shall not exceed one percent per month.

The provisions of this section shall not apply to the late payment provisions in any public utility tariffs or public utility negotiated contracts.

(Virginia Code Reference § 2.2-4352).

**§ 40 Date of Postmark Deemed to be Date Payment is Made.**

In those cases where payment is made by mail, the date of postmark shall be deemed to be the date payment is made for purposes of this chapter.

(Virginia Code Reference § 2.2-4353).

**§41 Payment Clauses to be Included in Contracts.**

Any contract awarded by the Commission in accordance with § 39, shall include:

1. A payment clause that obligates the contractor to take one of the two following actions within seven days after receipt of amounts paid to the contractor by the Commission for work performed by the subcontractor under that contract:
  - a. Pay the subcontractor for the proportionate share of the total payment received from the Commission attributable to the work performed by the subcontractor under that contract; or

- b. Notify the Commission, in writing, of its intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.
2. A payment clause that requires (i) individual contractors to provide their social security numbers and (ii) proprietorships, partnerships, and corporations to provide their federal employer identification numbers.
3. An interest clause that obligates the contractor to pay interest to the subcontractor on all amounts owed by the contractor that remain unpaid after seven days following receipt by the contractor of payment from the Commission for work performed by the subcontractor under that contract, except for amounts withheld as allowed in subdivision 1.
4. An interest rate clause stating, "Unless otherwise provided under the terms of this contract, interest shall accrue at the rate of one percent per month."

Any such contract awarded shall further require the contractor to include in each of its subcontracts a provision requiring each subcontractor to include or otherwise be subject to the same payment and interest requirements with respect to each lower-tier subcontractor.

A contractor's obligation to pay an interest charge to a subcontractor pursuant to the payment clause in this section shall not be construed to be an obligation of the Commission. A contract modification shall not be made for the purpose of providing reimbursement for the interest charge. A cost reimbursement claim shall not include any amount for reimbursement for the interest charge.

(Virginia Code Reference § 2.2-4354).

## **Article 5. Remedies**

### **§ 42 Ineligibility.**

- A. Any bidder, offeror or contractor refused permission to participate, or disqualified from participation, in public contracts shall be notified in writing. Prior to the issuance of a written determination of disqualification or ineligibility, the Commission Administration 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 the notice.

Within ten business days after receipt of the notice, the bidder may submit rebuttal information challenging the evaluation. The Commission Administration shall issue its written determination of disqualification or ineligibility based on all information in the possession of the Commission Administration, including any rebuttal information, within five business days of the date the Commission Administration 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 Commission Administration 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 Commission Administration 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 the notice by instituting legal action as provided in § 49.

- B. If, upon appeal, it is determined that the action taken was arbitrary or capricious, or not in accordance with the Constitution of Virginia, applicable state law or regulations, the sole relief shall be restoration of eligibility.

(Virginia Code Reference § 2.2-4357).

#### **§ 43 Appeal of Denial of Withdrawal of Bid.**

- A. A decision by the Executive Director denying withdrawal of bid under the provisions of § 20 shall be final and conclusive unless the bidder appeals the decision within ten days after receipt of the decision by instituting legal action as provided in § 49.
- B. If no bid bond was posted, a bidder refused withdrawal of a bid under the provisions of § 20, prior to appealing, shall deliver to the Commission a certified check or cash bond in the amount of the difference between the bid sought to be withdrawn and the next low bid. Such security shall be released only upon a final determination that the bidder was entitled to withdraw the bid.
- C. If, upon appeal, it is determined that the decision refusing withdrawal of the bid was not (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 to Bid, the sole relief shall be withdrawal of the bid.

(Virginia Code Reference § 2.2-4358).

#### **§ 44 Determination of Non-responsibility.**

- A. Following public opening and announcement of bids received on an Invitation to Bid, the Commission Administration shall evaluate the bids in accordance with element 4 of the process for competitive sealed bidding set forth in § 3.1. At the same time, the Commission Administration shall determine whether the apparent low bidder is responsible. If the Commission Administration so determines, then the Commission may proceed with an award in accordance with element 5 of the process for competitive sealed bidding set forth in § 3.1. If the Commission Administration determines that the apparent low bidder is not responsible, it shall proceed as follows:
  - 1. Prior to the issuance of a written determination of nonresponsibility, the Commission Administration 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 that relate to the determination, if so requested by the bidder within five business days after receipt of the notice.
  - 2. Within ten business days after receipt of the notice, the bidder may submit rebuttal information challenging the evaluation. The Commission Administration shall issue its written determination of responsibility based on all information in the possession of the Commission Administration including any rebuttal

information, within five business days of the date the Commission Administration received the rebuttal information. At the same time, the Commission Administration shall notify, with return receipt requested, the bidder in writing of its determination.

