

CITY OF WINCHESTER



PROCUREMENT MANUAL

PREFACE

PROCUREMENT MANUAL

February 2013 Edition

The *Procurement Manual (PM)* is published to establish the policies and procedures to be followed by City of Winchester departments and agencies in fulfilling procurement and related logistical responsibilities within their delegated authority.

The cooperation of all employees is essential in all procurement transactions and shall be carried out in an effective, economical, open, fair and impartial manner. The goal is to ensure that goods and services are purchased at the right price, right quality, right quantity, right time period, and right product or service. Employees delegated purchasing responsibilities shall adhere to all ethical standards and avoid the perception of impropriety when performing procurement duties.

The material in this manual is subject to revision to meet the rapidly changing developments encountered in the field of logistics. Within these limits the *Procurement Manual* will serve as a foundation for making procurement decisions in your career with the City of Winchester.

This manual is effective immediately upon issuance and receipt for all purchases and shall comply with Chapter 21 of the Winchester City Code and the Section 2.2 of the Virginia Code.

Comments, suggestions, and questions of interpretation are always welcomed and should be addressed to the Purchasing Agent.

Dale Iman
City Manager

Mary Blowe
Finance Director

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CHAPTER ONE

WINCHESTER CITY CODE

CHAPTER 21-PURCHASING

PURCHASES

CHAPTER 21

PURCHASES

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ARTICLE I. GENERAL PROVISIONS

DIVISION 1. PURPOSE AND APPLICATION

SECTION 21-1. PURPOSE.

The purpose of this chapter is to supplement the provisions of the Virginia Public Procurement Act by enunciating the City's policies pertaining to governmental procurement from nongovernmental sources, to encourage competition among vendors and contractors, to provide for the fair and equitable treatment of all persons involved in public purchasing by the city, to maximize the purchasing value of public funds in procurement so that high quality goods and services may be obtained at the best value and to increase public confidence in procurement practices by providing safeguards for maintaining a procurement system of quality and integrity.

This chapter should be read in conjunction with the Virginia Public Procurement Act regarding contracts for the procurement of goods, services, insurance and construction entered into by the city, involving every expenditure for public purchasing, regardless of its source. In the event of conflict between the provisions of this Chapter and the Virginia Public Procurement Act, the Act shall supersede except where modified by alternative policies and procedures enumerated in this chapter as authorized by law.

(Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 2007-32, 9-11-07)

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SECTION 21-2. APPLICATION.

This chapter applies to contracts for the procurement of goods, services, insurance and construction entered into by the City and every expenditure for public purchasing from non-governmental contractors irrespective of its source.

When the procurement involves the expenditure of federal assistance or contract-funds, the procurement shall be conducted in accordance with any applicable mandatory federal law and regulation which are not reflected in this chapter. Nothing in this chapter shall prevent any public agency from complying with the terms and conditions of any grant, gift, or bequest which are otherwise consistent with law. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

SECTION 21-3. EFFECTIVE DATE OF CHAPTER.

This chapter shall become effective upon adoption. The provisions of this chapter shall not apply to those contracts entered into prior to adoption hereof, which shall continue to be governed by the procurement policies and regulations of the City in effect at the time those contracts were executed, to the extent of any inconsistencies between such regulations and policies and this chapter. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

SECTION 21-4. SEVERABILITY.

If any provision of this chapter or any application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions of this chapter which can be given effect without the invalid provision, and to this end the provisions of this chapter are declared to be severable. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

SECTIONS 21-5 - 21-10. RESERVED.

DIVISION 2. DEFINITIONS

SECTION 21-11. DEFINITIONS.

- (a) Construction. Building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavation, grading or similar work upon real property.

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- (b) Purchasing Agent. For the purposes of this chapter only, the term "purchasing agent" shall mean the person designated by the city manager to carry out the duties set out in this chapter.
- (c) Cost analysis. The evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred, prices to be paid, and costs to be reimbursed.
- (d) Cost data. Factual information concerning the cash outlays for labor, material, overhead, and other cash outlays which are expected to be incurred or which have been actually incurred by the contractor in performing the contract.
- (e) Employee. Any individual receiving salary or wages from the City, whether elected or not; any non-compensated individual performing personal services for the city or any department, agency, commission, council, board or any other entity established by the executive or legislative branch of the City; and any non-compensated individual serving as an elected official of the city.
- (f) Goods. All material, equipment, supplies, printing and automated data processing hardware and software.
- (g) Invitation to bid. All documents, whether attached or incorporated by reference, utilized for soliciting sealed bids. No confidential or proprietary data shall be solicited in any invitation for bids.
- (h) Local bidder or offeror. A bidder or offeror having its headquarters, primary place of business, or place of operations within the City of Winchester, Virginia.
- (i) Professional services. Work performed by an independent contractor within the scope of the practice of accounting, architecture, land surveying, landscape architecture, law, medicine, optometry, or professional engineering.
- (j) Public body. Any legislative, executive, or judicial body, agency, office, department, authority, post, commission, committee, institution, board, or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in this chapter.
- (k) Request for proposals. All documents, whether attached or incorporated by reference, utilized for soliciting proposals.
- (l) Responsible bidder or offeror. A person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability which will assure good faith performance, and who has been prequalified, if required.

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- (m) Services. Any work performed by an independent contractor wherein the service rendered does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials and supplies.
- (n) Sheltered workshop. A work-oriented rehabilitative facility with a controlled working environment and individual goals which utilizes work experience and related services for assisting the handicapped person to progress toward normal living and a productive vocational status.
- (o) Small businesses. A United States business which is independently owned and which is not an affiliate or subsidiary of a business dominant in its field of operation.
- (p) Specification. Any description of the physical or functional characteristics or of the nature of a good, service or construction item. It may include a description of any requirement for inspecting, testing, or preparing a good, service or construction item for delivery. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 004-92, 4-14-92; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-37.

ARTICLE II. ORGANIZATION.

SECTION 21-12. ESTABLISHMENT, BOND, APPOINTMENT.

1. The purchasing agent shall be responsible for the management of procurement.
2. The purchasing agent may delegate authority to procure goods or services under this chapter to other city officials, as such delegation is deemed necessary for the effective procurement of those items. However, such designated officials shall have no authority to take any actions set forth in §§21-29, 36, 37, 48 through 51, or 55 through 62. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

SECTION 21-13. AUTHORITY AND DUTIES.

1. Principal Public Purchasing Official. The purchasing agent shall be responsible for the procurement of goods, services, insurance and construction in accordance with this chapter, as well as the management and disposal of goods and supplies.
2. Duties, Powers. In accordance with this chapter, and subject to the supervision of the city manager, the purchasing agent shall:

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- a. purchase or supervise the purchasing of all goods, services, insurance and construction needed by this accordance with this chapter;
- b. exercise direct supervision over the city's central stores and general supervision over all other inventories of goods belonging to the city;
- c. sell, trade or otherwise dispose of surplus goods belonging to the city;
- d. establish and maintain programs for specifications development, contract administration and inspection and acceptance, in cooperation with the public agencies using the goods, services, and construction; and
- e. have the authority to issue regulations and procedures consistent with this chapter, and forms for the carrying out of this chapter. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

SECTION 21-14. UNAUTHORIZED PURCHASES.

Except as herein provided no official, elected or appointed, or any employee shall purchase or contract for any goods, services, insurance, or construction within the purview of this chapter other than by and through the purchasing department or, as provided herein and in the regulations adopted pursuant to this chapter, the appropriate department or agency head. Any purchase order or contract made contrary to the provisions hereof shall not be approved and the city shall not be bound thereby. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

SECTIONS 21-15. PROCUREMENT SIGNING AUTHORITY

The City Manager's signing authority authorized under Section 2-99 may be delegated by his written authorization upon a Procurement Signing Authority document which shall be filed with and maintained by the City's Procurement Officer. Any subsequently filed Procurement Signing Authority document shall replace and supersede a previously filed Signing Authority document. The signature authority shall be consistent with the City of Winchester's Procurement signing authority policy incorporated herein.

PROCUREMENT SIGNING AUTHORITY:

The City Manager hereby authorizes the following individuals to serve as designee with regard to his signing authority granted under the Winchester City Code as follows:

Original Contracts/Agreements (less than \$50,000) Purchasing Agent Finance Director
City Mgr Other: ACM

Original Contracts/Agreements (\$50,000 to \$100,000) Purchasing Agent Finance Director
City Mgr Other: ACM

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Original Contracts/Agreements (\$100,000 to \$500,000)	<input checked="" type="checkbox"/> Purchasing Agent	<input checked="" type="checkbox"/> Finance
Director <input checked="" type="checkbox"/> City Mgr <input checked="" type="checkbox"/> Other: ACM		
Original Contracts/Agreements (\$500,000 to \$1MM)	<input type="checkbox"/> Purchasing Agent	<input checked="" type="checkbox"/> Finance
Director <input checked="" type="checkbox"/> City Mgr <input checked="" type="checkbox"/> Other: ACM		
Original Contracts/Agreements (\$1MM+)	<input type="checkbox"/> Purchasing Agent	<input type="checkbox"/> Finance
Director <input checked="" type="checkbox"/> City Mgr <input checked="" type="checkbox"/> Other: ACM		
Purchase Orders	<input checked="" type="checkbox"/> Purchasing Agent	<input checked="" type="checkbox"/> Finance
Director <input checked="" type="checkbox"/> City Mgr <input checked="" type="checkbox"/> Other: ACM, AFD		
Emergency Procurements	<input checked="" type="checkbox"/> Purchasing Agent	<input checked="" type="checkbox"/> Finance
Director <input checked="" type="checkbox"/> City Mgr <input checked="" type="checkbox"/> Other: ACM		
Sole Source	<input checked="" type="checkbox"/> Purchasing Agent	<input checked="" type="checkbox"/> Finance
Director <input checked="" type="checkbox"/> City Mgr <input type="checkbox"/> Other _____		
Contract Renewals (less than \$50,000)	<input checked="" type="checkbox"/> Purchasing Agent	<input checked="" type="checkbox"/> Finance
Director <input checked="" type="checkbox"/> City Mgr <input checked="" type="checkbox"/> Other: ACM		
Contract Renewals (more than \$50,000)	<input checked="" type="checkbox"/> Purchasing Agent	<input checked="" type="checkbox"/> Finance
Director <input checked="" type="checkbox"/> City Mgr <input checked="" type="checkbox"/> Other: ACM		
Change Orders (excl. construction)	<input checked="" type="checkbox"/> Purchasing Agent	<input checked="" type="checkbox"/> Finance
Director <input checked="" type="checkbox"/> City Mgr <input checked="" type="checkbox"/> Other: ACM, PSD		
Contract Amendments (excl. construction)	<input checked="" type="checkbox"/> Purchasing Agent	<input checked="" type="checkbox"/> Finance
Director <input checked="" type="checkbox"/> City Mgr <input checked="" type="checkbox"/> Other: ACM		
Notice of Award (excl. construction)	<input checked="" type="checkbox"/> Purchasing Agent	<input checked="" type="checkbox"/> Finance
Director <input checked="" type="checkbox"/> City Mgr <input checked="" type="checkbox"/> Other: ACM		
Notice to Proceed (excl. construction)	<input checked="" type="checkbox"/> Purchasing Agent	<input checked="" type="checkbox"/> Finance
Director <input checked="" type="checkbox"/> City Mgr <input checked="" type="checkbox"/> Other: ACM, PSD		
Change Orders (construction)	<input type="checkbox"/> Purchasing Agent	<input checked="" type="checkbox"/> Finance
Director <input checked="" type="checkbox"/> City Mgr <input checked="" type="checkbox"/> Other: ACM, PSD		
Contract Amendments (construction)	<input type="checkbox"/> Purchasing Agent	<input checked="" type="checkbox"/> Finance
Director <input checked="" type="checkbox"/> City Mgr <input checked="" type="checkbox"/> Other: ACM		
Notice of Award (construction)	<input type="checkbox"/> Purchasing Agent	<input checked="" type="checkbox"/> Finance
Director <input checked="" type="checkbox"/> City Mgr <input checked="" type="checkbox"/> Other: ACM		
Notice to Proceed (construction)	<input type="checkbox"/> Purchasing Agent	<input checked="" type="checkbox"/> Finance
Director <input checked="" type="checkbox"/> City Mgr <input checked="" type="checkbox"/> Other: ACM, PSD		
Opening/Renewing Credit Cards Accounts	<input type="checkbox"/> Purchasing Agent	<input checked="" type="checkbox"/> Finance
Director <input checked="" type="checkbox"/> City Mgr <input checked="" type="checkbox"/> Other: ACM, AFD		
Opening/Renewing Group Discount Cards	<input checked="" type="checkbox"/> Purchasing Agent	<input checked="" type="checkbox"/> Finance
Director <input checked="" type="checkbox"/> City Mgr <input checked="" type="checkbox"/> Other: ACM		
Signing Vehicle Titles after Surplus Sale	<input checked="" type="checkbox"/> Purchasing Agent	<input checked="" type="checkbox"/> Finance
Director <input checked="" type="checkbox"/> City Mgr <input checked="" type="checkbox"/> Other: ACM		

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NOTE: ‘ACM’ = Assistant City Manager; ‘AFD’ = Assistant Finance Director, ‘PSD’ = Public Services Director

These signing authorities can be revised in writing at any time and shall be reviewed at least once a year.

City Manager Signature

Date

(Ord. No.2010-05, 4-13-10)

SECTIONS 21-16 - 21-20. RESERVED.

ARTICLE III. COOPERATIVE PROCUREMENT

SECTION 21-21. CONDITIONS FOR USE.

The city may participate in, sponsor, conduct or administer a cooperative procurement agreement with one or more other public bodies for the purpose of combining requirements to increase efficiency or reduce administrative expenses. Any public body which enters into a cooperative procurement agreement with the City shall comply with the policies and procedures adopted by this chapter except as otherwise provided by law. (Ord. No. 002-83, 1-11-83, Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-40.

SECTIONS 21-22 - 21-24. RESERVED.

ARTICLE IV. METHODS OF PROCUREMENT - BONDS

DIVISION 1. METHODS OF PROCUREMENT

SECTION 21-25. METHODS OF PROCUREMENT.

- (a) All public contracts, excluding transit procurements with non-governmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, or construction shall be performed within the following guidelines:

Type	Amount	Action	Responsibility
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Field Purchase Order	\$1 - \$4,999	No quotes needed	Department
Purchase Order	\$5,000 - \$14,999	3 verbal quotes	Department
Purchase Order Professional Services	\$15,000 - \$29,999	3 written quotes	Department
Purchase Order Goods & Non- Profess. Svcs.	\$15,000 - \$49,999	4 written quotes	Department
Sealed Bid Process-Goods & Non-Profess. Svcs.	\$50,000	Competitive Sealed Bid or Competitive Negotiation	Submit Specs to Purchasing
Sealed Bid Process - Professional Services	\$30,000	Competitive Negotiation	Submit Specs to Purchasing

(Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95; Ord. No. 2007-32, 9-11-07; Ord. No. 2009-20, 7-14-09)

- (b) All transit contracts with non-governmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, or construction shall be performed within the following guidelines:

Type	Amount	Action	Responsibility
Micro Purchases	\$1 - \$3,000	No quotes	Department
Small Purchases	\$3,000.01- \$100,000	4 written quotes	Department with Finance Review
Formal Sealed Bids and Proposals	\$100,000.01+	Competitive Sealed Bid or Competitive Negotiation	Finance

(Ord. No. 2009-20, 7-14-09)

SECTION 21-26. COMPETITIVE SEALED BIDDING.

Procurement of contracts by means of competitive sealed bidding shall be carried out as follows:

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- (a) The purchasing agent shall issue a written Invitation to Bid to all potential contractors whose names are on the portion of the bidders' list maintained in the purchasing office for the type of goods or services similar in character to the goods or services being procured.

The purchasing agent shall also post the Invitation to Bid on the public bulletin board in the city hall at least 10 days prior to the last date set for the receipt of bids. The purchasing agent is further authorized to advertise the Invitation to Bid in one or more newspapers or trade or business periodicals, and to solicit bids from any other persons not on the bidders' list.

- (b) The Invitation to Bid shall contain or incorporate by reference the specifications and contractual terms and conditions applicable to the procurement. Unless prequalification is utilized in the procurement, the Invitation to Bid shall include a statement of any requisite qualifications of potential contractors.
- (c) Multi-Step Sealed Bidding. When it is considered impractical to initially prepare a purchase description to support an award based on price, 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 determined to be technically acceptable under the criteria set forth in the first solicitation.
- (d) Bid Opening. Bids shall be opened publicly in the presence of one or more witnesses at the time and place designated in the Invitation to Bid. The amount of each bid, and such other relevant information as the purchasing agent deems appropriate, together with the name of each bidder shall be recorded; the record and each bid shall be open to public inspection except as otherwise provided by law.
- (e) 1. Bid Evaluation. In determining the lowest responsible bidder the purchasing agent or designated official shall consider:
- a. The ability, capacity and skill of the bidder to perform the contract or provide the service required;
 - b. Whether the bidder can perform the contract or provide the service promptly, or within the time specified, without delay or interference;
 - c. The character, integrity, reputation, judgment, experience, and efficiency of the bidder;
 - d. The quality of performance of previous contracts or services;
 - e. The previous and existing compliance by the bidder with laws and chapters relating to the contract or service;

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- f. The sufficiency of the financial resources and ability of the bidder to perform the contract or provide the service;
 - g. The quality, availability and adaptability of the goods, or services to the particular use required;
 - h. The ability of the bidder to provide future maintenance and service for the use of the subject of the contract;
 - i. The number and scope of conditions attached to the bid.
2. The purchasing agent shall further evaluate the compliance and responsiveness of the bids to the terms of the Invitation to Bid.
- (f) Bid Award. The contract shall be awarded to the lowest responsive and responsible bidder as determined under §21-26.E. When the terms and conditions of multiple bids are so provided in the invitation to bid, awards may be made to more than one bidder.

Unless canceled or rejected, a responsible bid from the lowest responsive and responsible bidder shall be accepted as submitted except that if the bid from such bidder exceeds available funds, the City may negotiate with such bidder to obtain a contract price with available funds.

If, as authorized by law, the award is not given to the lowest bidder, a full and complete statement of the reasons for awarding a contract to another bidder shall be prepared by the purchasing agent or designated official and filed with the other papers relating to the transaction and shall be reported to the city manager. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-11-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-37.

SECTION 21-27. COMPETITIVE NEGOTIATION.

Procurement of contracts by competitive negotiation shall be carried out as follows:

- (a) The purchasing agent shall issue a written Request for Proposal to all potential contractors whose names are on the portion of the bidders' list maintained in the purchasing office for the type of goods or services similar in character to the goods or services being procured.

The purchasing agent shall also post the Request For Proposals on the public bulletin board in the city hall at least 10 days prior to the last date set for the

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receipt of bids, is further directed to publish the request for proposal in one or more of general circulation in the City of Winchester area and is authorized to solicit proposals from any other persons, not on the bidders' list.

- (b) The Request For Proposal shall indicate in general terms that which is sought to be procured, specifying the factors which will be used in evaluating the proposal and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities or qualifications which will be required of the contractor.
- (c) Procurement of professional services. The purchasing agent and other, appropriate officials designated by the purchasing agent 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. At the discussion stage, the purchasing agent may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of price for services. Proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of such discussions on the basis of evaluation factors published in the request for proposal and all information developed in the selection process to this point, the purchasing agent and designated officials 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 city can be negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise, negotiations with the offeror ranked first shall be formally terminated and negotiations conducted with the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable price. Should the purchasing agent and such designated officials determine in writing 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.
- (d) Procurement of other than professional services. Selection shall be made of two or more offerors deemed to be fully qualified and best suited among those submitting proposals, on the basis of the factors involved in the request for proposals, including price if so stated in the request for proposal. Negotiations shall then be conducted with each of the offerors so selected. Price shall be considered, but need not be the sole determining factor. After negotiations have been conducted with each offeror so selected, purchasing agent and such designated officials shall select the offeror which, in their opinion, has made the best proposal, and shall recommend to the city manager the award of the contract

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to that offeror. The city manager may award the contract to that offeror or may refer the matter back to the purchasing agent for another recommendation. Should the purchasing agent and such designated officials determine in writing 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. (Ord. No. 002-83, 1-11-83; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-37.

SECTION 21-28. SOLE SOURCE PROCUREMENT.

Upon a determination in writing by the purchasing agent 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 purchasing agent shall issue a written notice stating that only one price was determined to be practically available, and identifying that which is being procured, the contractor being selected, and the date on which the contract was or will be awarded. This notice shall be posted on the public bulletin board in the city hall on the day the purchasing agent awards or decides to award the contract, whichever occurs first. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-41.D.

SECTION 21-29. EMERGENCY PROCUREMENT.

If any emergency occurs during regular city business hours, the using department shall immediately notify the purchasing agent who shall either purchase the required supplies or contractual services or authorize the department to do so.

If an emergency occurs at times other than regular business hours, the using department may purchase directly the required goods or contractual services. The department, shall, however, whenever practicable, secure competitive telephone bids and order delivery to be made by the lowest responsible bidder. The department shall also, not later than the next regular city business day thereafter, submit to the purchasing agent a requisition, a tabulation of bids received, if any, a copy of the delivery record and a brief written explanation of the circumstances of the emergency.

In either case, 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 purchasing agent 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. The notice shall be posted on

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the public bulletin board in the city hall on the day the purchasing agent awards or announces his decision to award the contract, whichever comes first, or as soon thereafter as is practicable. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-41.E.

SECTION 21-30. REPEALED.
(Ord. No. 2007-32, 9-11-07)

SECTION 21-31. PROCUREMENT OF USED GOODS.

Notwithstanding any other provision of this chapter to the contrary, a contract for the purchase of any used goods, the price of which is less than One Hundred Thousand (\$100,000.00) Dollars, may be entered into without competitive sealed bidding or competitive negotiation. However, as much competition as is practicable under the circumstances shall be employed. For each such contract the purchasing agent shall determine in writing that as much competition as is practicable has been carried out. Such writing, a copy of which shall be kept in the contract file, and in the procurement file, shall contain the following information:

1. A statement listing the goods, including any specifications, being procured.
2. The need or use for such goods.
3. (a) A list of possible suppliers, if any, based on prior contracts, prior procurement of such goods, or informal contacts concerning such goods or similar goods, or a statement that other suppliers are not reasonably available.

(b) Which, if any of such suppliers were contacted concerning the goods sought to be procured, documenting when each was contacted.
4. A statement of whether or not alternate goods were available. If such goods were available, a description of the reason the goods procured were selected.
5. The name and address of the supplier chosen.
6. The date of the contract award.

(Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

SECTION 21-32. EXCEPTIONS.

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The following goods and services may be procured without competition:

- (a) Sheltered workshops, State Penitentiary, State Contracts.
 - 1. Purchases from persons, schools or workshops under the supervision of the Virginia Department for the Visually Handicapped or non-profit sheltered workshops or other non-profit organizations which offer transitional or supported employment services serving the handicapped.
 - 2. Purchases from the State Penitentiary.
 - 3. Purchases from state contracts from the state purchasing department warehouse.
- (b) Attorneys, Expert Witnesses. Legal services associated with actual or potential litigation, and expert witnesses or other services associated with litigation or regulatory proceedings.
- (c) Contract extension. Extension of the term of an existing contract for services to allow completion of any work undertaken but not completed during the original term of the contract.
- (d) Insurance pools. Contracts for insurance if purchased through an association of which the City is a member if the association was formed and is maintained for the purpose for promoting the interest and welfare of developing close relationships with similar public bodies, provided such association has procured the insurance by use of competitive principles and provided that the purchasing agent has made a determination in advance after reasonable notice to the public 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. Posting the writing at least ten (10) days prior to final determination on public bulletin board in city hall shall constitute reasonable notice to the public. (Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-45.

SECTION 21-33. COMPETITIVE BIDDING ON STATE AID PROJECTS.

No contract for the construction of any building or improvement of or addition to an existing building by the City or subdivision of the City for which state funds of thirty thousand dollars (\$30,000) or more, either by appropriation, grant-in-aid or loan are used or are to be used for all or part of the cost of construction shall be let except after competitive sealed bidding or after competitive negotiation. The procedure for the advertising for bids or for proposals and for letting of the contract shall conform, *mutatis mutandis*, to this chapter. No person or firm shall be eligible to bid on or submit a

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proposal for any such contract under competitive sealed bidding or competitive negotiation procedures nor to have the same awarded to him or it who has been engaged as architect or engineer in the same project under a separate contract. (Ord. No. 036-83, 12-13-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95; Ord. No. 2007-32, 9-11-07)

SECTION 21-34. CANCELLATION OR 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 in whole or in part when the purchasing agent determines that it is in the best interest of the city to do so. The reasons therefor shall be made a part of the contract file and shall be reported to the city manager.
- (b) The purchasing agent or designated official may waive informalities in bids or proposals. (1982, c. 647.) (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-42.

SECTION 21-35. CONTRACT PRICING ARRANGEMENTS - MULTI-TERM CONTRACTS.

- (a) Except as prohibited under the Virginia Public Procurement Act, public contracts may be awarded on a fixed price or cost reimbursement basis, or on any other basis that is not prohibited.

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- (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. 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, shall not be prohibited by this section. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)
- (c) Multi-term Contracts.
1. Specified Period. Unless otherwise provided by law, a contract for goods, services or insurance may be entered into for any period of time deemed to be in the best interests of the city provided the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor.
 2. Cancellation Due to Unavailability Of Funds in Succeeding Fiscal Periods. When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be canceled. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-43.

SECTION 21-36. PREQUALIFICATION.

The purchasing agent is authorized to prequalify bidders prior to the issuance of any invitation for bids, whether for goods, services, insurance or construction, by requiring prospective bidders to submit such information as he shall deem appropriate, including samples, financial reports, and references; provided, however, that opportunity to prequalify shall be given to any prospective bidder who has not been suspended or debarred under this chapter.

The purchasing agent may refuse to prequalify any prospective contractor, provided that written reasons for refusing to prequalify are made a part of the record in each case. The decision of the purchasing agent shall be final.

In considering any request for prequalification, the purchasing agent shall determine whether there is reason to believe that the bidder possesses the management, financial soundness, and history of performance which indicate apparent ability to successfully complete the plans and specifications of the invitations for bid. The purchasing agent may employ standard forms designed to elicit necessary information, or may design other forms for that purpose.

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Prequalification of a bidder shall not constitute a conclusive determination that the bidder is responsible, and such bidder may be rejected as nonresponsible on the basis of subsequently discovered information.

Failure of a bidder to prequalify with respect to a given procurement shall not bar the bidder from seeking prequalification as to future procurements, or from bidding on procurements which do not require prequalification. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-46.

SECTION 21-37. DEBARMENT.

- (a) After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the purchasing agent, after consulting with the city attorney, is authorized to debar a person for cause from consideration for award of contracts. The debarment shall not be for a period of more than three years. After consultation with the city attorney the purchasing agent, if appropriate, shall suspend a person from consideration for award of contracts if there is probable cause to believe that the person has engaged in any activity which might lead to debarment. The suspension shall not be for a period exceeding one year. The causes for debarment 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 city contractor;
 3. Conviction under state or federal antitrust statutes arising out of the submission of bids or proposals;
 4. 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 as a basis for debarment;
 5. Any other cause the purchasing agent determines to be so serious and compelling as to affect responsibility as a city contractor including debarment by another governmental entity for any cause in this chapter;

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6. For violation of the ethical standards set forth in this chapter.
 - (b) The purchasing agent shall issue a written decision to debar or suspend. The decision shall state the reasons for the action taken and inform the-debarred or suspended person involved of his rights concerning judicial or administrative review. A copy of the decision shall be mailed or otherwise furnished immediately to the debarred or suspended person.
 - (c) A decision to debar or suspend shall be final and conclusive, unless the debarred or suspended person within 10 days after receipt of the decision files an appeal to the city manager. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-46.1.

SECTION 21-38. TIE BIDS - PREFERENCE FOR VIRGINIA AND LOCAL PRODUCTS AND FIRMS.

Except as set forth below, in the case of a tie bid, preference shall be given to goods, services and construction produced in Virginia or provided by Virginia persons, firms or corporations, if such a choice is available; otherwise the tie shall be decided by lot.

If all bids received are for the same total amount or unit price, quality and service being equal, the contract shall be awarded to a local bidder.

In the event that there is a tie bid, the tie bidders shall be invited to resubmit written bids below the original bid, and award shall be made to the bidder with the lowest bid price. Any price quote made verbally shall be confirmed in writing in order to be eligible for consideration.

In the event that none of the foregoing provisions of this section resolve the tie, the purchasing agent may cancel the solicitation and rebid. Records shall be kept of any proceeding connected with tie bids. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-47.

SECTION 21-39. USE OF BRAND NAMES.

Unless otherwise provided in the invitation to bid, the name of a certain brand, make or manufacturer does not restrict bidders to the specific brand, make or manufacturer named; it conveys the general style, type, character, and quality of the article desired, and any article which the public body in its sole discretion determines to be the equal of that

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specified, considering quality, workmanship, economy of operation, suitability for the purpose intended, shall be accepted. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-49.

SECTION 21-40. COMMENTS CONCERNING SPECIFICATIONS.

For complex construction, goods, equipment, supplies or repair, pre-bid conferences with prospective bidders are desirable after draft specifications have been prepared. Conferences on purchasing bids may be called by the purchasing agent and attended by a department representative and, if necessary, the city attorney.

Otherwise, prospective bidders may submit comments concerning specifications or other provisions in Invitations to Bid or Requests for Proposal for consideration by the purchasing agent at least ten (10) days prior to deadline for receipt of bids, for his consideration. (Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-50.

SECTION 21-41. EMPLOYMENT DISCRIMINATION BY CONTRACTOR PROHIBITED.

The City shall include in every contract of over ten thousand dollars (\$10,000) the provisions of 1 and 2 herein:

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 or national origin except where sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.
 - b. The contractor, in all 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 ten thousand dollars (\$10,000), so

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that the provisions will be binding upon each subcontractor or vendor. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

SECTION 21-41.1. PAYMENT CLAUSES TO BE INCLUDED IN CONTRACTS.

Any contract awarded by the City shall include:

1. A payment clause which obligates the contractor to take one of the two following actions within seven (7) days after receipt of amounts paid to the contractor by the state agency or local government for work performed by the subcontractor under that contract:
 - a. Pay the subcontractor for the proportionate share of the total payment received from the agency attributable to the work performed by the subcontractor under that contract; or
 - b. Notify the agency and subcontractor, in writing, of his intention to withhold all or a part of the subcontractor's payment with the reason for nonpayment.
2. 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 (7) days following receipt by the contractor of payment from the state agency or agency of local government for work performed by the subcontractor under that contract, except for amounts withheld as allowed in subdivision 1 b of this section.
3. An interest rate clause stating, "Unless otherwise provided under the terms of this contract, interest shall accrue at the rate of one percent (1%) 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 may not be construed to be an obligation of the City. A contract modification may not be made for the purpose of providing reimbursement for such interest charge. A cost reimbursement claim may not include any amount for reimbursement for such interest charge. (Ord. No. 049-95, 10-17-95)

SECTION 21-41.2. PUBLIC CONSTRUCTION CONTRACT PROVISIONS BARRING DAMAGES FOR UNREASONABLE DELAYS DECLARED VOID.

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- (a) Any provision contained in any public construction contract entered into on or after July 1, 1991, that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages for unreasonable delay, in performing such contract, either on his behalf or on behalf of his subcontractor if and to the extent such delay is caused by acts or omissions of the public body, its agents or employees and due to causes within their control is against public policy and is void and unenforceable.
- (b) Subsection (a) shall not be construed to render void any provision of a public construction contract that:
 - 1. Allows a public body 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 a public body 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 public body and shall pay it for a percentage of all costs incurred by the public body in investigating, analyzing, negotiating, litigating and arbitrating the claim, which percentage shall be equal to the percentage of the contractor's total delay claim which is determined through litigation or arbitration to be false or to have no basis in law or in fact. (Ord. No. 049-95, 10-17-95)

SECTION 21-42. PUBLIC ACCESS TO PROCUREMENT INFORMATION.

- (a) Except as provided in the Virginia Public Procurement Act, all proceedings, records, contracts and other public records relating to procurement transactions shall be open to the inspection of any citizen, or any interested person, firm or corporation, in accordance with the Virginia Freedom of Information Act.
- (b) Cost estimates relating to a proposed procurement transaction prepared by or for the city shall not be open to public inspection.
- (c) Any bidder or offeror, upon request, shall be afforded the opportunity to inspect bid and proposal records within a reasonable time after the opening of all bids but prior to award, except in the event that the City decides not to accept any of the

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bids or proposals and to reopen the contract. Otherwise, bid and proposal records shall be open to public inspection only after award of the contract.

- (d) Any inspection of procurement transaction records under this section shall be subject to reasonable restrictions to ensure the security and integrity of the records.
- (e) Trade secrets or proprietary information submitted by a bidder, offeror or contractor in connection with a procurement transaction shall not be subject to public disclosure under the Virginia Freedom of Information Act. However, the bidder, offeror or contractor must invoke the protections of this section prior to or upon submission of the data or other materials, and must identify the data or other materials to be protected and state the reasons why protection is necessary. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-52.

SECTION 21-43. WITHDRAWAL OF BID DUE TO ERROR.

- (a) A bidder for a public construction contract may withdraw his bid from consideration if the price bid was substantially lower than the other bids due solely to a mistake therein, provided the bid was submitted in good faith, and the mistake was a clerical mistake as opposed to a judgment mistake, and was actually due to an unintentional arithmetic error or an unintentional omission of a quantity of work, labor or material made directly in the compilation of 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.

The procedure for withdrawal of bids shall be as follows, and shall be stated in the bid advertisement:

The bidder shall give notice in writing of his claim of right to withdraw his bid within two business days after the conclusion of the bid opening procedure.

- (b) Procedures for the withdrawal of bids for other than construction contracts may be established by the assistant city manager.
- (c) No bid may be withdrawn under this section when the result would be the awarding of the contract on another bid of the same bidder or of another bidder in which the ownership of the withdrawing bidder is more than five percent.
- (d) If a bid is withdrawn under the authority of this section, the lowest remaining bid shall be deemed to be the low bid.

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- (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) If the purchasing agent denies the withdrawal of a bid under the provisions of this section, he shall notify the bidder in writing stating the reasons for his decision and award the contract to such bidder at the bid price, if the bidder is a responsible and responsive bidder. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-54.

SECTION 21-44. CONTRACT MODIFICATION.

A public 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 ten thousand dollars (\$10,000), whichever is greater, without the advance written approval of the City Council. 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. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-55.

SECTION 21-45. RETAINAGE ON CONSTRUCTION CONTRACTS.

- (a) In any public contract for construction which provides for progress payments in installments based upon an estimated percentage of completion, the contractor shall be paid at least ninety-five percent of the earned sum when payment is due, with not more than five percent being retained to assure faithful performance of the contract. All amounts withheld may be included in the final payment.
- (b) Any subcontract for a public project which provides for similar progress payments shall be subject to the same limitations. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-56.

DIVISION 2. BONDS

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SECTION 21-46. BID BONDS ON CONSTRUCTION CONTRACTS.

- (a) Except in cases of emergency, all bids or proposals for construction contracts in excess of twenty-five thousand dollars (\$25,000) shall be accompanied by a bid bond from a surety company selected by the bidder which is legally authorized to do business in Virginia, as a guarantee that if the contract is awarded to such bidder, the bidder 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) 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. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

SECTION 21-47. PERFORMANCE AND PAYMENT BONDS ON CONSTRUCTION CONTRACTS.

- (a) Upon the award of any public construction contract exceeding twenty-five thousand dollars (\$25,000) awarded to any prime contractor, such contractor shall furnish to the city the following bonds:
 - 1. A performance bond in the sum of the contract amount conditioned upon the faithful performance of the contract in strict conformity with the plans, specifications and conditions of the contract.
 - 2. A payment bond in the sum of the contract amount. Such bond shall be for the protection of claimants who have and fulfill contracts to supply labor or materials to the prime contractor to whom the contract was awarded, or to any subcontractors, in the prosecution of the work provided for in such contract, and shall be conditioned upon the prompt payment for all such material furnished or labor supplied or performed in the prosecution of the work. "Labor or materials" shall include public utility services and reasonable rentals of equipment, but only for periods when the equipment rented is actually used at the site.
- (b) Each of such bonds shall be executed by one or more surety companies selected by the contractor which are legally authorized to do business in Virginia.
- (c) Bonds shall be made payable to the City of Winchester.
- (d) Each of the bonds shall be filed with the purchasing agent.

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- (e) Nothing in this section shall preclude such contractor from requiring each subcontractor to furnish a payment bond with surety thereon in the sum of the full amount of the contract with such subcontractor conditioned upon the payment to all persons who have and fulfill contracts which are directly with the subcontractor for performing labor and furnishing materials in the prosecution of the work provided for in the subcontract. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

SECTION 21-48. BONDS FOR OTHER THAN CONSTRUCTION CONTRACTS.

At the discretion of the purchasing agent, bidders may be required to submit with their bid a bid bond in an amount to be determined by the purchasing agent and specified in the Invitation to Bid or Request for Proposals, which shall be forfeited to the City as liquidated damages upon the bidder's failure to execute a contract awarded to him or upon the bidder's failure to furnish any required performance or payment bonds in connection with a contract awarded to him.

The purchasing agent may require successful bidders to furnish a performance bond and/or a payment bond at the expense of the successful bidder, the amounts to be determined and specified in the Invitation to Bid or Request for Proposal, to ensure the satisfactory completion of the work for which a contract is awarded. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-62.

SECTION 21-49. ACTIONS ON PERFORMANCE BOND.

No action against the surety on a performance bond shall be brought unless within one year after (i) completion of the contract, including the expiration of all warranties and guarantees, or (ii) discovery of the defect or breach of warranty, if the action be for such. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-59.

SECTION 21-50. ACTIONS ON PAYMENT BONDS.

- (a) Subject to the provisions of subsection (b) hereof, any claimant who has performed labor or furnished materials in accordance with the contract for which a payment bond has been given, and who has not been paid in full therefor before the expiration of ninety days after the day on which such claimant performed the last of such labor or furnished the last of such materials for which he claims payment, may bring an action on such payment bond to recover any amount due him for such labor or material, and may prosecute such action to final judgment

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and have execution on the judgment. The obligee named in the bond need not be named a party to such action.

- (b) Any claimant who has a direct contractual relationship with any subcontractor from whom the contractor has not required a subcontractor payment bond but who has no contractual relationship, express or implied, with such contractor, may bring an action on the contractor's payment bond only if he has given written notice to such contractor within 180 days from the day on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment, stating with substantial accuracy the amount claimed and the name of the person for whom the work was performed or to whom the material was furnished. Any claimant who has a direct contractual relationship with a subcontractor from whom the contractor has required a subcontractor payment bond but who has no contractual relationship, express or implied, with such contractor, may bring an action on the subcontractor's payment bond. Notice to the contractor shall be served by registered or certified mail, postage prepaid, in an envelope addressed to such contractor at any place where his office is regularly maintained for the transaction of business. Claims for sums withheld as retainages with respect to labor performance or materials furnished, shall not be subject to the time limitations stated in this subsection.
- (c) Any action on a payment bond must be brought within one year after the day on which the person bringing such action last performed labor or last furnished or supplied materials. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-60.

SECTION 21-51. ALTERNATIVE FORMS OF SECURITY.

- (a) In lieu of a bid, payment, or performance bond, a bidder may furnish a certified check or cash escrow in the face amount required for the bond.
- (b) If approved by the city attorney, a bidder may furnish a personal bond, property bond, or bank or savings and loan association'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 preferred affords protection to the City equivalent to a corporate surety's bond. (Ord. No. 003-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-61.

SECTIONS 21-52 - 21-54. RESERVED.

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ARTICLE V. APPEALS AND REMEDIES FOR BID PROTESTS

SECTION 21-55. INELIGIBILITY OF BIDDER, OFFEROR OR CONTRACTOR.

- (a) Any bidder, offeror, or contractor refused permission to, or disqualified from, participating in public contracts shall be notified in writing. Such notice shall state the reasons for the action taken. This decision shall be final unless the bidder, offeror, or contractor appeals within thirty days of receipt of such notice by instituting legal action as provided in the Virginia Public Procurement Act.
- (b) If, upon appeal, it is determined that the action taken was arbitrary or capricious, or not in accordance with the Constitution of Virginia, statutes or regulations, the sole relief shall be restoration of eligibility. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-63.

SECTION 21-56. APPEAL OF DENIAL OF WITHDRAWAL OF BID.