3. Such notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within ten days after receipt of the notice by instituting legal action as provided in § 49.

The provisions of this subsection shall not apply to procurements involving the prequalification of bidders and the rights of any potential bidders under such prequalification to appeal a decision that such bidders are not responsible.

- B. If, upon appeal pursuant to § 49, it is determined that the decision of the Commission Administration 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 to Bid, and the award of the contract in question has not been made, the sole relief shall be a finding that the bidder is a responsible bidder for the contract in question or directed award as provided in subsection A of § 49 or both.

If it is determined that the decision of the Commission Administration was not an honest exercise of discretion, but rather was arbitrary or capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid, and an award of the contract has been made, the relief shall be as set forth in subsection B of § 45.

- 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 the provisions of § 45.
- D. Nothing contained in this section shall be construed to require the Commission, when procuring by competitive negotiation, to furnish a statement of the reasons why a particular proposal was not deemed to be the most advantageous.

(Virginia Code Reference § 2.2-4359).

#### **§ 45 Protest of Award or Decision to Award.**

- A. Any bidder or offeror, who desires to protest the award or decision to award a contract shall submit the protest in writing to the Executive Director, no later than ten days after the award or the announcement of the decision to award, whichever occurs first. Public notice of the award or the announcement of the decision to award shall be given by the Commission in the manner prescribed in the terms or conditions of the Invitation to Bid or Request for Proposal. Any potential bidder or offeror on a contract negotiated on a sole source or emergency basis who desires to protest the award or decision to award such contract shall submit the protest in the same manner no later than ten days after posting or publication of the notice of such contract as provided in § 4. However, if the protest of any actual or potential bidder or offeror depends in whole or in part upon information contained in public records pertaining to the procurement transaction that are subject to inspection

under § 32, then the time within which the protest shall be submitted shall expire ten days after those records are available for inspection by such bidder or offeror under § 32, or at such later time as provided in this section. 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 Executive Director shall issue a decision in writing within ten days stating the reasons for the action taken with a copy of the decision being provided to the Commission. This decision shall be final unless the bidder or offeror appeals within ten days of receipt of the written decision by instituting legal action as provided in § 49. Nothing in this subsection shall be construed to permit a bidder to challenge the validity of the terms or conditions of the Invitation to Bid or Request for Proposal.

- 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 Commission or Commission Administration 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. Where the award has been made and performance has begun, the Commission, or Commission Administration with notice to the Commission, after consulting with General Counsel, may declare the contract void upon a finding that this action is in the best interest of the public. Where a contract is declared void, the performing contractor shall be compensated for the cost of performance up to the time of such declaration. In no event shall the performing contractor be entitled to lost profits.

- C. Where the Executive Director determines, after a hearing held 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 Article 6, Ethics in Public Contracting (§ 2.2-4367 et seq.) of the Virginia Code, the Commission shall be so notified and either the Commission or Executive Director may enjoin the award of the contract to a particular bidder.

(Virginia Code Reference § 2.2-4360).

#### **§ 46 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 the Virginia Public Procurement Act shall not be affected by the fact that a protest or appeal has been filed.

(Virginia Code Reference § 2.2-4361).

#### **§ 47 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 § 45, or the filing of a timely legal action as provided in § 49, no further action to award the contract shall be taken unless there is a written determination by the Executive Director, with notice to the Commission, that proceeding without delay is necessary to protect the public interest or unless the bid or offer would expire.

(Virginia Code Reference § 2.2-4362).