- (a) A decision denying withdrawal of bid under the provisions of Sec. 21-43 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 the Virginia Public Procurement Act.
- (b) If no bid bond was posted, a bidder refused withdrawal of a bid under the provisions of Sec. 21-43, prior to appealing, shall deliver to the purchasing agent 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 arbitrary or capricious, the sole relief shall be withdrawal of the bid. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-64.

SECTION 21-57. DETERMINATION OF NONRESPONSIBILITY.

- (a) Any bidder who, despite being the apparent low bidder, is determined not to be a responsible bidder for a particular contract shall be notified in writing. Such notice shall state the basis for the determination, which shall be final unless the

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bidder appeals the decision within ten days by instituting legal action as provided in the Virginia Public Procurement Act.

- (b) If, upon appeal, it is determined that the decision of the purchasing agent was arbitrary or capricious, 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. If, after an award, it is determined that the decision of the purchasing agent was arbitrary or capricious, the relief shall be as set forth in Sec. 21-58(B).
- (c) A bidder contesting a determination that he is not a responsible bidder for a particular contract shall proceed under this section, and may not protest the award or proposed award under Sec. 21-58 of this chapter.
- (d) Nothing contained in this section shall be construed to require the city when procuring by competitive negotiation, to furnish a statement of the reasons why a particular proposal was not deemed to be the most advantageous . (Ord. No. 002-83, 1-11-83; Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-65.

SECTION 21-58. PROTEST OF AWARD OR DECISION TO AWARD.

- (a) Any bidder or offeror may protest the award or decision to award a contract by submitting such protest in writing to the city manager no later than ten days after the award or the announcement of the decision to award, whichever occurs first. No protest shall lie for a claim that the selected bidder or offeror is not a responsible bidder or offeror. The written protest shall include the basis for the protest and the relief sought. The city manager shall issue a decision in writing within ten days stating the reasons for the action taken. This decision shall be final unless the bidder or offeror appeals within ten days of the written decision by instituting legal action as provided in the Virginia Public Procurement Act.
- (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 purchasing agent 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 city manager may declare the contract void upon a finding that this action is in the best interest of the public. Where a contract is declared void, the performing contractor shall be compensated for the cost of performance up to the time of such declaration. In no event shall the performing contractor be entitled to lost profits.

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- (c) Where the city manager 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, Article 4, Chapter 7, Title 11 of the Code of Virginia (Ethics in Public Contractor), the city manager may enjoin the award of the contract to a particular bidder. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-66.

SECTION 21-59. EFFECT OF APPEAL UPON CONTRACT.

Pending final determination of a protest or appeal, the validity of a contract awarded and accepted in good faith in accordance with this chapter shall not be affected by the fact that a protest or appeal has been filed. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-67.

SECTION 21-60. STAY OF AWARD DURING PROTEST.

An award need not be delayed for the period allowed a bidder or offeror to protest, but in the event of a timely protest, no further action to award the contract will be taken unless there is a written determination that proceeding without delay is necessary to protect the public interest or unless the bid or offer would expire. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-68.

SECTION 21-61. 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 such claim must be at the time of the occurrence or beginning of the work upon which the claim is based. Nothing herein shall preclude a contract from requiring submission of an invoice for final payment within a certain time after completion and acceptance of the work or acceptance of the goods. Pendency of claims shall not delay payment of amounts agreed due in the final payment.
- (b) A procedure for consideration of contractual claims shall be included in each contract. Such procedure, which may be incorporated into the contract by

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reference, shall establish a time limit for a final decision in writing by the city manager.

- (c) A contractor may not institute legal action as provided in the Virginia Public Procurement Act prior to receipt of the decision on the claim, unless the purchasing agent fails to render such decision within the time specified in the contract.
- (d) The decision of the city manager shall be final and conclusive unless the contractor appeals within six months of the date of the final decision on the claim by the City mayor by instituting legal action as provided in the Virginia Public Procurement Act. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-69.

SECTION 21-62. REPEALED.

(Ord. No. 049-95, 10-17-95)

SECTIONS 21-63 - 21-64. RESERVED.

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ARTICLE VI. ASSISTANCE TO SMALL AND DISADVANTAGED BUSINESSES

SECTION 21-65. ESTABLISHMENT OF PROGRAMS TO EXPAND PARTICIPATION.

It is the policy of the City to encourage the participation of small businesses and businesses owned by women and minorities to participate in city procurement transactions. The purchasing agent shall establish programs consistent with all provisions of this chapter to facilitate the participation of small businesses and businesses owned by women and minorities in procurement transactions. Such programs shall be in writing, and shall include cooperation with the State Office of Minority Business Enterprise, the United States Small Business Administration and other public or private agencies. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-13-88; Ord. No. 049-95, 10-17-95)

State Law Reference--Code of Virginia, §11-48.

SECTION 21-66. DISCRIMINATION PROHIBITED.

In the solicitation or awarding of contracts, the city shall not discriminate because of race, religion, color, sex, or national origin of the bidder or offeror. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

SECTIONS 21-67 - 21-69. RESERVED.

ARTICLE VII. ETHICS IN PUBLIC CONTRACTING

SECTION 21-70. PURPOSE.

The provisions of this article supplement, but do not supersede, other provisions of law, including, but not limited to, the Virginia Conflict of Interests Act Code of Virginia §2.1-639.1 *et seq.*, the Virginia Governmental Frauds Act Code of Virginia §18.2-498.1 *et seq.* and Articles 2 and 3 of Chapter 10 of Title 18.2 of the Code of Virginia. The provisions of this article apply notwithstanding the fact that the conduct described may not constitute a violation of the Virginia Conflict of Interests Act. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-72, 1987 Supp.

SECTION 21-71. DEFINITIONS.

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The words defined in this section shall have the meanings set forth below throughout this article.

"Immediate family" shall mean a spouse, children, parents, brothers and sisters, and any other person living in the same household as the employee.

"Official responsibility" shall mean administrative or operating authority, whether immediate or final, to initiate, approve, disapprove or otherwise affect a procurement transaction, or any claim resulting therefrom.

"Pecuniary interest arising from the procurement" shall mean a personal interest in a contract as-defined in the State and Local Government Conflict of Interests Act (§2.1-639.1 *et seq.*).

"Procurement transaction" shall mean all functions that pertain to the obtaining of any goods, services or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

"Public employee" shall mean any person employed by a governing body, including elected officials or appointed members of governing bodies. (Ord. No. 002-83. 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-73.

SECTION 21-72. PROSCRIBED PARTICIPATION BY PUBLIC EMPLOYEES IN PROCUREMENT TRANSACTIONS.

Except as may be specifically allowed by provisions of the Comprehensive Conflict of Interests Act (§2.1-599 *et seq.*), no public employee having official responsibility for a procurement transaction shall participate in that transaction on behalf of the governing body when the employee knows that:

1. The employee is contemporaneously employed by a bidder, offeror or contractor involved in the procurement transaction; or
2. The employee, the employee's partner, or any member of the employee's immediate family holds a position with a bidder, offeror or contractor such as an officer, director, trustee, partner or the like, or is employed in a capacity involving personal and substantial participation in the procurement transaction, or owns or controls an interest of more than five percent; or

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3. The employee, the employee's partner, or any member of the employee's immediate family has a pecuniary interest arising from the procurement transaction; or
4. The employee, the employee's partner, or any member of the employee's immediate family is negotiating, or has an arrangement concerning, prospective employment with a bidder, offeror or contractor. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-74.

SECTION 21-73. SOLICITATION OR ACCEPTANCE OF GIFTS.

No public employee having official responsibility for a procurement transaction shall solicit, demand, accept, or agree to accept from a bidder, offeror, contractor or subcontractor any payment, loan, subscription, advance, deposit of money, services or anything of more than nominal or minimal value, present or promised, unless consideration of substantially equal or greater value is exchanged. The city may recover the value of anything conveyed in violation of this section. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-75.

SECTION 21-74. DISCLOSURE OF SUBSEQUENT EMPLOYMENT.

No public employee or former public employee having official responsibility for procurement transactions shall accept employment with any bidder, offeror or contractor with whom the employee or former employee, employee dealt in an official capacity concerning procurement transactions for a period of one year from the cessation of employment by the city unless the employee, or former employee, provides written notification to the city manager prior to commencement of employment by that bidder, offeror or contractor. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-76.

SECTION 21-75. GIFTS BY BIDDERS, OFFERORS, CONTRACTORS OR SUBCONTRACTORS.

No bidder, offeror, contractor or subcontractor shall confer upon any public employee having official responsibility for a procurement transaction any payment, loan subscription, advance, deposit of money, services or anything of more than nominal value, present or

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promised, unless consideration of substantially equal or greater value is exchanged. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-77.

SECTION 21-76. KICKBACKS.

- (a) No contractor or subcontractor shall demand or receive from any of his suppliers or his subcontractors, as an inducement for the award of a subcontract or order, any payment, loan subscription, advance, deposit of money, services or anything, present or promised, unless consideration of substantially equal or greater value is exchanged.
- (b) No subcontractor or supplier shall make, or offer to make, kickbacks as described in this section.
- (c) No person shall demand or receive any payment, loan, subscription, advance, deposit of money, services or anything of value in return for an agreement not to compete on a public contract.
- (d) If a subcontractor or supplier makes a kickback or other prohibited payment as described in this section, the amount thereof shall be conclusively presumed to have been included in the price of the subcontract or order and ultimately borne by the city and will be recoverable from both the maker and recipient. Recovery from one offending party shall not preclude recovery from other offending parties. (Ord. No. 002-83 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-78.

SECTION 21-77. PURCHASE OF BUILDING MATERIALS, ETC. FROM ARCHITECT OR ENGINEER PROHIBITED.

Except in cases of emergency, no building materials, supplies or equipment for any building or structure constructed by or for the city shall be sold by or purchased from any person employed as an independent contractor by the city to furnish architectural or engineering services, but not construction, for such building or structure, or from any partnership, association, or corporation in which such architect or engineer has a pecuniary interest (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-79.

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SECTION 21-78. PENALTY FOR VIOLATION.

Willful violation of any provision of this article shall constitute a Class 1 misdemeanor. Upon conviction, any public employee, in addition to any other fine or penalty provided by law; shall forfeit his employment. (Ord. No. 002-83, 1-11-83; Ord. No. 013-88, 3-08-88)

State Law Reference--Code of Virginia, §11-80

CHAPTER TWO SOURCES OF SUPPLY

1.0 General:

This chapter discusses mandatory and non-mandatory sources of supply. All departments and agencies are required to use the mandatory sources under the conditions outlined in each subsection of paragraph 2.0. The non-mandatory sources identified in Section 3.0 are recommended for the products/services indicated and department and agencies are encouraged to use them. The remaining sections of this chapter offer guidance on use of supplier source list, catalogs and seeking assistance from vendors.

2.0 Mandatory Sources:

- a. **Term Contracts.** To obtain more favorable prices through volume purchasing and to reduce lead-time and administrative cost and effort, the Finance department has established for goods or services. Written notices of contract awards are issued notifying participants (agencies or institutions or organizational elements within) of the existence of such contracts. In accordance with the terms and conditions, purchase orders shall be issued in any amount for any goods or service on a term contract available to that participant. If an item is available on contract, departments may not use their delegated authority to purchase from another source unless the purchase is exempt by contract terms. Vendors who intentionally sell or attempt to sell goods or services to an authorized participant who is under contract with another vendor may result in suspension and/or debarment by the City. The purchase by City personnel of goods or services that are on contract from non-contract sources may result in reduction or withdrawal of that personnel or department's delegated purchasing authority by the City Manager. An exception from a mandatory city contract may be granted by the Purchasing Agent responsible for the contract.

Term contracts are for the benefit of the City of Winchester, its departments, agencies and boards. They do not apply to City employees or other individuals, and ordering from City contracts by individuals directly or by using orders with subsequent reimbursement to the City is prohibited.

3.0 Nonmandatory Sources.

- a. **Optional Use Term Contracts.** Optional use term contracts may be established by Finance. This type of contract may be appropriate because of the unique nature of the commodity or service being procured. An example would be a good or service that is generally ordered in low dollar increments and local storage or distribution costs exceed any bulk purchase savings. Optional use contracts may also be appropriate when erratic or rapidly dropping prices are encountered such as in the personal computer and related peripheral equipment industries. Market conditions in these limited applications create an incentive for the contractors to retain business by publishing revised price lists against which fixed discount rates can be applied throughout the contract's term.

- b. **Surplus Property.** Local government, state and federal surplus property is an available resource to the City of Winchester. These programs are optional use sources of supply and should always be considered prior to initiating purchase action. Substantial sums of money can be saved for goods that are often in “like new” condition. To avoid unnecessary purchases of new materials or equipment, the City departments, agencies and boards should ensure that assets being procured are first screened against available assets from within their own agency and from other agencies and institutions.

- c. **Nonprofit Sheltered Workshops and Nonprofit Organizations.** City department, agencies and boards may purchase selected goods and services from nonprofit sheltered workshops and nonprofit organizations serving the handicapped without competition if the goods or services:
 - (1) are of acceptable quality;
 - (2) can be supplied within the time required;
 - (3) can be purchased within ten percent (10%) of fair market value. Finance deems fair market value to be the lowest purchase price paid by the purchasing agency or other governmental entity for like items or services purchased in a similar quantity within the last six (6) months. If this information is not available, then obtain at least one additional quote to determine fair market value.

Purchase of goods from nonprofit sheltered workshops and nonprofit organizations should be accomplished by utilizing an appropriate purchase order. Contracts may be negotiated with individual nonprofit workshops and nonprofit organizations serving the handicapped for nonprofessional services (*Code of Virginia*, § 2.2-1118). When establishing contracts for goods or services that involve the manual packaging of bulk supplies or the manual assemblage of goods where individual items weigh less than 50 pounds departments should include the Nonprofit Sheltered Workshop and Nonprofit Organizations special term and condition.

4.0 Source Lists.

Care should be taken to solicit sources capable of providing, as a regular part of their business, the goods or services needed. The maintenance and use of appropriate and current source lists are essential to competitive procurement. Personnel at all levels should make a concerted effort to identify responsible vendors as sources of supply for goods and services. Special emphasis should be placed on including Virginia and City vendors, and SWAM vendors (small, women-owned and minority-owned businesses) on all solicitation lists. Departmental source lists may also be furnished to the Purchasing Agent for use as well as for use by other departments. Finance department maintains a bidders list of registered vendors by commodity and service.

5.0 Suppliers' Catalogs.

Suppliers' catalogs are an excellent source of descriptive information and current technology. Purchasing will attempt to keep current catalogs and make them available to departmental personnel to assist them in identifying functional characteristics of supplies, materials, and equipment. Caution must be exercised when using suppliers' catalogs to be sure that information is taken from current editions.

6.0 Contact with Vendors.

Suppliers' and manufacturers' representatives are valuable sources of information and may be contacted when developing purchase requirements. Vendors' visits should be arranged in a manner that will assure a full, courteous, and mutually beneficial exchange of information. Such assistance must be considered normal sales effort and does not entitle a vendor to any preference. Departmental personnel should be cautioned that commitments cannot be made which would lead a supplier to believe they will subsequently receive an order. If departmental personnel receive vendor assistance in preparing a specification, a written notification to that effect must accompany the request for solicitation to the Purchasing Agent. Under no circumstances shall a bidder or offeror be permitted to evaluate or assist in evaluating competitors' bids or offers.

7.0 Other Sources of Supply.

Sources of supply can be identified through a variety of methods. Some methods include bidders lists, trade journals, trade shows and exhibitions, Yellow Pages, Thomas Register, and through networking with other local jurisdictions or purchasing personnel. Other State agencies and organizations such as the Department of Economic Development, Department of Minority Business Enterprise (DMBE, 800-223-0671), Virginia Minority Supplier Development Council (VMSDC) and local Chambers of Commerce are also possible vendor information sources. The Internet provides a good source of possible vendor and product information. Search on "business" or particular industries or products. Sites such as www.virginiabusiness.com or www.wiznet.net may offer information on sources of supply. National purchasing organizations such as the National Institute of Governmental Purchasing (NIGP) at www.nigp.org or the Institute for Supply Management (ISM) at www.ism.ws also provide resource information.

CHAPTER THREE GENERAL PROCUREMENT GUIDELINES AND PLANNING

3.0 **General.** This chapter contains general guidelines and suggestions when procuring goods, services, and non-capital outlay construction. In some cases, these guidelines expand upon requirements that have their basis in the *Virginia Public Procurement Act (VPPA)*. Their intent is to assist purchasers in conforming to generally acceptable procurement principles, yet provide maximum interpretive latitude in their application.

3.1 **Lead-Time.**

- a. **Administrative Lead-Time.** Administrative lead-time is that period of time from initiation of the requirement by the user to issuance of an award. For routine procurements where informal written solicitations are used, the minimum time required to prepare, solicit, evaluate, and make an award may take from three (3) days up to thirty (30) days. When competitive sealed bidding or competitive negotiation is used, the time required by the purchasing office may be longer. It is important to emphasize that this time period should be included in their planning.
- b. **Order/Ship Time (OST).** Order/Ship Time is the time after award required by suppliers to fill an order and ship by designated means (truck, rail, or air) to the delivery point. These times vary widely by industry. Consideration should be given to market conditions which will affect delivery. Except for the most routine of expendable supplies, e.g., off-the-shelf items, a range of 30-90 days should be estimated in determining the OST. Custom made and complex items of equipment normally take longer to obtain.

3.2 **Selection of Procurement Method.**

It is important to select the proper procurement method. The estimated or anticipated value of the contract must be determined first, unless the purchase is an emergency. The anticipated value of the contract includes the dollar value for the initial period of the contract, and includes all possible renewal periods. The expected trade-in value of equipment should not be considered when determining the anticipated value of a contract. When determining the total value of a contract, include all cost elements such as travel related expenses (e.g., travel, lodging, and meals) and direct bill expenses (e.g., copying costs, postage, shipping and handling costs, long distance charges). If purchases under \$50,000 are required, then the small purchase procedures in Chapter 4 shall be used. If over \$50,000, a decision by the purchasing office will be made whether to use competitive sealed bidding or competitive negotiation.

4.3 **Preparing the Written Solicitation.**

- a. **General.** Solicitations should convey to the reader, in a clear, concise and logical sequence, the information necessary to answer the basic questions of who, what, why, where, when and how. The *Code of Virginia*, § 2.2-4343.1D requires public bodies to

prominently display a nondiscrimination statement concerning faith-based organizations in all Invitation to Bid (ITB), Request for Proposals (RFP), contracts, and purchase orders. The following statement must be prominently displayed on the cover page of every ITB or RFP:

Note: This public body does not discriminate against faith-based organizations in accordance with the *Code of Virginia*, § 2.2-4343.1 or against a bidder or offeror because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by state law relating to discrimination in employment.

- b. **Terms and Conditions.** Terms and conditions must be in writing, be clear and concise, and express the intent of the agency. Generally, if there is an ambiguity in a written contract that results in a dispute, its resolution will be against the party who wrote the contract. General Terms and Conditions shall be a part of every good or service procurement issued by all departments (see Appendix B-1: City of Winchester General Terms and Conditions). Exceptions to the use of the terms and conditions must be approved by the City Attorney. Special Conditions can be found in Appendix B-2, B-3 and B-4. Information and assistance in the preparation or use of additional special terms and conditions not contained in this manual can be obtained by contacting the purchasing office. Unless the City has provided for prequalification of bidders, the solicitation shall include a statement of any requisite qualifications. Such qualifications must be verifiable and must be used in determining responsiveness of bids and in evaluating proposals.
- c. **Contract Period.** Term contracts normally cover a 12-month period or cite a specific time for completion for the project or service. A solicitation for a multi-year contract, or one that includes an option on the part of the City to renew the contract for an additional period, may be advantageous and should be considered; however, in determining the value of the contract and procurement method, all possible renewal periods must be included. Multi-year programs are subject to availability of funds, and each solicitation covering a multi-year period must contain an availability of funds clause. If price adjustments are to be permitted during the contract period, the conditions under which they are authorized must be specified in the original solicitation and resulting contract. The purchasing office, in conjunction with the user department(s) should review all multi-year contracts at least annually to determine if the goods or services are still required, if prices are fair and reasonable based on the current market conditions, and if performance is satisfactory. Multi-year contracts including options to renew normally should not exceed 5 years.
- d. **Types of Contracts.** Listed below are some various types of contracts.
 - (1) **Fixed Price Contracts.**
 - (a) **Firm Fixed Price.** Fixed pricing agreement where firm unit or total prices are established at the time of order placement or contract award for the goods or

services. A fixed price contract may result from bidding or negotiation processes. Specifications are clear. Costs are predictable. There is minimal risk to the purchasing activity when firm fixed price contracting is used. This type of contract encourages efficient performance and is least costly to administer. Financial requirements are known. The use of firm fixed price contracting may be inappropriate if requirements or specifications are unclear or indefinite.