**§ 48 Contractual Disputes.**

- A. Contractual claims, whether for money or other relief, shall be submitted in writing no later than sixty days after final payment. However, written notice of the contractor's intention to file a claim shall be given at the time of the occurrence or beginning of the work upon which the claim is based. Nothing 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. The Commission shall include in its contracts a procedure for consideration of contractual claims. Such procedure, which may be contained in the contract or may be specifically incorporated into the contract by reference and made available to the contractor, shall establish a time limit for a final decision in writing by the Executive Director.
- C. If, however, the Commission fails to include in its contracts a procedure for consideration of contractual claims, the following procedure shall apply:
  - 1. Contractual claims, whether for money or other relief, shall be submitted in writing no later than 60 days after receipt of final payment; however, written notice of the contractor's intention to file a claim shall be given at the time of the occurrence or at the beginning of the work upon which the claim is based.
  - 2. No written decision denying a claim or addressing issues related to the claim shall be considered a denial of the claim unless the written decision is signed by the Commission's Executive Director or designee. The contractor may not institute legal action prior to receipt of the final written decision on the claim unless the public body fails to render a decision within 90 days of submission of the claim. Failure of the public body to render a decision within 90 days shall not result in the contractor being awarded the relief claimed or in any other relief or penalty. The sole remedy for the public body's failure to render a decision within 90 days shall be the contractor's right to institute immediate legal action.
- D. A contractor may not institute legal action as provided in § 49, prior to receipt of the Executive Director's decision on the claim, unless the Executive Director fails to render such decision within the time specified in the contract, or, if no time is specified, then within the time provided in subsection C. A failure of the Commission to render a final decision within the time provided in subsection C shall be deemed a final decision denying the claim by the Commission.
- E. The decision of the Executive Director shall be final and conclusive unless the contractor appeals within six months of the date of the final decision on the claim, by instituting legal action as provided in § 49.

(Virginia Code Reference § 2.2-4363).

**§ 49 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 appropriate circuit court challenging that decision, which shall be reversed only if the petitioner establishes that the decision was not (i) an honest exercise of discretion, but rather was arbitrary or capricious; (ii) in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid; or (iii) in the case of denial of prequalification, based upon the criteria for denial of prequalification set forth in subsection B of § 14. In the event the apparent low bidder, having been previously determined by the Commission to be not responsible in accordance with § 2, is found by the court to be a responsible bidder, the court may direct the Commission to award the contract to such bidder in accordance with the requirements of this section and the Invitation to Bid.

- B. A bidder denied withdrawal of a bid under § 43 may bring an action in the appropriate circuit court challenging that decision, which shall be reversed only if the bidder establishes that the decision of the Executive Director 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 to Bid.
- C. A bidder, offeror or contractor, or a potential bidder or offeror on a contract negotiated on a sole source or emergency basis in the manner provided in § 4, whose protest of an award or decision to award under § 45 is denied, may bring an action in the appropriate circuit court 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 (i) an honest exercise of discretion, but rather is arbitrary or capricious or (ii) in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms and conditions of the Invitation to Bid or Request for Proposal.
- D. If injunctive relief is granted, the court, upon request of the Commission or Commission Administration, shall require the posting of reasonable security to protect the Commission.
- E. A contractor may bring an action involving a contract dispute with the Commission in the appropriate circuit court.
- F. Nothing herein shall be construed to prevent the Commission from instituting legal action against a contractor.

(Virginia Code Reference § 2.2-4364).

#### **§ 50 Alternative Dispute Resolution.**

The Commission or Commission Administration, after consulting with General Counsel, may enter into agreements to submit disputes arising from contracts entered into pursuant to this chapter to arbitration and utilize mediation and other alternative dispute resolution procedures.

(Virginia Code Reference § 2.2-4366).

**Article 6.**  
**Ethics in Public Contracting**

**§ 51 Ethics in Public Contracting.**

The provisions of Article 6, Ethics in Public Contracting, Sections 2.2-4367 through 2.2-4377, Code of Virginia (1950), as amended, of the Virginia Public Procurement Act apply to all Commission procurement transactions and are hereby incorporated by reference into these Procurement Regulations.

**Article 7.**

**Virginia Public Procurement Act Controlling; Notice**

**§ 52 Virginia Public Procurement Act Controlling.**

These Procurement Regulations are intended to include a restatement and implementation of the Virginia Public Procurement Act, Code of Virginia (1950), as amended, as applied to the Roanoke Regional Airport Commission. In the event of any conflict, discrepancy, or omission as between these Regulations and the Virginia Public Procurement Act, to the extent appropriate and/or required by law, the provisions of the Virginia Public Procurement Act, as amended and then current, shall be determinative and controlling.

**§ 53 Notice to Commission.**

All notices or copies of decisions made by the Executive Director and required to be filed with the Commission Secretary or given to the Commission shall be presented as correspondence under the Commission's Consent Agenda at its next regularly scheduled meeting.

2. All Procurement Regulations previously adopted by the Commission are hereby repealed and of no effect, including, without limitation, those adopted by Resolution No. 03-011712 dated January 17, 2012, as amended by Resolution No. 35-101612, dated October 16, 2012, and Resolution No. 24-082013, dated August 20, 2013.