- (b) **Fixed Price with Escalation/De-escalation.** This fixed price agreement provides for price adjustments, up or down if specified contingencies occur. This type of contracting may result from bidding or negotiation processes. It is used to eliminate fluctuations in vendor's prices due to unstable markets. The contract period is typically over a long period of time. The use of fixed price contracts with escalation/de-escalation reduces the need for contractors to inflate cost of goods to offset unstable markets or economic conditions. The risk is partially transferred to the buyer. Costs are increased through greater contract administration efforts that are required by this type of contracting.
- (2) **Requirements-Type Contracts.** Requirements-type contracts are agreements for performance over a specified period of time, when quantities are indefinite. They have no fixed total dollar amount; rather, they are unit price based. They establish a framework under which goods/services are provided, but it is the degree of purchase order activity against the contract that will ultimately determine its total value. Effective administration of these open-ended agreements requires that the agency maintain some record of the degree of activity against these contracts. Purchasing must, either manually or through an automated system, have some means to capture, analyze, and report usage information. Purchase order activity must be periodically reviewed for compliance with the terms of the agreement. Contract expenditure activity should always be examined prior to the exercise of any renewal provision or re-solicitation. These contracts are generally used when conducting cooperative procurements and the need for close administration becomes even greater.
- (3) **Time and Materials Contracts (T&M).** The agreement for supplies or services is on the basis of billable hours, which include overhead, profit, and materials at cost. Details of the work are known but the scope of the work is not known. T&M contracts are suitable for maintenance, design, engineering, emergencies, etc. Competition is sought on the basis of labor-hour rate. These contracts may be expensive to administer. Whenever a department or agency uses a cost-reimbursement agreement such as T&M to acquire needed goods/services, it is essential that billed costs be analyzed (and challenged when appropriate) prior to their approval for payment. Because there is usually no incentive for contractors to contain costs, departments or agencies have an obligation to verify the legitimacy and accuracy of any costs submitted for reimbursement.

When a time and materials agreement is used, departments or agencies must request a detailed job estimate which should include the amount and type of contract labor with associated rates and itemized material costs to allow evaluation of the reasonableness of its cost elements before authorizing the work to be performed. If it is determined that the estimate is not reasonable or in accordance with the terms of the contract, negotiation or the solicitation of additional estimates should be considered.

- (4) **Construction-Type Contracts.** Procurement and administration of construction services requires the planning and use of special procedures.
- (5) **Blanket Purchase Agreements (BPA).** Blanket purchase agreements are contractual relationships which may be entered into with local vendors to obtain small dollar value, expendable operating supplies or services (less than the single quote limit) for which low or erratic demand usage exists. Use of these should be discouraged as the City has a far more comprehensive program, with the Small Purchase Charge Card Program.
- (6) **Cost Plus a Percentage of Cost.** Except in the case of an emergency affecting the public health, safety or welfare, no public contract shall be awarded on the basis of cost plus a percentage of cost (*Code of Virginia*, § 2.2-4331). This contract permits a contractor to be paid for all costs plus a percentage of the cost. There is no incentive for the contractor to be cost conscious because the greater the cost, the greater the profit.
- (7) **Cost-Plus-A-Fixed-Fee.** A cost-plus-a-fixed-fee contract is a cost-reimbursement type contract that provides for the payment of allowable costs plus a firm fixed fee to the contractor which is negotiated prior to contract award. The fixed fee, once negotiated, does not vary with the actual cost but may be adjusted as a result of any subsequent changes which may be negotiated in the scope of work or services to be performed under the contract. The scope of work is generally vague or specifications are indefinite. It accelerates procurement of new technologies. This contract is costly to administer. There are no incentives to reduce costs.
- (8) **Incentive.** A fixed price is agreed upon with a target cost/profit, a ceiling price, and a profit formula. Below target, the contractor and state share savings. Above ceiling, the contractor must assume all costs. This is used for competitively negotiated contracts for high cost, long lead-time projects. The contractor's incentive is greater profit by improving performance to control costs. It promotes performance efficiency. The agency may save in costs savings. This type of contracting requires a good accounting system. It increases administrative burden to both parties. The target price may be difficult to establish. The agency assumes a portion of the risk.

- e. **Prebid or Preproposal Conferences.** Conference or site visits early in the solicitation cycle provide an opportunity to emphasize and clarify critical aspects of solicitations, eliminate ambiguities or misunderstandings, and permit vendor input. Conferences/site visits shall be conducted with potential bidders or offerors when issuing solicitations for complex, large (over \$50,000) or critical requirements. This requirement may be waived by the purchasing office. A waiver is normally granted only when the procurement is routine, and past procurements have shown no problems. Attendance at conferences or site visits may be either optional or mandatory. When mandatory attendance is stipulated in the solicitation, an attendance roster is signed by the attendees and only bids or proposals from those firms represented at the conference or visiting the site will be accepted. The City should carefully consider whether it is absolutely necessary that bidders or offerors attend in order to understand the solicitation and submit a response to it. Such mandatory conferences and site visits can reduce competition because of vendor scheduling conflicts. In addition, no such conference or site visit can be scheduled less than ten (10) full calendar days from the date the solicitation is issued and public notice requirements are completed. Prebid or preproposal conferences scheduled during a period of suspended City business operations must be rescheduled by the purchasing office to a date and time that will permit proper notification to all potentially interested participants. If a modification to the solicitation is required as a result of the conference or site visit, an addendum must be issued.

- f. **Response Time.** When establishing an opening date and time, the City should allow for holiday mail disruptions and erratic mail deliveries as well as vendor's time required to respond to complex procurements. The sealed bid or proposal opening date shall be no less than ten (10) days after the scheduled prebid or preproposal conference. If the tenth calendar day falls on a weekend or holiday, the bid or proposal due date shall be no sooner than the first regular business day thereafter. The fact that an agency or institution is open on a weekend or official holiday does not affect these rules.

- g. **Acceptance Period.** Bids are valid for a minimum of 60 days unless a longer period of time is specified in the solicitation or in the bid response. The Bid Acceptance Period clause in Appendix B-1 should be used if it is anticipated that the review and evaluation period will exceed 60 days or the time period stated in the solicitation.

- h. **Public Notice of Solicitations.** The purchasing office (formal bids) or requesting department (unsealed quotes) shall designate a specific place available to the public used for the purpose of publicly notifying solicitations.

4.4 **Specifications.** Specifications can either enhance or inhibit competition. It is the city's policy that competition be sought to the maximum feasible degree. This can be accomplished by describing goods or services in a manner which meets the user department's needs and encourages competition. Unless otherwise expressly stated in the solicitation, all supplies and equipment furnished must be new and in first class condition. Demonstration, previously rented, or reconditioned items are not considered new. The following specification (descriptive) categories are listed in the preferred order of use:

- a. **Generic (Performance and Design).** Buyers should analyze incoming requirements with a view towards soliciting the requirement on a generic specification basis. Under appropriate circumstances, performance specifications (setting forth the performance requirements), design specifications (setting forth the essential characteristics of the items solicited), or a qualified products list (QPL) may be used.
- b. **Brand Name or Equal.** When it is determined to be impractical to develop a generic specification, a brand name may be used to convey the general style, type, character and quality of the article desired. Unless otherwise provided in the ITB the name of a certain brand, make or manufacturer does not restrict bidders to the specific brand or manufacturer named. Any article which the city, 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 (*Code of Virginia*, § 2.2-4315). When brand or manufacturers' names are specified, and one or more of these are known to be Virginia brands or manufacturers, those known to be Virginian shall be listed first prior to listing non-Virginia brands or firms.
- c. **Proprietary.** A proprietary specification restricts the acceptable products to those of one or more specified manufacturers. It is appropriate to use a proprietary specification when the desired product must be compatible with or is an integral component of existing equipment or products, or where prequalification of products is necessary to support specific needs of a program; is covered by a patent or copyright; must yield absolute continuity of results; or is one with which a user has had extensive training and experience, and the use of any other similar piece of equipment would require considerable reorientation and training. Upon solicitation, every effort must be made to obtain full competition among the distributors which carry the manufacturer's product. The determination for the use of a proprietary specification shall be made in advance, in writing, and be included in the procurement file.
- d. **Vendor Assistance in Specification Preparation.** Advice or assistance may be received from a vendor in identifying the features and characteristics needed by the agency; however, no person who, for compensation, prepares an Invitation to Bid or Request for Proposal for or on behalf of a public body shall (i) submit a bid or proposal for that procurement or any portion thereof or (ii) disclose to any bidder or offeror information concerning the procurement which is not available to the public. However, a public body may permit such person to submit a bid or proposal for that procurement or any portion thereof if the public body determines that the exclusion of such person would limit the number of potential qualified bidders or offerors in a manner contrary to the best interests of the public body (*Code of Virginia*, § 2.2-4373). The provisions of this act shall not affect the validity of any procurement contract entered into prior to July 1, 1997. This does not prohibit departments or agencies from freely exchanging information concerning what is sought to be procured and what is offered. The name of the vendor(s) providing assistance must be submitted to the purchasing office. Such information is helpful to the buyer when identifying restrictive or proprietary features

which could be challenged by other bidders or offerors causing delays and/or cancellations.

- 4.5 **Qualified Products Lists (QPL) or Qualified Contractor's Lists (QCL)**. It is sometimes necessary to prequalify products or suppliers and only solicit those who have been prequalified. In such cases, a list is maintained of specific products (QPL) or contractors (QCL) which have been evaluated and determined to be acceptable in meeting predetermined minimum acceptable levels of quality or performance (*Code of Virginia*, § 2.2-4317). This qualification is performed in advance of any particular purchase program. By having a prequalification procedure, the time in the purchase cycle can be reduced. The qualification requirements must be established and potential contractors advised by letter and/or public posting sufficiently in advance of the anticipated procurement to allow for evaluation and qualification of potential contractors and/or products. A contractor whose product or service has been determined not qualified will be advised in writing. Solicitations are only sent to those contractors determined to be qualified.
- 4.6 **Computer Hardware-Site Preparation**. In the acquisition of computer hardware, the requesting department or agency is responsible for ensuring that all site and environmental requirements, such as cabling, space, electrical and temperature specifications, load-bearing capabilities and elevator capacities, can be satisfied prior to issuance of a delivery order. For departments or agencies located in city-owned buildings under the jurisdiction of the City of Winchester, coordination with information Technology and Facility Maintenance is required, including compliance with its regulations applicable to the use of such buildings.
- 4.7 **Prompt Payment Discounts**. Prompt payment discounts should normally not be considered in determining the lowest responsive bidder. If a bidder does offer a discount for prompt payment, this will not be considered in evaluation, but should be included on the purchase order, and the discount taken if invoices are processed and payment made within the stipulated time frame. If a department or agency knows that it can regularly process payments within a prescribed time frame, such as 10 or 20 days, and wishes to consider cash discounts in its evaluation, then it may do so by including a statement such as "discounts for prompt payment within ____ (state number of days, e.g., 10, 20, etc.) days will be considered in determining net low bid."
- 4.8 **Advance Payments**. Advance payments may become necessary for certain purchases. Prior to establishing contract advance payment conditions, agencies should consult the purchasing office for guidance and restrictions prior to acceptance.
- 4.9 **Intentionally Left Blank**.
- 4.10 **Price Reasonableness Determination**. A written price reasonableness determination is required to determine if prices bid or offered are fair and reasonable when:
- a. competition is restricted or lacking,
 - b. the prices offered do not appear to be fair and reasonable,

- c. the decision is made to award to other than the lowest bidder or highest ranking offeror (appropriate award clause must have been included in the solicitation)

This also applies for any sole source purchase, single response purchase, contract change and contract renewal. The written determination of a fair and reasonable price requires that the price is acceptable to both the department or agency and the bidder or offeror considering all circumstances. Circumstances include, but are not limited to, the degree of competition, market conditions, quality, location, inflation, value, technology and unique requirements of the procuring agency or institution. The written determination may be based on price analysis (comparison with prices previously paid, prices charged for functionally similar items, prices paid by other consumers, prices set forth in a public price list or commercial catalog, or state estimates) or through the analysis of price-to-unit variations, value analysis (make-or-buy study), or cost analysis. Advice and assistance can also be obtained from the purchasing office. The written analysis must be supported by factual evidence in sufficient detail to demonstrate why the proposed price is deemed to be reasonable. If a determination is made that the prices offered are not fair and reasonable, then the purchasing office shall decide whether to rebid seeking broader competition, revise specifications and rebid the requirement, or to negotiate a better price as may be identified through the price analysis process. A combination of these methods may be necessary. If it is a negotiated procurement, then the price should be negotiated to one that is fair and reasonable.

4.11 **Order Splitting Prohibition.** The placement of multiple orders within other than a reasonable time period to one or more vendors for the same, like, or related goods or services to avoid using the appropriate method of procurement or to remain within delegated purchasing authority is prohibited. Order splitting results in higher administrative cost to the city. It is a highly inefficient practice. Requirements should be combined when practical to obtain quantity discounts and other administrative efficiencies.

4.12 **Award Documents.** Every procurement transaction (except those made through the Procurement Card Program) should originate from a requisition containing, among other information, budget details and the necessary approval authority. Field Purchase Order or Purchase Order must be prepared and given to suppliers who request a copy, regardless of dollar value. Award documents will vary according to the method of solicitation. The award shall include or incorporate by reference the specifications, descriptions or scope of work, general conditions, special conditions and all other requirements contained in the solicitation (Invitation to Bid or Request for Proposal), together with all written modifications and the bid or proposal submitted by the contractor. The award document is to be signed and issued by an authorized official of the agency. Listed below are the types and conditions under which they are to be used.

a. **City Purchase Order.** The City Purchase Order, Appendix N-1, shall be used:

- for all procurements above \$5,000;
- to place orders against term contracts for goods and services;
- as a binding commitment for one time spot purchases of goods and services;

- as a term contract for goods and services issued under an department or agency's delegated purchasing authority using formal or informal (sealed or unsealed) competitive bidding procedures.

The City Purchase Order shall not be used to establish a line of credit with one vendor upon which a series of purchases can be made, unless a city term contract has been awarded to the vendor for the commodity being purchased. The City Purchase Order should not be used merely to encumber funds.

- Notice of Award.** The Notice of Award form is the recommended document to be used as a unilateral award document issued to contractors to accept bids received from sealed and unsealed bid/quote solicitations for spot purchases or term contracts.
- Standard Contracts.** A City of Winchester Standard Contract (see Appendix N-2) may be by the purchasing office and used as a two-party award document issued to a contractor resulting from a competitively or noncompetitively negotiated spot purchase or term contract. If the use of a Contractor's standard form is being considered, the purchasing office and city attorney's office shall review prior to executing the contract. For all contracts, i.e. procurement and non-procurement, the City has implemented a Contract Review Process starting in October 2012. All departments shall start by completing and forwarding the Contract Routing Form to the Purchasing Agent and finishing with the City Attorney's approval or disapproval (with recommended changes).
- Notice of Intent To Award.** The Notice of Intent to Award form is a suggested format the purchasing office may use to officially notify the public through a public posting of their intent to issue an award. This notice is recommended for use whenever considerable bidder or offeror interest has been expressed about the potential award and/or an agency suspects an award decision may be challenged. The notice should not be posted until after completion of the evaluation. The notice shall be date stamped and publicly posted for the ten (10) day period allowed for protest (*Code of Virginia*, § 2.2-4360). Upon expiration of the ten-day period, the appropriate award document as discussed above may be issued.

4.13 **Freight.**

- F.O.B. Destination.** It is the policy of the City to solicit bids for goods F.O.B. (free on board) Destination, which means that freight charges are paid by the seller who owns and assumes all risk for the goods until they are accepted at the designated delivery point. The cost of shipping the goods may be included in the quoted price or by the bidder or offeror as a separate line item.
- F.O.B. Origin.** Under F.O.B. Origin, the vendor will be required to select the most economical method of shipment consistent with the required delivery date, prepay the freight charge and add it to the invoice. Regardless of the F.O.B. point, the City accepts title only when goods are received.

- (1) Under F.O.B. Origin, the total cost for freight to destination, shipping and handling charges etc., shall be included in determining the lowest responsive and responsible bidder. In such cases, the buyer is required to obtain the actual or estimated cost of shipment and show the freight, shipping, and/or handling cost as a line item on the purchase document. Both the F.O.B. point and shipping cost must be clearly shown on the purchase document.
- (2) Before approving an invoice for payment the department or agency should review it and compare it to the solicitation and award document to determine if the shipping costs are accurate.

4.14 **Insurance.** Whenever work is to be performed on city owned or leased property or facilities, the contractor shall be required to have Workers' Compensation, Employer's Liability, Commercial General Liability and Automobile Liability, and in certain types of programs Professional Liability/Errors and Omissions insurance coverage. Requirements for the various Professional Liability/Errors and Omissions coverages are listed in Appendix B-1, or the City of Winchester's General Terms and Conditions. The City of Winchester must be named as an additional insured when requiring a Contractor to obtain Commercial General Liability coverage. In some cases, Workers' Compensation Insurance and Employer's Liability Insurance may not be required. Workers' Compensation insurance is required when the contractor has three (3) or more employees. If work is performed by a sole proprietor, the person does not need Workers' Compensation insurance, as they do not have employees. Employer's Liability is required if an employer has employees who are paid a wage or salary. Employer's Liability is not required for persons in business together, e.g., husband and wife, siblings or parents and children, as these persons would be considered owners not employees. For construction contracts, if any subcontractors are involved, subcontractors shall also be required to have Workers' Compensation Insurance in accordance with *Code of Virginia*, §§ 2.2-4332 and 65.2-800 et seq. Stipulated insurance must be obtained prior to commencing work and be maintained during the entire term of the contract. At a minimum, the contractor must certify to the purchasing office that they possess the appropriate insurance coverage and documentation concerning the contractor's insurance shall be included in the procurement file. Certification shall be in writing when written quotes are required. The purchasing office may require a certificate of insurance to be furnished prior to commencement of work and at anytime during contract performance.

4.15 **Intentionally Left Blank**

4.16 **Conference Planning.**

- a. Acquisition of the use of meeting rooms and lodging rooms in hotels or motels is considered to be short term rentals of portions of real property - real estate transactions. So long as the procurement involves only the use of the facilities, the competitive requirements of the *VPPA* and this manual do not apply. However, if the procurement includes the provision of catered meals, audio visual equipment, etc., and the value of these other included services exceeds the \$5,000 level for which competition is required,

the entire procurement, including the use of the space, shall be procured as a package based on its anticipated value using procedures as stated below.

- b. For the purchase of a conference facilities package not expected to exceed \$50,000, department or agencies may use the following procedures.
 - (1) Prepare a written description of the conference requirements and attach the General Terms and Conditions and any Special Terms and Conditions considered appropriate to the procurement. Prepare the evaluation criteria and methodology to be used in evaluating the proposals received.
 - (a) Contact at least three (3) facilities of sufficient size to handle the conference. Determine and document the availability of the desired dates and their interest in providing the services. Provide the written description of the services required.
 - (b) Visit each of these facilities, if practical. Discuss the conference requirements, their ability to meet these requirements, other related services they have to offer and obtain their proposed prices for the conference. Negotiate with each offeror until you are satisfied that you have obtained their best proposal. Obtain in writing, from each facility with whom negotiations have been held, confirmation of the services to be provided and prices.
 - (c) Upon completion of these discussions and negotiations, apply the evaluation criteria to the proposals as negotiated and determine who has presented the best proposal.
 - (d) Award the contract using the City's Standard Contract Form.
- c. For purchases of conference facilities package deals expected to exceed \$50,000, the purchasing office shall issue a written solicitation and follow the procedures prescribed for competitive sealed bidding or competitive negotiation.
- d. In the event that only one particular hotel/motel can provide the needed facilities during the time frame in which the event is to be held, the procedures for sole source procurement shall be followed.

4.17 **Used Equipment.**

- a. Winchester City Code, Chapter 21-31.

4.18 **Rental/Lease, Installment Purchases.**

- a. **Rental or Lease.** The procurement process for the rental or lease of any equipment will be handled in the same manner as the procurement of goods. Note, however, that hiring a contractor to provide equipment and personnel (operators) to perform a task is a contractual service. The following examples are offered to clarify the difference:

- (1) Renting a bulldozer to be operated by city employees to perform grading work is an acquisition of goods. Hiring a contractor to use his bulldozer and operator to perform the same grading work is a contractual service.
- (2) Renting 1,000 folding chairs to be picked up by state employees in city vehicles at the contractor's place of business, used and returned is an acquisition of goods. Hiring a contractor to deliver, setup, remove, and haul away the same 1,000 folding chairs is a labor intensive contractual service.

The solicitation should, at a minimum, in addition to other terms and conditions, specify:

- (1) Length of time;
- (2) Number and types of equipment;
- (3) Who will provide maintenance and repair service and insurance coverage; and
- (4) Inspection at time of delivery and return.

- b. **Installment Purchase.** The procurement process for the installment purchase of any materials, equipment or supplies must be handled in the same manner as the procurement of goods. A purchase order is issued in the full amount but only encumbering the amount to be paid in the current fiscal year. The solicitation should contain an Availability of Funds provision. If the purchase is being financed by a third party, the purchase order must name both the vendor and the third party, and use the third party's address.

4.19 **Maintenance/Repair of Equipment.**

- a. **General.** Equipment is generally covered by warranty provisions for various periods of time. Care should be taken to assure that full advantage is taken of warranty provisions prior to contracting for maintenance or repair service. Where equipment is covered by insurance, i.e., boiler or machinery, the insurance carrier shall be advised, in accordance with the provisions of the policy, prior to contracting for repair.
- b. **Contracting for Equipment Maintenance.**
 - (1) Contracting for equipment maintenance falls into two basic methods:
 - (a) Full service maintenance normally requires the contractor to provide scheduled service, preventive maintenance, necessary repair parts and additional service calls as required under an annual contract at a firm fixed price. Full service maintenance contracts should be used only on an exception basis or when experience indicates that maintenance/repair on an as needed basis is not practical. In bidding on full service maintenance, contractors include in their bids the cost of all contingencies that might occur during the contract period; normally this results in higher agency costs.
 - (b) Maintenance/Repair on an as needed basis is normally provided on a time and materials cost basis. Materials and parts must be bid either at contractor's invoiced cost or on a bid percentage discount from manufacturer's published

list or catalog prices. Cost plus percentage of cost (markup) is prohibited (*Code of Virginia*, § 2.2-4331). Time and materials contracts demand more effort by the receiving department or agency in monitoring actual hours expended, prompt identification and solution of problems, and cost control to assure the contractor's performance is not inefficient or wasteful.

- (2) Solicitations for maintenance of equipment should identify the make, model, style, and the quantity of each type of equipment. Provisions may be made to add and/or delete equipment during the contract period on a prorated basis; also, for the loan of like equipment during extended periods of downtime. When maintenance is to be performed under contract on state-owned, leased, or rented property, the contractor shall be required to provide necessary insurance coverage.

c. **Contracting for Repair and Overhaul.**

- (1) **Major Scheduled Repair/Overhaul:** In situations where major equipment items are scheduled to be repaired or overhauled, it is usually impossible to determine the amount of labor and parts required without complete disassembly of the item to inspect all of its internal parts. Contracting for major repair or overhaul work on a fixed price basis without such an inspection is impractical because it forces the bidders to base their prices on an assumed worst case basis. These situations are best handled in an Invitation to Bids requiring the work to be done in two phases. Bids are solicited for a lump sum fixed price for complete disassembly, inspection and preparation of an estimate of the costs to complete the job as the first phase. The second phase is for repair and reassembly with contractor furnished replacement parts and components, startup and operational test, all to be done on a time and materials basis. The bidders are required to bid on the basis of a labor hour rate, with an overall total (not to exceed) labor cost, and parts are to be provided at a bid percentage discount from the manufacturer's parts catalog prices. The ITB includes a bid evaluation procedure with a hypothetical number of man-hours and list price value of parts to which the discount offered will be applied.
- (2) **Unscheduled Repair:** Major equipment items which cannot be scheduled for repair should be handled using the appropriate existing emergency procedures. To control costs, it is important for a department to establish a fixed hourly rate and an estimated number of hours prior to allowing the contractor to proceed with the repair/overhaul.

4.20 **Printing**

- a. **Ownership of Artwork, Negatives, Etc.** All artwork, negatives, dies, overlays or similar material used to print a job shall be the property of the City and must be delivered to the requisitioning department or agency upon completion of the job. Departments or agencies using their delegated authority to purchase printing should use the appropriate special conditions found in City of Winchester Special Terms and

Conditions. Departments or agencies should not process any invoice for payment until these items are returned. This requirement may be waived by the agency purchasing director when it is not practical.

- b. **Copyright.** No vendor may copyright any work produced for the City without the written consent of the requisitioning department or agency.
- c. **Colors and Ink.** Except for promotional publications or where the use of color is essential to support the purpose of the publication, all printing shall be one color. Examples of supporting the purpose of the publication are: maps, aeronautical charts, or pictures such as those used in a medical publication illustrating the difference between healthy tissue and diseased tissue or the use of color blocks or words on a form to highlight or separate critical areas.
- d. **Overruns and Underruns.** The city is not required to accept overruns provided “no overruns” is specified in the solicitation. However, a department for a valid and justified basis accept up to a 10% overrun. Prices for overruns must not exceed the quoted base price per unit or the quoted price for additional copies run at the same time (R.A.S.T.). Whichever price is less will prevail. A department or agency may accept an underrun. Prices for underruns will be calculated at the quoted base price per unit. If an agency will not accept underruns or overruns, it must be stated in the specifications. Include the City of Winchester Special Term and Condition for printing operations in all printing solicitations.

4.21 **Services.** The contracting responsibility for services generally remains with the purchasing office and the department or agency should contact the purchasing office to select the best method for contracting for nonprofessional services and professional services. In procurements involving both professional and nonprofessional services, the procedure used (e.g., professional services versus nonprofessional) shall be determined by which service predominates in the solicitation. When the estimated cost of materials, equipment, or supplies amounts to fifty percent (50%) or more of the total expenditure, it is not considered a contractual service and shall be obtained using the procedures for the procurement of goods.

4.22 **Non-Professional Services**

- a. **General.** This section covers contracting for nonprofessional services from nongovernmental sources. The term “nonprofessional” services, as used in this section, means all services not within the scope of the practice of accounting, actuarial services, architecture, dentistry, land surveying, landscape architecture, law, medicine, optometry, pharmacy or professional engineering (*Code of Virginia*, § 2.2-4301).
- b. **Individual Services.** Contracting for the services of individuals as contractors should be treated the same as any other procurement transaction. Department or agencies contracting with individuals are cautioned that problems have arisen with the Federal

Internal Revenue Service concerning withholding and Social Security taxes in situations where the individual contractor performs under the supervision and control of the department or agency. An employer - employee relationship has been determined to exist in such cases, thereby subjecting the City to liability for such taxes plus those employment obligations established by state or federal law. When in doubt, consult the personnel officer and/or the City Attorney.

- c. **Consultant Services.** By definition, consultants provide information, assistance, and guidance of a purely advisory nature, usually in the form of a report or other deliverable, setting forth alternative courses of action and recommendations based on the expertise possessed by the outside individual, firm or organization. Such advice or assistance does not relieve city management of responsibility for its final decision. Use of consultants is a legitimate means to improve government services and operations.
 - (1) **Assistance through state agencies.** In recognition of this need, the state has developed the capability for providing certain technical and managerial assistance through selected central agencies. City department or agencies are strongly encouraged to make maximum use of the consultant services available from these agencies and the Commonwealth's institutions of higher education before seeking such services from the private sector.
 - (2) **Department and Agency Responsibility.** Departments or agencies are responsible for assuring that the use and control of the services of private consultants is properly justified in terms of agency mission, programs, priorities, and funding.
 - (3) **Selection.** The process of selecting an outside consultant individual, firm, or organization should be objective, unbiased, and should encourage those qualified to offer their services. The following methods are suggested for use in developing the pricing schedule and for payment of consultants:
 - (a) A lump sum or fixed price for the total project.
 - (b) Hourly rate plus cost reimbursement, with a ceiling on the total contract; payment will be made only for hours used at the agreed rate and cost incurred. Items for which cost reimbursement will be made must be specifically indicated in the solicitation and resulting contract.
 - (c) Daily or hourly compensation for work "when requested" during the period of the contract at agreed rates, with a ceiling on the total, including any other costs which have been determined to be allowable.
 - (d) An incentive fee arrangement designed to motivate the contractor to complete the project early or achieve specified economies.

4.23 **Professional Services.**

- a. **Responsibility.** The procurement of professional services from nongovernmental sources shall be in accordance with the applicable provisions of the *VPPA and the*

Winchester City Code. The guidelines contained in this section should not be used as authority to obtain professional services contrary to law, executive orders, regulations, directives, or appropriations. All required justifications and approvals should be obtained and made a part of the procurement file.

- b. **General.** Professional Services as defined in § 2.2-4301 of the *VPPA* 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, and professional engineering. Public posting is required for professional service procurements over \$30,000.
- c. **Legal Services and Expert Witness.** Agencies may enter into contracts without competition for (i) legal services, provided that the pertinent provisions of Chapter 43 (§ 2.2-500 et seq.) of Title 2.2 remain applicable; or (ii) expert witnesses and other services associated with litigation or regulatory proceedings.
- d. **Competitive Negotiation.** Competitive negotiation shall be used for the procurement of professional services. Note that solicitations for professional services shall not request that offerors furnish estimates of man-hours or cost for services (*Code of Virginia*, § 2.2-4301.3a).
- e. **Evaluation and Award Procedures.** The evaluation and award procedure for the procurement of professional services by competitive negotiation is as follows:
 - (1) **Evaluation.** The City is to engage in individual discussions with two or more offerors deemed fully qualified, responsible, and suitable on the basis of initial responses and with emphasis on professional competence, to provide the required services. Repetitive informal interviews shall be permissible. Such offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. Such discussions may also include non-binding estimates of total project costs, including but not limited to where appropriate, design, construction and life-cycle costs. Non-binding methods to be utilized in arriving at a price for services may also be discussed. Proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of discussions outlined in this paragraph, on the basis of evaluation factors published in the Request for Proposal and all information developed in the selection process to this point, the procuring agency shall select, in the order of preference, two or more offerors whose professional qualifications and proposed services are deemed most meritorious. Negotiation shall then be conducted, beginning with the offeror ranked first. If a contract satisfactory and advantageous to the public body can be negotiated at a price considered fair and reasonable, the award shall be made to that offeror. Otherwise, negotiation with the offeror ranked first shall be formally terminated and negotiation conducted with the offeror ranked second, and so on until such a contract can be negotiated at a fair and reasonable price. Notwithstanding the

foregoing, if the terms and conditions for multiple awards are included in the Request for Proposal, a public body may award contracts to more than one offeror. Should the procuring agency 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 (*Code of Virginia*, § 2.2-4301.3b). At any time during the negotiations, the procuring agency may terminate all negotiations and re-advertise the requirement. The reason for such termination is to be made a part of the file.

(2) **Award.** The award document should be a signed contract incorporating by reference all the requirements, terms and conditions of the RFP and the contractor's proposal as negotiated. Care should be taken to ensure that all points negotiated are properly documented and become part of the contract.

g. **Contractor Performance.** During the period of the contract, the contractor's performance is to be monitored in accordance with the standards set forth in the contract.

h. **Administration.** The administration of contracts, i.e. scheduling, ordering services, payment and other related day-to-day activities, are delegated to the primary user department or agency and shall be notified within the solicitation.

4.24 **Construction.**

a. **Definitions**

(1) **Construction.** Construction shall mean building, altering, repairing, improving or demolishing any structure, building or highway, and any draining, dredging, excavation, grading or similar work upon real property (*Code of Virginia*, § 2.2-4301).

(2) **Capital Outlay Project.** Capital outlay projects include acquisition, construction or improvement related to property, plant or equipment (including plans therefore). A department or agency is responsible for remaining abreast and informed of the progress in submission and subsequent City Council approval of future capital outlay projects for the department or agency and for consulting with the purchasing office early in the preliminary design stage to ensure program utilization of mandatory and other related sources of supply.

b. **Construction.** Construction may be procured only by competitive sealed bidding, except that competitive negotiation may be used in the following instances upon a determination made in advance by the public body 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 (*Code of Virginia*, § 2.2-4303D):

- (1) by the Commonwealth, its departments, agencies, and institutions on a fixed price design-build basis or construction management basis under *Code of Virginia*, § 2.2-4306.
 - (2) by any public body for the alteration, repair, renovation, or demolition of buildings when the contract is not expected to cost more than \$500,000.
 - (3) by any public body for the construction of highways and any draining, dredging, excavation, grading, or similar work on real property.
- c. Equipment and/or furnishings, whether built-in or free standing, not acquired as part of a general construction contract and not requiring plans and specifications prepared by an architect or engineer, will be purchased in accordance with the provisions of this manual. Systems necessary to make a building functional, such as heating, ventilation, air conditioning, electrical, elevators, or like systems will be purchased in accordance and consistent with the construction Invitation to Bid.
 - d. Except in an emergency, all bids for construction services in excess of \$25,000 must be accompanied by a Bid Bond from a surety, selected by the bidder, which is legally authorized to do business in Virginia. The amount of the Bid Bond shall not exceed 5% of the amount bid (*Code of Virginia*, § 2.2-4336).
 - e. Upon award of a construction contract exceeding \$25,000, the contractor shall furnish a Performance Bond and a Payment Bond, each in the sum of the contract. Each such bond shall be executed by one or more surety companies which are legally authorized to do business in Virginia.
 - f. As a minimum, a construction contractor will be required to provide insurance in accordance with the insurance clause in Appendix X-City of Winchester General Terms and Condition. Additional insurance may be required based on the type of construction service being performed.
 - g. Solicitations for construction contracts with an estimated cost of \$1,500 or more must contain the appropriate Contractor Registration clause in Appendix B-2.

4.25 **Make-or-Buy Analysis.** When contracting for services which have traditionally been accomplished using in-house resources, a thorough analysis of the services to be acquired should be performed. Department or agencies should first determine if the service is a viable candidate for privatization; then identify all internal costs associated with performing the service (see Appendix O: Make-or-Buy Analysis Procedures). Adequate performance expectations and close scrutiny of vendor performance following the award are critical to a successful program.

- 4.26 **Use of Contractor's Standard Contract Form.** A contractor's standard contract form should be carefully read and those provisions that are contrary to the interests of the City or in conflict with state law, must be lined out, rewritten, or removed if the contract is less than \$50,000. If it is not possible to award a contract without using the contractor's contract form, the contractor should sign the Contract Addendum Form, found in Appendix N-4. A contractor's standard contract form should not be used for procurements of \$50,000 or more without the approval from the city attorney and the purchasing office. Department or agencies unable to obtain goods or services without using the contractor's form and the contractor refuses to accept the Addendum to Contractor's Form should contact the purchasing office.
- 4.27 **Samples.** There are situations when samples will be needed to verify quality levels or to test materials or equipment to determine conformance with the specifications stipulated in the solicitation. A request for bid samples must be clearly indicated in the ITB. Samples should be properly labeled, stored, and controlled until no longer needed. Those not destroyed during testing may be returned at the bidder's expense. If, after 60 days, the samples have not been picked up and bidders fail to provide disposition instructions, samples may be offered to other departments or agencies for use. If the items have significant reusable utility value, they should be disposed of using established property disposal procedures. The file must be documented as to disposition of samples.
- 4.28 **Vendor Advertising Prohibition.** Advertising or promotional literature stating that a City department or agency has purchased or used a vendor's products or services is prohibited. Exceptions may only be granted by the purchasing office after consultation with its city attorney.
- 4.29 **Advertising.** Departments or agencies purchasing goods or services less than \$50,000 are not required to advertise in a local publication although the purchasing office recommends advertising, i.e. bulletin board, newspaper, online posting, to create competition. The purchasing office shall handle all advertising for competitive sealed bids and competitive negotiation solicitations.
- 4.30 **Antitrust Violations**
- a. **General.** Practices that eliminate or restrict competition usually lead to excessive prices and may warrant criminal, civil, or administrative action against the offeror, vendor, or contractor. Examples of anti-competitive practices are collusive bidding, bid rigging, bid rotation, and sharing of the business.

Procurement personnel are an important potential source of investigating leads and recognizing possible antitrust violations. As a result, procurement personnel should therefore be sensitive to indications of unlawful behavior by offerors, vendors contractors, and other procurement, technical, or administrative personnel.

- b. **Reporting Suspected Antitrust Violations.** Purchasing office, departments or agencies shall report to the Office of the City Attorney any quotes, bids or proposals that show evidence or suspicion that an antitrust law violation has occurred. (See *Code of Virginia*, §§ 59.1-9.1 through 59.1-9.8 and §§ 59.1-68.6 through 59.1-68.8).

The purpose of the antitrust laws is to promote the free market system in the economy of this City by prohibiting restraints of trade and monopolistic practices that act or tend to act to decrease competition.

- 4.31 **Debarment.** Grounds for debarment of vendors and procedures for disqualification and reinstatement of vendors are contained City Code, Chapter 21-37.

- 4.32 **Unsolicited Proposals.** This policy applies to goods and non-professional services, and not to construction or professional services. The submission of a unique offer for new and innovative goods or services through unsolicited proposals is encouraged. However, all solicited and unsolicited proposals and all solicited and unsolicited ideas for innovation or improvement are submitted at the risk and expense of the offeror, and no obligation on the part of the City and no restriction on the City's use of such ideas, proposals or the information contained therein shall arise in connection with such submission. The foregoing shall not preclude express, written commitments made by agencies in formal solicitation documents within the limitations imposed by the *Code of Virginia*, § 2.2-4342F and the *Freedom of Information Act*. The foregoing shall also not diminish or waive any copyright, patent rights or trademark rights, which the offeror may have.

If acceptance of offers to "loan" or provide goods or services at no cost or minor cost would tend to create a need for subsequent additional acquisitions, the requirement for such goods or services and the additional needs shall be offered for competition in accordance with the *Virginia Public Procurement Act (VPPA)* and the *City of Winchester Procurement Manual*. Potential bidders or offerors shall be afforded an opportunity to participate in the resulting procurement activity.

If the offeror believes that it is the only source practicably available for goods or services required by the department or agency and available through the unsolicited proposal, to assist the City in evaluating the unsolicited proposal, the proposal shall include a justification by the offeror as to why the company is the only source practicably available for the goods or services in question.

- a. Definition: "Unsolicited Proposal" means a proposal received that is not in response to any City initiated solicitation or program.
- b. Receipt: Unsolicited proposals shall be submitted in writing directly to the purchasing office who shall establish a primary point of contact to coordinate the receipt and handling of unsolicited proposals.
- c. Evaluation:

- (1) A favorable comprehensive evaluation of an unsolicited proposal by the City does not, in itself, justify awarding a contract without providing for competition. No preference shall be given to the offeror that initially offered the unsolicited proposal.
- (2) If it is determined by the evaluation that goods or services required by the department or agency and offered in an unsolicited written proposal are practicably available from only one source, the purchasing office may negotiate and award a contract following the sole source procedures. The buyer shall post a notice of intent to award for ten (10) calendar days before awarding the contract.