ATTEST:

  
Secretary

VOTE: AYES: Dooley, Gust, Minnix, Lawrence  
NAYS: None  
ABSENT: Porterfield

**RESOLUTION OF THE ROANOKE REGIONAL AIRPORT COMMISSION**

**Adopted this 22nd day of July, 2014**

**No. 15-072214**

A RESOLUTION awarding a contract to Blake Construction of VA, Inc. for the Taxiway "G" Drainage Ditch Repairs Project, upon certain terms and conditions.

BE IT RESOLVED by the Roanoke Regional Airport Commission that:

1. Subject to the terms and conditions set forth herein, the bid of the lowest responsible and responsive bidder, Blake Construction of VA, Inc., for the labor and materials necessary for the Taxiway "G" Drainage Ditch Repairs Project, in a total amount including base unit price bid and bid additive of not to exceed Two Hundred Twenty-Seven Thousand Eight Hundred Thirty Dollars (\$227,830.00) as set forth in such company's bid, is hereby ACCEPTED, such bid being in full compliance with the Commission's Invitation to Bid Package, plans and specifications therefore, including any addenda thereto, which bid is on file in the Office of the Commission Secretary;

2. The Executive Director and Secretary are hereby authorized to execute and attest, respectively, in form approved by General Counsel, the requisite contract with the successful bidder based upon its bid and the Commission's Invitation to Bid and specifications, including any addenda thereto, with such contract to include such additional terms and conditions as the Executive Director and General Counsel shall determine to be in the best interests of the Commission, all as more particularly set forth in the report of the Executive Director to this Commission dated July 22, 2014; and

3. Effective upon execution and final acceptance of the contract, any and all other bids made to the Commission for the aforesaid work are hereby REJECTED, and the Secretary is directed to notify each such bidder and to express to each the Commission's appreciation for such bids; and,

4. The Commission Treasurer is authorized to appropriate the following funds to Account No. 1700-169 for the administrative, engineering, and construction costs related to such project:

(i) approximately \$227,200.00 of State Entitlement funds from Account No. 1100; and,

(ii) approximately \$56,800.00 of Commission Capital Improvement funds from Account No. 2820.

ATTEST:

*Cathy J. Bowman*  
Secretary

VOTE: AYES: Dooley, Gust, Lawrence  
NAYS: None  
ABSTAIN: Minnix  
ABSENT: Porterfield



**RESOLUTION OF THE ROANOKE REGIONAL AIRPORT COMMISSION**

**Adopted this 22nd day of July, 2014**

**No. 16-072214**

A RESOLUTION awarding a contract to Hi-Lite Markings, Inc. for the Sealcoat Taxiways A, E, G and Blast Pads for Runways 24 and 34 Project, upon certain terms and conditions.

BE IT RESOLVED by the Roanoke Regional Airport Commission that:

1. Subject to the terms and conditions set forth herein, the bid of the lowest responsible and responsive bidder, Hi-Lite Markings, Inc., for the labor and materials necessary for the Sealcoat Taxiways A, E, G and Blast Pads for Runways 24 and 34 Project, in an amount not to exceed Four Hundred and Forty-Four Thousand, Nine Hundred Thirty-Seven and 50/100 Dollars (\$444,937.50) as set forth in such company's bid, is hereby ACCEPTED, such bid being in full compliance with the Commission's Invitation to Bid Package, plans and specifications therefore, including any addenda thereto, which bid is on file in the Office of the Commission Secretary;

2. The Executive Director and Secretary are hereby authorized to execute and attest, respectively, in form approved by General Counsel, the requisite contract with the successful bidder based upon its bid and the Commission's Invitation to Bid and specifications, including any addenda thereto, with such contract to include such additional terms and conditions as the Executive Director and General Counsel shall determine to be in the best interests of the Commission, all as more particularly set forth in the report of the Executive Director to this Commission dated July 22, 2014; and,

3. The Commission Treasurer is authorized to appropriate the following funds to Account No. 1700-168 for the administrative, engineering, and construction costs related to such project:

(i) approximately \$403,600.00 of State Entitlement funds from Account No. 1100; and,

(ii) approximately \$100,900.00 of Commission Capital Improvement funds from Account No. 2820.