CHAPTER FOUR SMALL PURCHASES

- 1.0 **General.** The *Virginia Public Procurement Act (VPPA)* permits a public body to establish small purchase procedures, if adopted in writing, not requiring the use of competitive sealed bidding or competitive negotiation for single or term contracts if the aggregate or sum of all phases is not expected to exceed \$50,000; however, such small purchase procedures shall provide for competition wherever practicable (*Code of Virginia, § 2.2-4303G*). The following small purchase procedures have been established by the Finance department for use by City departments, agencies and boards when acquiring materials, supplies, equipment, printing or nonprofessional services under \$50,000. Procurements made pursuant to these procedures do not require public bid openings or newspaper advertising of competitively negotiated procurements.
- 2.0 **Competitive Requirements.** Procurements up to \$50,000 shall seek the required competition, according to the number of competitive sources shown in Chapter 1, Section 21-25. The City encourages the participation of at least one (1) small business, woman or minority owned business (SWAM) and at least one (1) City of Winchester business. If neither of these can be identified, then the file shall be documented with the efforts made to obtain the number of required sources. Estimate the total cost, including all possible renewal periods if a term contract, to determine if the procurement will not exceed \$50,000. If the procurement is expected to exceed \$50,000 over the entire term of the contract, including all possible renewal periods, contact the Purchasing Agent and begin discussions to competitively bid the goods or services. The expected trade-in value of equipment shall not be considered when determining the anticipated total value of a contract.
- 3.0 **Single Quotation.** (Up to \$4,999.99)
- a. Where the department's estimated cost of goods or nonprofessional services is \$5,000 or less unless exempted, purchases may be made upon receipt of a minimum of one (1) written or telephone (oral) quotation. Other quotes received from SWAM or City of Winchester sources that were not solicited shall be considered. Unless modified in the written or oral RFQ and approved by the Purchasing Agent, the award shall be made to the lowest responsive and responsible vendor and in the event of a tie, the local source shall be awarded the business. A record of the quotation must be kept with the file. If a telephone quote is solicited, a record shall be kept of the name and address of the vendor(s) contacted, the item description or service offered, price quoted, delivery dates and F.O.B. point, names of persons giving and receiving the prices and the date the information was obtained.
 - b. Agencies should seek additional competition whenever there is reason to believe a quotation is not a fair and reasonable price.
 - c. The *City of Winchester's General Terms and Conditions* shall apply to all verbal and written quotations and stated by reference or attached to the Request for Quote. All vendors performing work on City property shall provide the required insurance documentation as listed.
 - d. Recommended Forms:
 - 1.) Attachment B-1: City of Winchester's General Terms and Conditions
 - 2.) Attachment B-2: City of Winchester's Special Terms and Conditions

- 3.) Attachment E-1 or E-2 – Sample Written Request for Quote
- 4.) Attachment J: Contractor’s Data Sheet

4.0 **Verbal Quotes** (\$5,000 to \$14,999.99)

- a. Where the department's estimated cost of goods or nonprofessional services is between \$5,000 to \$14,999.999 unless exempted, purchase requisitions may be entered upon receipt of a minimum of three (3) written or telephone (oral) quotations. Other quotes received from SWAM or City of Winchester sources that were not solicited shall be considered. Unless modified in the written or oral RFQ and approved by the Purchasing Agent, the award shall be made to the lowest responsive and responsible vendor and in the event of a tie, the local source shall be awarded the business. A record of the quotation must be kept with the file. If a telephone quote is solicited, a record shall be kept of the name and address of the vendor(s) contacted, the item description or service offered, price quoted, delivery dates and F.O.B. point, names of persons giving and receiving the prices and the date the information was obtained.
- b. Agencies should seek additional competition whenever there is reason to believe a quotation is not a fair and reasonable price.
- c. The *City of Winchester’s General Terms and Conditions* shall apply to all verbal and written quotations and stated by reference or attached to the Request for Quote. All vendors performing work on City property shall provide the required insurance documentation as listed.
- d. Recommended Forms
 - 1.) Attachment B-1: City of Winchester’s General Terms and Conditions
 - 2.) Attachment B-2, B-3 or B-4: City of Winchester’s Special Terms and Conditions
 - 3.) Attachment D-1: Telephone Record for Service
 - 4.) Attachment D-2: Telephone Record for Goods
 - 5.) Attachment E-1 or E-2: Sample Written Request for Quote
 - 6.) Attachment J: Contractor’s Data Sheet

5.0 **Unsealed Quotes** (Over \$15,000 to \$49,999.99)

- a. Where the department's estimated cost of goods or nonprofessional services is between \$15,000 to \$49,999.999 unless exempted, purchase requisitions may be entered upon receipt of a minimum of four (4) written quotations. Other quotes received from SWAM or City of Winchester sources that were not solicited shall be considered. Unless modified in the RFQ and approved by the Purchasing Agent, the award shall be made to the lowest responsive and responsible vendor and in the event of a tie, the local source shall be awarded the business. A record of the quotations must be kept with the file. If a telephone quote is solicited, a record shall be kept of the name and address of the vendor(s) contacted, the item description or service offered, price quoted, delivery dates and F.O.B. point, names of persons giving and receiving the prices and the date the information was obtained.
- b. Any appropriate special conditions, purpose, descriptions, specifications, pre-bid meeting, site visit, pricing schedule and attachments must be stated in or attached to the Request for Quote (RFQ). Specifications should identify the minimum acceptable requirements of the end user, allows for competitive quotes, provides a reproducible test/inspection method, and provides for an equitable award at the lowest possible cost.

- c. The *City of Winchester's General Terms and Conditions* shall apply to all verbal and written quotations and stated by reference or attached to the Request for Quote. All vendors performing work on City property shall provide the required insurance documentation as listed.
- d. Advertising is not required under \$50,000.
- e. To avoid any appearance of impropriety, post the Notice of Award if a Notice of Intent to Award was not issued. The award document is a purchase order incorporating the quote and all Terms and Conditions by reference. Departments may post on an administrative bulletin board for the public to view for five (5) business days.
- f. Recommended Forms:
 - 1.) Attachment B-1: City of Winchester's General Terms and Conditions
 - 2.) Attachment B-2, B-3 or B-4: City of Winchester's Special Terms and Conditions
 - 3.) Attachment E-1 or E-2: Sample Written Request for Quote
 - 4.) Attachment J: Contractor's Data Sheet

6.0 **Unsealed Proposals** (Over \$15,000 to \$49,999.99).

- a. Where the department's estimated cost of goods or nonprofessional services is between \$15,000 to \$49,999.999, or professional services up to \$30,000 unless exempted, purchase requisitions may be entered upon receipt of a minimum of four (4) written proposals. Other proposals received from SWAM or City of Winchester sources that were not solicited shall be considered.
- b. Any appropriate special conditions, submittal requirements (questions), statement of needs, evaluation criteria, weights, pricing schedule, pre-conference meeting, site visits, and attachments must be stated in or attached to the unsealed proposal.
- c. The *City of Winchester's General Terms and Conditions* shall apply to all verbal and written quotations and stated by reference or attached to the Request for Quote. All vendors performing work on City property shall provide the required insurance documentation as listed.
- c. Advertising is optional, but encouraged up to \$50,000. Advertising is required over \$50,000.
- d. Proposals may be opened and evaluated upon receipt. All responses must be received at the designated location by the date and hour stated in the request for proposal.
- e. In lieu of an evaluation committee, the requesting department may solely evaluate and rank offers based on the published evaluation criteria and scoring. Upon completion of the evaluation, negotiations shall be conducted with the offeror(s) selected.
- f. Post the Notice of Award if a Notice of Intent to Award was not issued. The award document is a purchase order incorporating the bid and all Terms and Conditions by reference.
- g. Recommended Forms:
 - 1.) Attachment B-1: City of Winchester's General Terms and Conditions
 - 2.) Attachment B-2, B-3 or B-4: City of Winchester's Special Terms and Conditions

- 3.) See Purchasing Agent - Sample Written Request for Proposal
- 4.) Attachment J: Contractor's Data Sheet

7.0 **Unsealed Best Value Acquisition** (Over \$5,000 to \$50,000).

Departments, agencies and boards may obtain required goods or nonprofessional services using best value concepts. A written determination for the use of competitive negotiation is not required for unsealed Best Value Acquisition.

- a. Procurement Planning. A purpose statement must include that the solicitation is using best value procurement procedures and shall note if SWAM requirements are applicable. Describe Statement of Needs in general terms. Mandatory requirements are stated. Include Subjective/Objective evaluation criteria. If making multiple awards, the total sum of all awards shall not exceed \$50,000.
- b. Pre-proposal Conference/Site Visit. A pre-proposal conference or a site visit may be held if necessary. Seek information from vendors concerning criteria.
- c. Evaluation Criteria. Criteria shall be stated in the solicitation. Unless otherwise stated, each criterion will be of the same importance. If criteria are not of the same importance, then include a statement at the end of the paragraph such as: Criteria are listed in the order of importance. Examples of criteria may be Technical Approach, Qualifications of Personnel, Resource Commitment, Past Performance, Risk and Incentives.
- d. General and Special Terms & Conditions. Add General and Special Terms and Conditions to the solicitation or incorporate them by reference. The Announcement of Award clause must be included in the solicitation.
- e. Select Rating and Scoring Method. Listed below are methods that can be used to score and evaluate proposals. Any method is acceptable.
 - 1.) Adjectival
 - 2.) Color
 - 3.) Numerical
- f. Pricing Schedule/Scenario. Include how proposal prices are to be submitted. If lump sum pricing is not advantageous, use a pricing scenario to obtain prices for unknown quantities or hours. The pricing schedule should be tied to deliverables and must coincide with the method of payment stipulated in the solicitation.
- ▼ h. Advertising is optional, but encouraged up to \$50,000. Advertising is required over \$50,000.
- i. Receipt. Unsealed Best Value proposals may be received by FaxBack, electronically, hand-delivery or mail. Receive proposals until the due date and time specified in the solicitation. Proposals may be opened and evaluated upon receipt. In lieu of an evaluation committee, the requesting department's buyer may solely evaluate and rank offers.
- j. Evaluation and Negotiation. Use a Go/No-Go approach and eliminate those proposals that do not meet mandatory requirements. Evaluate vendor performance to determine responsibility. Check debarment records on the DPS eVA web-site, www.eva.virginia.gov, or request the Purchasing Agent to assist in this search. Evaluation criteria, other than price, are evaluated first. After rating the technical proposals, pricing is then considered. Consider

▲ the overall benefits and costs to the agency. Points to be negotiated may be selected. Negotiations may be conducted with the offeror(s) deemed to be fully qualified and offering the best value proposal(s). Document results of any negotiations in the procurement file.

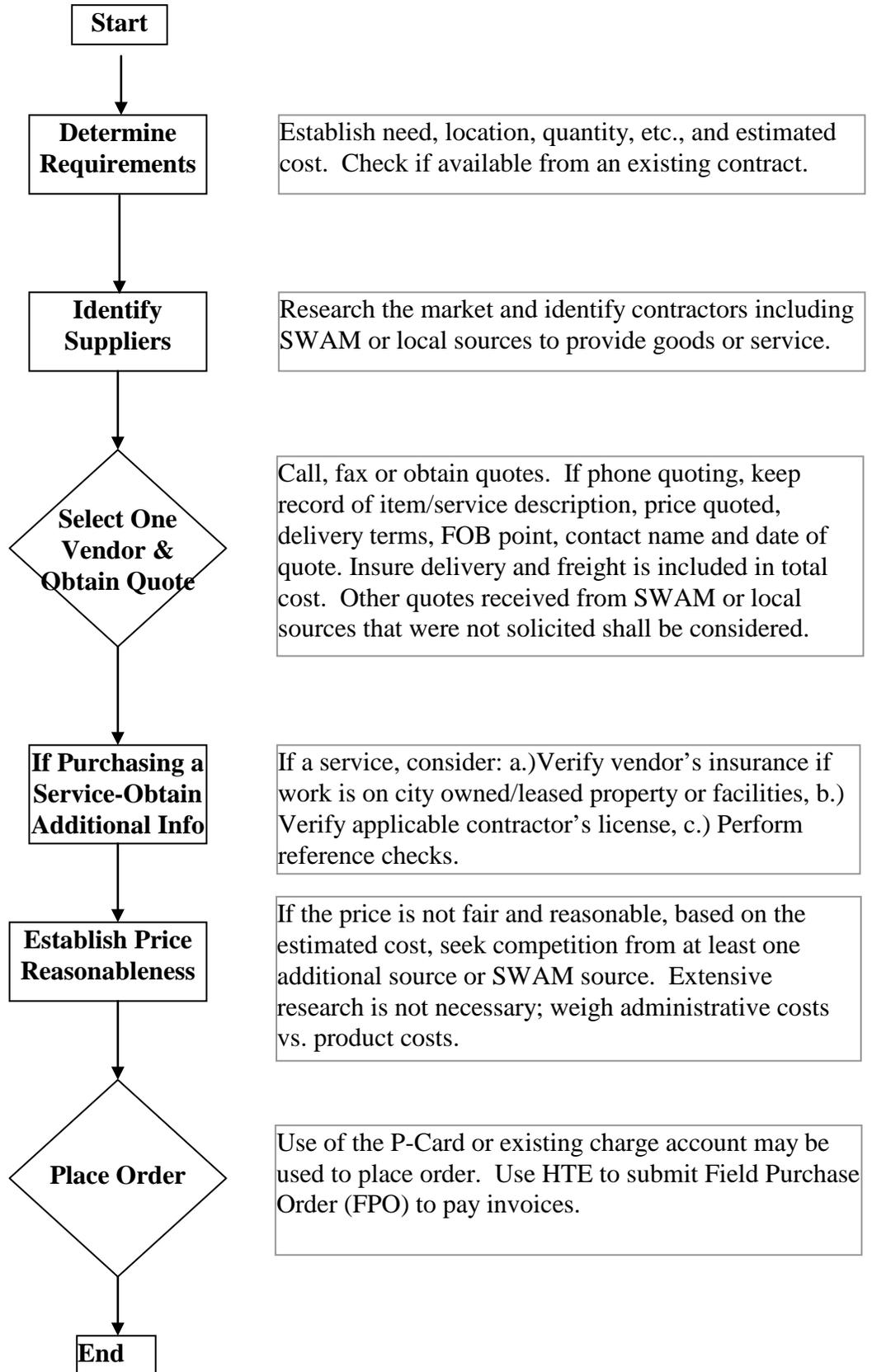
- k. Award. The award will be made to the responsible Offeror(s) whose proposal, conforming to the solicitation, is the most advantageous and represents the Best Value to the City, costs and other factors considered. Prepare a written justification and place in contract file.
- l. Recommended Forms:
 - 1.) Attachment B-1: City of Winchester's General Terms and Conditions
 - 2.) Attachment B-2, B-3 or B-4: City of Winchester's Special Terms and Conditions
 - 3.) See Purchasing Agent - Sample Written Request for Unsealed Best Value Acquisition
 - 4.) Attachment J: Contractor's Data Sheet

7.0 **Blanket Purchase Agreements.**

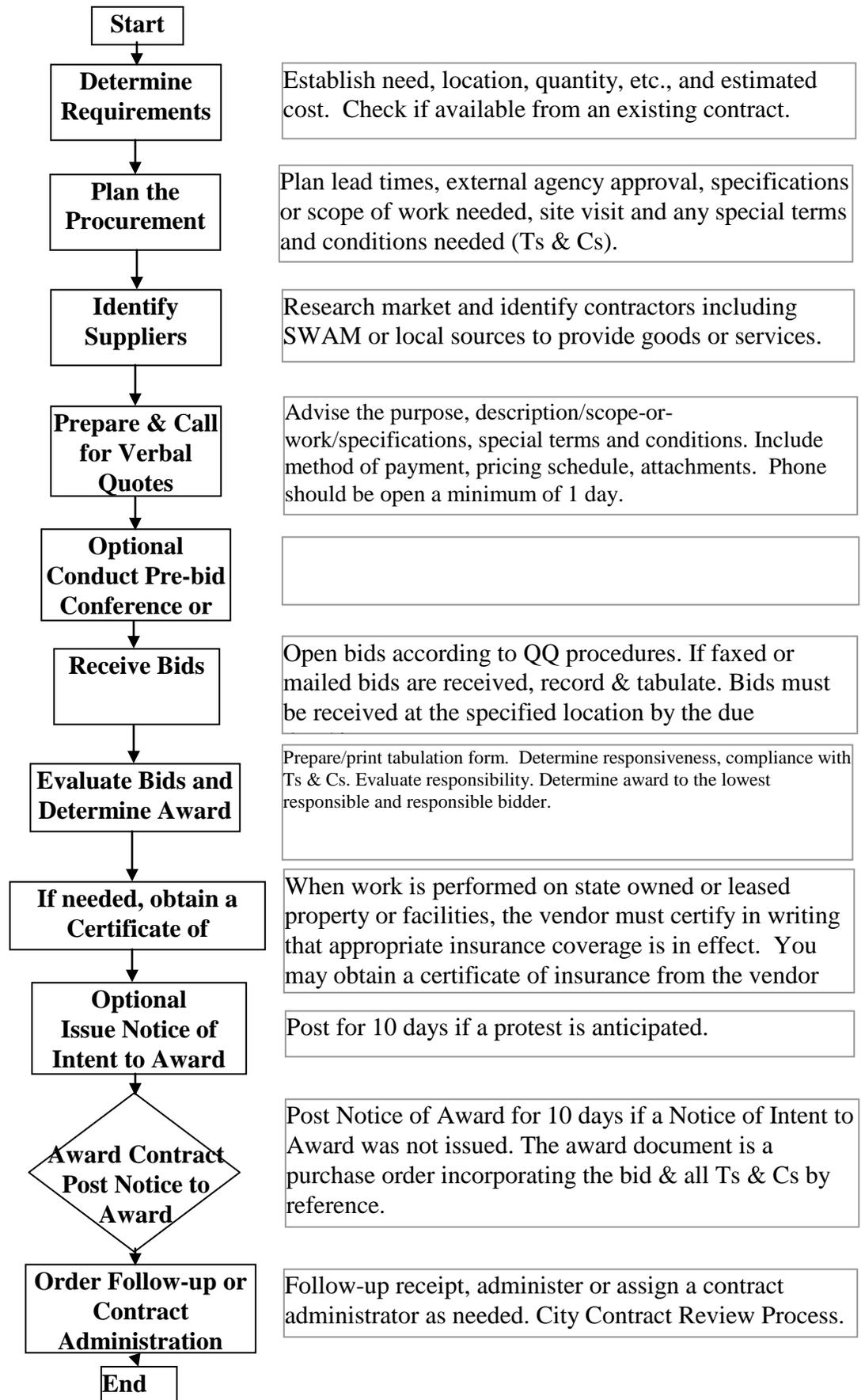
- a. Blanket purchase agreements (BPAs) are contractual relationships which may be entered into with local vendors to obtain small dollar value expendable operating supplies or services (less than the single quote limit) for which low or erratic demand usage exists. Basically, a set of terms and conditions are agreed upon between the buyer and seller wherein the seller will deliver or permit pick up of supplies ordered through a call system controlled by the individual who has received authorization from the purchasing office. The prevailing market price, less any trade and/or volume discounts as may be agreed upon, is charged and invoiced on a consolidated (usually monthly) basis. Finance and Purchasing shall approve prior to the use and set-up of a blanket purchase order.
- b. The principle advantage of a BPA is the ability to delegate ordering authority to the user level, resulting in quicker access to the goods or services. Consolidated invoices are processed, which reduces the paper flow and administration. The success of this procedure is dependent upon the establishment and enforcement of proper controls.
- c. By careful analysis of recurring needs, BPAs may be entered into for supplies or services not available from contracts or other prior purchase commitments. Examples are hardware, plumbing supplies, locksmith, and film developing.

Single Quotation Process

For Goods and Non-professional Services to \$5,000



**Unsealed Verbal Quote Process
For Goods and Non-professional Services over \$5,000 to \$14,999.99**



CHAPTER FIVE SOLE SOURCE PURCHASES

8. **Definition.** A sole source procurement is authorized when there is only one source practicably available for the goods or services required. Competition is not available in a sole source situation; thus distinguishing it from a proprietary purchase where the product required is restricted to the manufacturer(s) stipulated, but is sold through distributors and competition between them can be obtained. Sole source justification based solely on a single vendor's capability to deliver in the least amount of time is not appropriate since availability alone is not a valid basis for determining a sole source procurement. Note: For sole source requirements exceeding \$5,000, a written quotation must be obtained from the vendor.
- 8.1 **Approval for Sole Source Procurements.** All sole source procurements requests to the purchasing office must be in writing, using the Sole Source Justification form in Appendix C, documenting that there is only one source practicably available for that which is to be procured. Departments or agencies are recommended to provide specific details, i.e. product information or sole source letter, outlining why the firm's product or service qualifies as a sole source. Appendix C shall be completely fill out and must answer all four questions outlined in 8.2. The writing shall document the basis for the determination, which should include any market analysis conducted in order to ensure that the good or service required was practicably available from only one source. Upon approval, the purchasing office shall post the sole source notice by law and at that time the department or agency may enter the purchase requisition. Appendix C and supporting information must be included in the procurement file. Sole source procurements are valid for one (1) year and must be reviewed to ensure new sources have not entered the market and created competition within the applicable good or service industry.
- 8.2 **Sole Source Reasonableness.**
To guide the review process of a sole source procurement, the below questions are required to be answered and they have been included in Appendix C.
- Explain why this is the only product or service that can meet the needs of the purchasing agency.
 - Explain why this vendor is the only practicably available source from which to obtain this product or service.
 - Explain why the price is considered reasonable.
 - Describe the efforts that were made to conduct a noncompetitive negotiation to get the best possible price for the taxpayers.
- Once written approval has been given, agencies and institutions are delegated the authority to proceed with awarding the contract.
- 8.3 **Negotiating a Contract.** Upon satisfying the requirements of paragraphs 8.1 and 8.2 above, a contract may be negotiated and awarded without competitive sealed bidding or competitive negotiation. When making a sole source procurement determination it is the purchasing office's responsibility, in conjunction with the requesting department or agency, to negotiate a contract that is in the best interest of the City. Negotiations can be conducted by adding terms and conditions favorable to the City and deleting or changing terms that are one-sided or in favor of the contractor. It is important to know the market and the contractor's situation in regard to the market. In noncompetitive negotiation, one must be exceptionally well prepared and negotiate to the extent that is practicable. Written documentation of the negotiations shall be included in the procurement file.
- 8.4 **Price Reasonableness Determination.** The requesting department or agency should carefully research the good or service and determine in writing what is a fair and reasonable priced. For example, if the good or service has been provided before, find out what price was previously paid. Research and determine if another agency has purchased the same commodity. This will provide valuable pricing information that can be used in the course of negotiations and in determining price reasonableness.
- 8.5 **Posting Requirements.** The purchasing office shall post all award notices on a public bulletin board. The posting must state that only one source was determined to be practicably available and must also state that which is being procured, the contractor selected, and the date on which the contract was or will be awarded. Public award notices may be posted at the requesting department or agencies location as well.
- 8.6 **Award Document.** Upon approval by the purchasing agent, departments and agencies may issue an award document for sole source purchases. When a quote has been obtained from the vendor and no further negotiations are needed, a purchase order is acceptable and will act as the award notice. When complicated negotiations have been involved, the purchasing office will prepare the City's Standard Contract, Appendix N-2.

CHAPTER SIX EMERGENCY PURCHASES

9. **General.** An emergency is an occurrence of a serious and urgent nature that demands immediate action. Emergency procedures may be used to purchase only that which is necessary to cover the requirements of the emergency. Subsequent requirements shall be obtained using normal purchasing procedures. The potential loss of funds at the end of a fiscal year or lack of planning are not reasons for a good or service to be considered an emergency.
- 9.1 **Types of Emergency Procurements.** The nature of the emergency will determine what pre-award action may be taken:
- a. For an emergency purchase required to protect personal safety or property, efforts should be directed to finding a source and directing the contractor to proceed; however, such procurement shall be made with such competition as is practicable under the circumstances (*Code of Virginia*, § 2.2-4303F). This does not relieve the purchasing office, in conjunction with the department or agency, from negotiating a fair and reasonable price and subsequently documenting the procurement action.
 - b. For other types of emergencies, competition should also be sought to the maximum extent practicable. Vendor's qualifications may be checked and verification of insurance coverage, if applicable, information on warranty offered, and any other data pertinent to the procurement.
- 9.2 **Award of Emergency Procurements.** The requesting department or agency shall prepare a confirming purchase requisition (purchase order), as soon as practicable, after directing the contractor to proceed. Notify the purchasing office by the next business day and care should be taken to include in detail any agreements, including price, that were made orally with the contractor. Any subsequent audit by the purchasing office finding the requesting department or agency over utilizing emergency procurements or exhibiting poor procurement planning may have their delegated authority removed until further notice.
- 9.3 **Documentation.**
- a. **Written Determination.** Prepare a written determination for signature by the requesting department head or designated representative indicating the nature of the emergency, the reason for selection of the particular contractor and include such determination with the file.
 - b. **Posting Requirements.** The purchasing office will issue, post and/or publish all required written notices. All emergency notices shall be posted on the city's purchasing web page.
- 9.4 **Emergency Planning.** In many cases, procurement planning can reduce the need for using emergency procedures. Each agency should prepare and keep current a list of local sources of goods and services that might be needed in an emergency. Information on rates and charges should be established and agreed upon in advance. In addition, "on call," "as needed" annual contracts for various services may be competitively bid to expedite action, ensure adequate support, and reduce the cost of meeting emergency requirements.

CHAPTER SEVEN CONTRACT ADMINISTRATION

10. **General.** Contract administration begins after award of the contract. Its purpose is to assure that the contractor's and city's total performance is in accordance with the terms and conditions of the contractual agreement. The integrity of the public purchasing system demands that goods or services be furnished, received, invoiced and paid as specified in the contract. Contract administration includes all actions taken by the city relative to a specific contract after the award is made. Each department or agency in its procurement planning procedures shall ensure that effective contract administration is included. Department or agencies should assemble and maintain a master listing of all their term contracts.

After issuance of a contract award document including those awarded by the purchasing office, the department or agency is responsible for contract administration to assure that the services or goods are provided in accordance with the terms of the contract. Planning and proactive management of a contract are crucial to effective contract administration. All vendor noncompliance shall be reported on a Vendor Complaint and reported to the purchasing office immediately.

- 10.1 **Planning and Checklist.** Contract administration planning should occur during the pre-award phase and be reflected in solicitation and award documents. All purchases should encompass some post-award administrative efforts--with the degree determined by evaluating purchase complexity, value, delivery or performance schedule, commodity or service type, and risks to the agency. A contract checklist or milestone chart should be developed for each contract that requires multiple or scheduled actions by the contractor during the contract period. This checklist or chart is developed directly from the contract by extracting specific requirements, scheduled delivery dates, start-up and a completion date, plus other related items such as performance guarantees (e.g., bonds, certificates of insurance, catalogs, copies of warranties, volume reports, as-built drawings, maintenance manuals, parts lists, maintenance, scheduled testing, etc.). These actions are essential if the contract administrator is to ensure that the contractor fulfills the obligations of the contract. Successful service contract administration usually involves a team approach with specific administrative tasks delegated to end-users or others who can closely monitor contract performance. The anticipated contract administrator or end user and the buyer should work together in establishing administrative requirements or tasks while developing the solicitation.
- 10.2 **Contract Administrator.** The administrator should be the end user of the contract or one who has a vested interest in the procurement who will be responsible for the proper adherence to all contract specifications by the contractor. Contract administration shall be delegated in writing by the purchasing office designating a specific individual or position, highlighting important aspects of the contract, and distinguishing between the administrator's authority and that which must remain a function of the purchasing office. Specific delegated tasks should be outlined in the designation letter which may include acceptance of goods or services, approval of invoices, scheduling and monitoring of project progress, coordination of the provision of agency or other resources when part of the contract, and favorable or critical feedback to the contractor and buyer. All continuous or term contracts shall be assigned an administrator in writing.
- 10.3 **Procurement Records.** A complete file should be maintained in one place for each purchase transaction, containing all the information necessary to understand the why, who, what, when, where and how of the transaction. Generally, records are open to the public in accordance with the *Virginia Freedom of Information Act* and should be made available for review after the award has been made. A record must be established for a procurement transaction which has reached the solicitation stage, including the description of requirements, sources solicited, a copy of the advertisement, cancellation notices, the method of evaluation and award, a signed copy of the contract or purchase order, contractor performance reports submitted by the administrator, modifications or change orders, Complaint to City Contractor forms, cure letters, usage data such as release orders or obligation registers, and any other actions relating to the procurement.
- 10.4 **Delivery of Goods.** The basic policy of the state is to request bids for goods F.O.B. Destination, which means the quoted price includes shipping costs and ownership changes at the city's specified shipping destination. Receiving personnel or the contract administrator should have a copy of the purchase order or award document in order to be aware of the type or method of delivery the contractor is required to perform and what is to be delivered. The contractor may be required by the contract to deliver in a specific manner such as one of the following: tailgate only, at dockside only, deliver on pallets, make inside delivery by floor and room number, deliver and install and remove all debris, or deliver at only certain specified hours. Delivery instructions should be made clear in the award

documents specifying any conditions or issues impacting delivery such as restrictive loading areas or limited elevator access. Delivery must be made by the date or period specified in the contract or the contractor will be considered to be in default.

- 10.5 **Inspection.** Departments or agencies are responsible for inspecting and accepting goods or services purchased. Inspection is the close and critical examination of goods or services delivered to determine conformance with applicable contract requirements or specifications. It includes the determination that:
- a. Unless otherwise specifically ordered, the delivery consists of new and unused merchandise.
 - b. Goods or services of the quality, quantity, grade, or standard specified in the purchase order or contract have been delivered.
 - c. The design, construction, ingredients, size, kind, type, make, color, style, etc., of the commodities conform to the requirements of the purchase order or contract and where applicable, to the manufacturer's published specifications.
 - d. The packaging and labeling, marking, or other means of identification meet specifications. The commodities comply with specification requirements in all essential respects, are in good condition, and delivery has been made in accordance with the terms and conditions of the purchase order or contract.
- 10.6 **Acceptance.** Proper notification of the acceptance of goods or services usually involves the receiving department or agency, the purchasing and accounting departments. Notification of the acceptance of the delivery should be noted on a receiving document such as a packing slip or copy of the purchase order. Timely and proper payment of invoices requires expedient review and acceptance of the delivery against the terms of the purchase.
- 10.7 **Rejection.** Rejection of goods or services is the responsibility of the receiving department or agency whenever the goods or services do not meet contract requirements. In the event of a partial or total rejection, the department or agency should take immediate action to notify the contractor as to the reasons for rejection and to request prompt replacement. When a rejection is made, the purchasing office should be notified followed by rendering a Complaint to City Contractor form.
- 10.8 **Restocking Charges.** A restocking charge may be assessed by a contractor for those deliveries rejected by an department or agency due to no fault of the contractor. The value of these charges should be identified prior to making the decision to return. *Code of Virginia*, § 8.2-710, allows the seller incidental damages after the buyer's breach in connection with return of the goods resulting from the breach.
- 10.9 **Overshipments/Overruns.** A department or agency should not accept goods in excess of those specified on the purchase order or contract unless it is recognized as a custom of that industry (e.g. printing, cable, fabric), is so stated in the bid, and is accepted by the buyer. In the event that an overshipment is not recognized until after receipt and not provided for in the award, the department or agency must notify the contractor that the overshipment will not be accepted and, unless the overshipment is picked up by the contractor, it will be returned at the contractor's expense. Prices for overruns must not exceed the quoted base price per unit or the quoted price for additional copies run at the same time. Whichever price is less will prevail. Prices for underruns will be calculated at the quoted base price per unit. If an agency will not accept underruns or overruns, it must be stated in the specifications.
- 10.10 **Lost or Damaged Shipments.** It is the department or agency's responsibility to promptly inspect deliveries for shipping damage at the receiving location. Concealed damage or latent defects should be reported to the carrier and contractor within seven (7) days of receipt and prior to removal from the point of delivery if possible. It is difficult to fix responsibility for deliveries once the department or agency has moved goods to another location or when the inspection has not been made in a timely manner. If latent defects are found, the contractor is responsible for replacing the defective goods within the delivery time originally stated in the solicitation and is liable for any resulting expenses incurred by the city. The city accepts title only when goods are received regardless of the F.O.B. point.
- 10.11 **Payment and Invoice Processing.**
- a. **Invoice Processing.** Invoice processing is to be performed in accordance with the rules and regulations set forth by the Finance Department. To maintain good vendor relationships and a competitive environment, it is imperative that invoices be processed promptly and in accordance with the contract terms. The *Code of*

Virginia, § 2.2-4350A, requires department and agencies to pay for the completely delivered goods or services by the required payment date. If no payment date has been established by contract, then payment is due 30 days after receipt of a proper invoice by the department or agency responsible under the contract for approval of such invoices for the amount of payment due, or 30 days after the receipt of the goods or services, whichever is later (*Code of Virginia*, § 2.2-4347). When a large purchase requires performance over an extended period of time, departments or agencies should make arrangements to process partial payments upon receipt of evidence indicating that the goods or services have been received. For processing within Sunguard HTE system, please follow Appendix A-2, Purchase and Payment Processing Guidelines.

b. **Charge Cards Payments.** In an effort to streamline invoice and payment processing steps and sharply reduce paperwork, the Finance Department has established two methods of charge card procurements for departments and agencies and they are: 1.) Procurement Card (P-card) and 2.) Platinum Card. Unlike the typical consumer charge card, these programs incorporate the features of corporate charge cards - national concept designed for business applications. Major program benefits include the reduction in the number of invoices processed by City departments or agencies, reduction in internal requisitioning reduced vendor collection costs, and payment to the vendor by the charge card company within as little as three business days. City departments or agencies participation in either program is optional. Departments, agencies and cardholders must follow all policies and procedures established in the City accounting policies and procedures. Charge card purchases shall be processed through Sunguard HTE unless the purchase is exempt from processing through Sunguard HTE.

(1) **Procurement Card (P-card).** The P-card may be issued upon completion of the City's Purchasing Card Cardholder Agreement form (Appendix F-3) for employee use of a single transaction up to \$2,000 and the cardholder's monthly transaction limit up to \$5,000 for the purchases of small dollar goods and services in accordance with the City's Purchasing Card Policy and Procedures (Appendix F-1), and the Purchasing Card Payment Procedures (Appendix F-2). All cardholder changes or modification to their P-card account shall be completed by the Department or Agency Head through the Purchasing Card Request/Change Form (Appendix F-4).

(2) **Platinum Card.** The City platinum card will only be issued by the Finance Director, Assistant Finance Director, or designee for periodic purchase transactions up to \$50,000 for small dollar goods and services and a monthly transaction limit up to \$250,000. Platinum cards may only be issued to Department Heads or their staff deemed responsible by the Department Head. Platinum cards must be returned the Finance Director promptly after the transaction, including a receipt of the transaction.

10.12 **Modifications and Change Orders.** Any request for change affecting price, quality, quantity, delivery or cancellation requires a thorough written explanation by the department or agency prior to approval. A contractor shall not be notified that a change has been approved until that change has been authorized by an authorized agent of the City (see Appendix A-1). All change requests should be evaluated for contract validity and a price reasonableness determination of the change shall be made in writing. Contact the purchasing office on when an official change order is required.

10.13 **Contract Renewal and Extension.**

a. **Renewal.** A term contract may contain a renewal clause describing the conditions under which it may be renewed for a stipulated period of time. However, no contract may be renewed and no additional consideration may be paid unless specifically provided for in the original solicitation or subsequent contract. Often indices such as the Consumer Price Index (CPI) or Producer Price Index (PPI) are used as a benchmark in pricing renewal options and assist in determining price reasonableness. Price increases should not be given automatically at renewal. It is the responsibility of the contractor to request a price increase, if desired, up to the amount authorized by the index referenced in the contract. The purchasing office, or if delegated to the department or agency, may then negotiate the amount of the increase up to the indexed amount.

b. **Extension.** The purchasing office, or if delegated to the department or agency, 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. No additional consideration exceeding the contracted price may be paid to the contractor. Also, in exceptional or extenuating circumstances a contract may be extended by mutual consent for a limited period of time, not to exceed six (6) months. Whenever possible, this action should be taken in writing prior to the expiration of the current contract.

- 10.14 **Termination for the Convenience of the City.** Occasions may arise when a department or agency purchase order or contract may need to be terminated for the convenience of the City. The termination date and the extent of termination must be specified in writing to the contractor. The contractor may submit any termination claim within 120 days after receipt of the notice of termination, or such longer period as the city may allow.
- 10.15 **Cancellations of Purchase Orders and Contracts.** Cancellation of contracts may only be made in writing by the issuing department or agency to the purchasing office. Any request for cancellation should include an explanation of the basis for the request. A contractor may request cancellation, and the city will grant relief, if the contractor is prevented from specific performance including timely delivery, by an act of war, order of legal authority, act of God, or other unavoidable causes not attributed to the contractor's fault or negligence.
- 10.16 **Default.** A contractor is considered in default if he or she fails to perform in accordance with the terms and conditions of the contract (e.g., late delivery, nonconformance to specifications). The following factors should be considered prior to taking any action:
- a. The specific reasons for such failure.
 - b. The period of time needed to obtain the goods or services from other sources compared to the time delivery or performance could be accomplished by the delinquent contractor.

If it is determined that a contractor is in default, contact the purchasing office to investigate and determine if there is a need to issue and distribute a "Notice to Cure" if unacceptable vendor response, resolution, or action is received. A cure letter may also be issued at the same time as the Complaint to City Contractor form. Resolution of performance issues should progressively start with the filing of the Complaint to City Contractor form.

- 10.17 **Contractor Performance Complaints.** Complaints and/or discrepancies on vendor performance should be reported as they occur using the Complaint to City Contractor form (see Appendix N-10). Vendors are required to respond to the department or agency and send a copy to the purchasing office. Failure to respond within ten (10) days may result in removal from the Bidders List. These complaint reports are necessary in order for purchasing to develop vendor history, evaluate vendor performance, and, if required, to take appropriate and timely action.
- 10.18 **Notice to Cure.** A Cure letter is used when a contractor has failed to perform or deliver as substantiated by a Complaint to City Contractor form. It provides the contractor a period of time to correct or "cure" the deficiency and places the contractor on notice as to the consequences for failure to take the required corrective action. The notice may be given either orally or in writing advising the contractor that non-delivery or non-conformance is a breach of a contract and, if the deficiency is not corrected within a stated number of days, the City will terminate the contract for default and hold the contractor liable for any excess costs. When the notice to cure is given orally, it should be confirmed in writing when warranted, i.e., complex agreements and/or concern about willingness of the contractor to voluntarily comply. Sample Cure letter, Appendix N-11.
- 10.19 **Termination for Default and Reprourement Costs.** Upon the expiration of the time period stated in the "Notice to Cure," if a satisfactory resolution has not been reached, send the contractor a Termination for Default letter and take repurchase action. This letter states that the contract is being terminated for default and that when the City repurchases the goods or services, any additional cost to the City will be billed to the contractor (see sample Default letter, Appendix N-11). Normally repurchase should be by competitive means in order to secure a fair and reasonable price. If the repurchase results in increased costs to the City, a letter shall be sent to the delinquent contractor demanding payment of the excess costs (see sample request for payment letter, Appendix N-11). Until the excess repayment costs have been received, the contractor shall be removed from the Bidders Mailing List. In no case should the Termination for Default letter be held up to obtain repurchase costs since the contractor still has a valid contract until notification. If repayment has not been made by the end of the specified period of time, subsequent collection action shall be taken in accordance with the Office of the City Attorney.

In some instances a contractor will notify the city that they refuse to or cannot deliver or complete performance on a contract. In those situations, it is not necessary to follow the procedure of using a cure notification. However, a Complaint to City Contractor form should be filed to provide a historical file for future determinations of responsibility, etc. Refusals are usually timely, in which repurchase would consist of re-awarding to the next lowest of the current slate of still valid bids allowing the submissions of a combined Default and Request for Payment letter. Occasionally, other contractual failures happen quickly enough to allow this same approach. In those instances, a Complaint to City Contractor form (Appendix N-10) is required to substantiate the action before notice of default and repayment cost.