ATTEST:

*Cathy A. Bowman*  
Secretary

VOTE: AYES: Dooley, Gust, Minnix, Lawrence  
NAYS: None  
ABSENT: Porterfield





**RESOLUTION OF THE ROANOKE REGIONAL AIRPORT COMMISSION**

**Adopted this 22nd day of July, 2014**

**No. 17-072214**

A RESOLUTION authorizing an FAA Grant (No. 3-51-0045-05-Pending) for the Purchase of One ARFF Vehicle, Class 4, upon certain terms and conditions.

BE IT RESOLVED by the Roanoke Regional Airport Commission that:

1. The Executive Director is authorized on behalf of the Commission to complete, file, and execute, and the Commission Secretary is authorized to attest, in form approved by General Counsel, all grant and related documents, including the FAA's Master Agreement, and any subsequent amendments thereto or to the grant, necessary to apply for and accept an AIP grant or grants, (AIP # 3-51-0045-05-Pending), from the United States of America, including the commitment of matching funds, for the Purchase of One ARFF Vehicle, Class 4, all as more particularly set forth in the report of the Executive Director to this Commission dated July 22, 2014; and,

2. The Commission Treasurer is authorized to make the following appropriations to Account No. 1690:

(i) up to approximately \$66,358.00 of state entitlement funds on hand from Account No. 1100; and,

(ii) up to approximately \$597,222.00 of federal AIP funds when received.

ATTEST:

*Cathy D. Bowman*

Secretary



VOTE: AYES: Dooley, Gust, Minnix, Lawrence  
NAYS: None  
ABSENT: Porterfield

**RESOLUTION OF THE ROANOKE REGIONAL AIRPORT COMMISSION**

**Adopted this 22nd day of July, 2014**

**No. 18-072214**

A RESOLUTION authorizing an FAA Grant (No. 3-51-0045-05-Pending) for the Preliminary Design of Runway 6/24 EMAS Project, upon certain terms and conditions.

BE IT RESOLVED by the Roanoke Regional Airport Commission that:

1. The Executive Director is authorized on behalf of the Commission to complete, file, and execute, and the Commission Secretary is authorized to attest, in form approved by General Counsel, all grant and related documents, including the FAA's Master Agreement, and any subsequent amendments thereto or to the grant, necessary to apply for and accept an AIP grant or grants (AIP # 3-51-0045-05-Pending), from the United States of America, including the commitment of matching funds, for the Preliminary Design of Runway 6/24 EMAS Project, all as more particularly set forth in the report of the Executive Director to this Commission dated July 22, 2014; and,

2. The Commission Treasurer is authorized to make the following appropriations to Account No. 1700-175:

(i) up to approximately \$67,500.00 of state entitlement funds on hand from Account No. 1100; and,

(ii) up to approximately \$607,500.00 of federal AIP funds when received.

ATTEST:

*Cathy S. Bowman*

Secretary



VOTE: AYES: Dooley, Gust, Minnix, Lawrence  
NAYS: None  
ABSENT: Porterfield

**RESOLUTION OF THE ROANOKE REGIONAL AIRPORT COMMISSION**

**Adopted this 22nd day of July, 2014**

**No. 19-072214**

A RESOLUTION awarding a contract to Delta Airport Consultants, Inc. for airport engineering services necessary for the design and construction of the Modified EMAS for Runway 6-24, subject to and upon certain terms and conditions.

BE IT RESOLVED by the Roanoke Regional Airport Commission that:

1. The Executive Director and Secretary are hereby authorized to execute and attest, respectively, in form approved by General Counsel, an appropriate contract with Delta Airport Consultants, Inc. for airport engineering services for the design and construction of the Modified EMAS for Runway 6-24 and specifically authorizing the Phase I Preliminary Design and Feasibility Study services for a lump sum price of \$648,719.00, such contract to contain the terms and conditions contained in the Request for Proposals package, including any addenda thereto and modifications resulting from negotiations, and such additional terms and conditions as shall be determined by the Executive Director and General Counsel to be in the best interest of the Commission, with subsequent phases, if any, to be brought back to the Commission for approval, provided that such contract shall not be effective unless and until it has been specifically approved by the FAA, all as more particularly set forth in the report of the Executive Director to this Commission dated July 22, 2014; and,

2. Upon the full and complete execution of the contract with the successful proposer, all other proposals shall be rejected, and each such proposer shall be notified of the Commission's appreciation for such proposal.

ATTEST:

  
Secretary



VOTE: AYES: Dooley, Gust, Minnix, Lawrence  
NAYS: None  
ABSENT: Porterfield