10.20 **Debarment and Reinstatement.** In addition to the above default procedures, concurrent action to have the defaulted contractor debarred shall be initiated from the purchasing office by sending a letter to the Office of the City Attorney recommending debarment and providing all the pertinent facts to support that recommendation. Debarment means action taken by the City to exclude individuals or firms from contracting with city departments or agencies for particular types of goods or nonprofessional services for specified periods of time. Debarment does not relieve the contractor of responsibility for existing obligations. The purpose of debarment is to protect the City from risks associated with awarding contracts to persons or firms having exhibited an inability or unwillingness to fulfill contractual requirements, and to protect city interests and the integrity of the city's procurement process by preventing individuals or firms who have displayed improper conduct from participating in city requirements for specific periods of time. Grounds for debarment of vendors and procedures for disqualification and reinstatement of vendors are:

- a. Breach (including anticipatory breach) of contract with a city department or agency.
- b. Sale or attempted sale to a city department or agency of items or services which are required to be purchased under a city contract with another vendor, when the vendor knew or had a reason to know that the items or services are required to be purchased under that contract.
- c. Stating an unwillingness or inability to honor a binding bid. A mere request to withdraw a bid, which does not otherwise state an unwillingness or inability to perform, is not a cause for debarment.
- d. Falsifying or misrepresenting manufacturer's specifications in order to appear responsive to a solicitation
- e. Conferring or offering to confer any gift, gratuity, favor, or advantage, present or future upon any employee of a city department or agency who exercises any "official responsibility" for a "procurement transaction" as those terms are defined in the Code of Virginia, §2.2-4368. It is not necessary that the offer be accepted by the employee, or that the offer is made with intent to influence the employee in an official act. Extending to any city employee exercising official responsibility for a procurement transaction any discount or privilege not available to all city employees is considered to be offering an advantage.
- f. Failing to disclose a condition constituting a conflict of interest by any officer, director, owner, or partner of the vendor in a contract or purchase order awarded by the city or any other agency of the city (Code of Virginia §2.2-3106).
- g. Any cause indicating that the individual or firm is not a responsible vendor.
- h. A determination by the City Manager that a vendor has used abusive or obscene language or a threatening manner toward city personnel during the performance of their duties or as a result of the performance of their duties.
- i. Sale, under nonemergency conditions, of building materials, supplies, or equipment for any building or structure constructed by or for the City by an independent contractor employed to furnish architectural or engineering services, but not construction for such building or structure or from any partnership, association or corporation in which such architect or engineer has a personal interest (Code of Virginia, §2.2-3101 and §2.2-4374).

10.21 **Cooperative Procurement Contract Administration.** Overall administration of multi-user contracts (cooperative procurements) shall remain the responsibility of the requesting department or agency, upon written authorization of the purchasing office. The purchasing office shall maintain the procurement file, including but not limited to:

- a. Provide authorized departments or agencies a complete copy of the contract and make any interpretations necessary during the term of the contract.
- b. Authorize and provide a copy of all contract changes to authorized departments or agencies, including renewals, extensions, and modifications.
- c. Maintain a master list of all authorized departments or agencies.
- d. Instruct departments and agencies to refer all contract complaints in accordance with this Chapter: Vendor Performance Complaints by completing the Complaint to City Contractor form and forwarding a copy to the purchasing office.
- e. Appoint a contract administrator in writing.

Responsibilities and procedures for contract administration of cooperative procurement contracts for the requesting department or agency include:

- a. Notifying the purchasing office of any changes desired in the contract or any problems with performance by the contractor.

- b. Handle all day-to-day responsibilities with the contractor, including but not limited to: ordering, scheduling, invoicing, delivery, inspection, report management, and acceptance.
- c. If a multiple year contract, the requesting department or agency must advise the purchasing office of their intent to renew, if allowed within the contract or solicitation.

10.22 **Administration efforts - contract types and pricing arrangements.** The type of contract and pricing arrangement will prescribe the type and extent of required administrative efforts. The firm fixed-price contract type is usually less costly to administer. It typically requires proper receiving and verification of the contract price or lump sum amount. The following contract types describe special administrative considerations:

- a. **Requirements-Type Contracts.** Effective administration of open-ended agreements requires that agency purchasing offices maintain a record of the degree of activity against these contracts verifying the activity is within the scope of the contract and is paid in accordance with the contracted price. Contractor performance and contract expenditure activity should always be examined prior to the exercise of any renewal provision or re-solicitation.
- b. **Time and Materials Contracts.** It is essential that billed costs be analyzed (and challenged when appropriate) prior to their approval for payment because there is usually no incentive for contractors to contain costs when using this type of contract. Departments or agencies have an obligation to verify the legitimacy and accuracy of any costs submitted for reimbursement. When a time and materials agreement is used, departments or agencies must request a detailed job estimate and evaluate the reasonableness of its cost elements before authorizing the work to be performed. If it is determined that the estimate is not reasonable or in accordance with the terms of the contract, negotiations or the solicitation of additional estimates should be considered. Invoices should specify the amount and type of labor that is contained in the contract with the associated rates and the material costs so that verification of contract terms and pricing can be accomplished. The material costs should be supported with documentation as required in the contract (i.e., price list or invoiced cost).
- c. **Consultant Services.** When the services of a consultant are utilized, especially when analysis and research are involved and the contractor's performance is to culminate in a written report or other document (i.e., the deliverable), it is imperative that procuring departments or agencies periodically check the contractor's performance and assure that it is progressing to the degree anticipated. Crucial milestone or progress reports may be required to be submitted by the contractor in the solicitation which would assist in post-award administration of the contract. If performance is found not to be up to expectations, the contractor shall be given a "cure" notice with specific guidance on what must be done to adequately meet performance expectations.

CHAPTER 8 APPEALS AND DISPUTES

8. **General.** The *Virginia Public Procurement Act (VPPA)* and *Chapter 21, Article 5 of the Winchester City Code* provide remedies that are available to a contractor in the event of a challenge on a procurement action. Below is Chapter 21, Article 5 of the Winchester City Code, excluding 8.8 (VPPA) and 8.9 (Alternative Dispute Resolution procedures):
- 8.1 **Ineligibility of Bidder, Offeror or Contractor.**
- (a) Any bidder, offeror, or contractor refused permission to, or disqualified from, participating in public contracts shall be notified in writing. Such notice shall state the reasons for the action taken. This decision shall be final unless the bidder, offeror, or contractor appeals within thirty days of receipt of such notice by instituting legal action as provided in the Virginia Public Procurement Act.
 - (b) If, upon appeal, it is determined that the action taken was arbitrary or capricious, or not in accordance with the Constitution of Virginia, statutes or regulations, the sole relief shall be restoration of eligibility.
- 8.2 **Appeal of Denial of Withdrawal of Bid.**
- (a) A decision denying withdrawal of bid under the provisions of Sec. 21-43 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 the Virginia Public Procurement Act.
 - (b) If no bid bond was posted, a bidder refused withdrawal of a bid under the provisions of Sec. 21-43, prior to appealing, shall deliver to the purchasing agent 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 arbitrary or capricious, the sole relief shall be withdrawal of the bid.
- 8.3 **Determination of Responsibility.**
- (a) Any bidder who, despite being the apparent low bidder, is determined not to be a responsible bidder for a particular contract shall be notified in writing. Such notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within ten days by instituting legal action as provided in the Virginia Public Procurement Act.
 - (b) If, upon appeal, it is determined that the decision of the purchasing agent was arbitrary or capricious, 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. If, after an award, it is determined that the decision of the purchasing agent was arbitrary or capricious, the relief shall be as set forth in Sec. 21-58(B).
 - (c) A bidder contesting a determination that he is not a responsible bidder for a particular contract shall proceed under this section, and may not protest the award or proposed award under Sec. 21-58 of this chapter.
 - (d) Nothing contained in this section shall be construed to require the city when procuring by competitive negotiation, to furnish a statement of the reasons why a particular proposal was not deemed to be the most advantageous .
- 8.4 **Protest of Award or Decision to Award.**
- (a) Any bidder or offeror may protest the award or decision to award a contract by submitting such protest in writing to the city manager no later than ten days after the award or the announcement of the decision to award, whichever occurs first. No protest shall lie for a claim that the selected bidder or offeror is not a responsible bidder or offeror. The written protest shall include the basis for the protest and the relief sought. The city manager shall issue a decision in writing within ten days stating the reasons for the action taken. This decision shall be final unless the bidder or offeror appeals within ten days of the written decision by instituting legal action as provided in the Virginia Public Procurement Act.

- (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 purchasing agent 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 city manager may declare the contract void upon a finding that this action is in the best interest of the public. Where a contract is declared void, the performing contractor shall be compensated for the cost of performance up to the time of such declaration. In no event shall the performing contractor be entitled to lost profits.
- (c) Where the city manager 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, Article 4, Chapter 7, Title 11 of the Code of Virginia (Ethics in Public Contractor), the city manager may enjoin the award of the contract to a particular bidder.

8.5 **Effect of Appeal Upon Contract.**

Pending final determination of a protest or appeal, the validity of a contract awarded and accepted in good faith in accordance with this chapter shall not be affected by the fact that a protest or appeal has been filed.

8.6 **Stay of Award During Protest.**

An award need not be delayed for the period allowed a bidder or offeror to protest, but in the event of a timely protest, no further action to award the contract will be taken unless there is a written determination that proceeding without delay is necessary to protect the public interest or unless the bid or offer would expire. (

8.7 **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 such claim must be at the time of the occurrence or beginning of the work upon which the claim is based. Nothing herein shall preclude a contract from requiring submission of an invoice for final payment within a certain time after completion and acceptance of the work or acceptance of the goods. Pendency of claims shall not delay payment of amounts agreed due in the final payment.
- (b) A procedure for consideration of contractual claims shall be included in each contract. Such procedure, which may be incorporated into the contract by reference, shall establish a time limit for a final decision in writing by the city manager.
- (c) decision on the claim, unless the purchasing agent fails to render such decision within the time specified in the contract.
- (d) The decision of the city manager shall be final and conclusive unless the contractor appeals within six months of the date of the final decision on the claim by the City mayor by instituting legal action as provided in the Virginia Public Procurement Act.

8.8 **Legal Actions (VPPA §2.2-4364).**

- (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 § 2.2-4317. In the event the apparent low bidder, having been previously determined by the public body to be not responsible in accordance with § 2.2-4301, is found by the court to be a responsible bidder, the court may direct the public body 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 § 2.2-4358 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 public body 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 § 2.2-4303, whose protest of an award or decision to award under § 2.2-4360 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 public body, shall require the posting of reasonable security to protect the public body.
- (e) A contractor may bring an action involving a contract dispute with a public body in the appropriate circuit court. Notwithstanding any other provision of law, the Comptroller shall not be named as a defendant in any action brought pursuant to this chapter or § 33.1-387, except for disputes involving contracts of the Office of the Comptroller or the Department of Accounts.
- (f) A bidder, offeror or contractor need not utilize administrative procedures meeting the standards of § 2.2-4365, if available, but if those procedures are invoked by the bidder, offeror or contractor, the procedures shall be exhausted prior to instituting legal action concerning the same procurement transaction unless the public body agrees otherwise.
- (g) Nothing herein shall be construed to prevent a public body from instituting legal action against a contractor.

8.9

Alternative Dispute Resolution (ADR)

- a. Alternative Dispute Resolution is designed to increase the opportunity for relatively inexpensive and expeditious resolution of contract disputes. If the City's final decision denying a contractual claim is challenged, the contractor and the City are encouraged to resolve the dispute through the informal ADR process described below. However, participating in the ADR process does not relieve the contractor from complying with the filing deadlines and does not imply that the City's previously-issued decision is suspended or no longer final.
- b. The contractor requesting ADR shall give written notice to the City purchasing office identifying the portions of the City's decision that are in dispute and requesting that ADR be used. If the City agrees to ADR, the City and contractor shall each appoint a representative to participate in ADR on its behalf. Each party's representative shall be a senior manager who is not an attorney and who was not previously involved in the dispute. Each party shall furnish to the other party all non-privileged documents and information with respect to the dispute that either party believes to be appropriate and germane. The representatives may then negotiate in an effort to resolve the dispute without the need for legal counsel. The use of a facilitator to accelerate the resolution process is encouraged.
- c. No obligation to negotiate or continue negotiating shall be inferred from this paragraph 8.8 or from the parties' agreement to use ADR, and each party shall remain free to discontinue ADR at any time. No agreement shall be deemed to arise from any communication during the ADR process, unless the agreement is reduced to writing and signed by duly-authorized representatives of both parties. Any settlement or compromise of claim must be approved by the Office of the City Attorney.
- d. Any compensation and expenses paid to the facilitator shall be shared equally by the two parties. In no event shall either party be entitled to reimbursement from the other party for any other cost incurred or effort expended as a result of the ADR process.

CHAPTER 9 ETHICS IN PUBLIC PROCUREMENT

9. **General.** The *Virginia Public Procurement Act (VPPA)* and *Chapter 21, Article 8 of the Winchester City Code* provide guidance regarding ethical, fair and impartial behavior during all phases of public procurements. Furthermore, the City's *Comprehensive Employee Management System (CEMS)* provides additional standards, or a "Code of Ethics, for all City employees, as well.

9.1 **Purpose.** The provisions of this article supplement, but do not supersede, other provisions of law, including, but not limited to, the Virginia Conflict of Interests Act Code of Virginia §2.1-639.1 *et seq.*, the Virginia Governmental Frauds Act Code of Virginia §18.2-498.1 *et seq.* and Articles 2 and 3 of Chapter 10 of Title 18.2 of the Code of Virginia. The provisions of this article apply notwithstanding the fact that the conduct described may not constitute a violation of the Virginia Conflict of Interests Act.

9.2 **Definitions.** The words defined in this section shall have the meanings set forth below throughout this article.

"Immediate family" shall mean a spouse, children, parents, brothers and sisters, and any other person living in the same household as the employee.

"Official responsibility" shall mean administrative or operating authority, whether immediate or final, to initiate, approve, disapprove or otherwise affect a procurement transaction, or any claim resulting therefrom.

"Pecuniary interest arising from the procurement" shall mean a personal interest in a contract as-defined in the State and Local Government Conflict of Interests Act (§2.1639.1 *et seq.*).

"Procurement transaction" shall mean all functions that pertain to the obtaining of any goods, services or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

"Public employee" shall mean any person employed by a governing body, including elected officials or appointed members of governing bodies.

9.3 **Proscribed Participation by Public Employees in Procurement Transactions.** Except as may be specifically allowed by provisions of the Comprehensive Conflict of Interests Act (§2.1-599 *et seq.*), no public employee having official responsibility for a procurement transaction shall participate in that transaction on behalf of the governing body when the employee knows that:

- (a) The employee is contemporaneously employed by a bidder, offeror or contractor involved in the procurement transaction; or
- (b) The employee, the employee's partner, or any member of the employee's immediate family holds a position with a bidder, offeror or contractor such as an officer, director, trustee, partner or the like, or is employed in a capacity involving personal and substantial participation in the procurement transaction, or owns or controls an interest of more than five percent; or
- (c) The employee, the employee's partner, or any member of the employee's immediate family has a pecuniary interest arising from the procurement transaction; or
- (d) The employee, the employee's partner, or any member of the employee's immediate family is negotiating, or has an arrangement concerning, prospective employment with a bidder, offeror or contractor.

- 9.4 **Solicitation or Acceptance of Gifts.** No public employee having official responsibility for a procurement transaction shall solicit, demand, accept, or agree to accept from a bidder, offeror, contractor or subcontractor any payment, loan, subscription, advance, deposit of money, services or anything of more than nominal or minimal value, present or promised, unless consideration of substantially equal or greater value is exchanged. The city may recover the value of anything conveyed in violation of this section
- 9.5 **Disclosure of Subsequent Employment.** No public employee or former public employee having official responsibility for procurement transactions shall accept employment with any bidder, offeror or contractor with whom the employee or former employee, employee dealt in an official capacity concerning procurement transactions for a period of one year from the cessation of employment by the city unless the employee, or former employee, provides written notification to the city manager prior to commencement of employment by that bidder, offeror or contractor.
- 9.6 **Gifts by Bidders, Offerors, Contractors, or Subcontractors.** No bidder, offeror, contractor or subcontractor shall confer upon any public employee having official responsibility for a procurement transaction any payment, loan subscription, advance, deposit of money, services or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is exchanged.
- 9.7 **Kickbacks.**
- (a) No contractor or subcontractor shall demand or receive from any of his suppliers or his subcontractors, as an inducement for the award of a subcontract or order, any payment, loan subscription, advance, deposit of money, services or anything, present or promised, unless consideration of substantially equal or greater value is exchanged.
 - (b) No subcontractor or supplier shall make, or offer to make, kickbacks as described in this section.
 - (c) No person shall demand or receive any payment, loan, subscription, advance, deposit of money, services or anything of value in return for an agreement not to compete on a public contract.
 - (d) If a subcontractor or supplier makes a kickback or other prohibited payment as described in this section, the amount thereof shall be conclusively presumed to have been included in the price of the subcontract or order and ultimately borne by the city and will be recoverable from both the maker and recipient. Recovery from one offending party shall not preclude recovery from other offending parties.
- 9.8 **Purchase of Building Materials, Etc. from Architect or Engineer Prohibited.** Except in cases of emergency, no building materials, supplies or equipment for any building or structure constructed by or for the city shall be sold by or purchased from any person employed as an independent contractor by the city to furnish architectural or engineering services, but not construction, for such building or structure, or from any partnership, association, or corporation in which such architect or engineer has a pecuniary interest
- 9.9 **Penalty for Violation.** Willful violation of any provision of this article shall constitute a Class 1 misdemeanor. Upon conviction, any public employee, in addition to any other fine or penalty provided by law; shall forfeit his employment.

Appendix A-1

Procurement Signing Authority

This document was approved by City Council and incorporated into Chapter 21 of the City Code. The City Code is Chapter 1 of this manual and the signing authority is outlined herein.



Finance Department Procedures

Purchasing & Payment Processing Guidelines

I. Scope and Purpose of Procedure

- A. Scope: This procedure describes the four types of purchase requests for products and services, and the related payment of the invoices.
- B. Purpose: The purpose of this procedure is to ensure that the purchase of products and services is treated in a consistent and accurate manner, following proper procurement guidelines, and that City purchases are recorded and paid in an accurate and timely manner.

II. Types of Purchases & Payments

There are four basic methods for processing payment of goods and service and authorizing the related payment. These methods are briefly described as follows, and described in more detail beginning with Section VI below. All of the forms mentioned in these guidelines are available on the City's internal website: www.ci.winchester.va.us/internal/forms.

A. Field Purchase Orders (FPO)

Use the FPO for small purchases under \$5,000 total to the same vendor, including one-time vendors such as travel, training, refunds, and reimbursements. Do not separate purchases to the same vendor to avoid this \$5,000 restriction. Quotes are not required for these purchases, but are encouraged. By periodically obtaining quotes for items purchased by your department, you will be assured the City is getting the most competitive price.

B. Purchase Requisition (Purchase Order)

Use the purchase requisition for purchases of \$5,000 or more to the same vendor. When the vendor requires a copy of the purchase order, you may use the purchase requisition for amounts under \$5,000. For purchases of \$5,000 or more, quotes will be required. Verbal quotes are acceptable for amounts up to \$14,999. For amounts over \$15,000 written quotes are required (see Section IV, Quotes).

C. Blanket Purchase Order

Use the blanket purchase order for routinely purchased items or services that do not require advance approval, such as utility bills or items that are on contract (office supplies, vehicle maintenance, and cleaning services).

D. Manual Payment Request (GM Transaction)

1. Under \$5,000: Only departments who do not have access to the City's purchasing system may use manual payment requests to submit vendors under \$5,000.
2. \$5,000 or more: The manual payment request can be used for purchases of \$5,000 or more for the following items:
 - a. Travel & training
 - b. Refunds & reimbursements
 - c. Advertisements
 - d. Debt service payments
 - e. Payroll taxes and benefit payments

III. Documentation

- A. Original invoices and receipts are required for payment; copies will only be accepted upon written verification from the department that the original invoice or receipt was misplaced.
- B. Payments will not be made from statements or packing slips.
- C. Invoices should have the vendor's name, address and telephone number, in addition to the service or item description and a breakdown of the charges with a total due.
- D. Approved and completed Travel Reimbursement Request forms must be submitted with each travel reimbursement request for payment. Documentation describing the event or training (agenda, conference brochure, registration form, email confirmation, etc.) and receipts for hotel, parking, tolls, etc. should also be attached to each request.

IV. Quotes

- A. All Departments shall request a minimum of at least one (1) local Contractor for all goods and non-professional service quotes under \$50,000 and all professional service quotes under \$30,000, whenever practicable. If the Department cannot obtain a quote, then this provision may be withdrawn following a written determination.
- B. Three or more verbal quotes are required for purchase amounts of \$5,000 to \$14,999
- C. Three or more written quotes are required for professional services of \$15,000 to \$29,999
- D. Four or more written quotes are required for goods & non-professional services of \$15,000 to \$49,999
- E. Formal sealed bid processing is required for professional services over \$30,000
- F. Formal sealed bid processing is required for goods & non-professional services of over \$50,000
- G. Exceptions to quotes
 1. Approved contracts: typically awarded after a competitive quote process, and for an extended period of time of one or more years. Contract information to include the approval and termination dates must be specified in the requisition comments on the purchase requisition.

2. Emergency purchases: procedures as outlined in the City code must be followed with written justification, purchasing agent approval, and public posting of the reason for the emergency purchase.
3. Sole source: applies only when one source is practically available with the written approval of the Purchasing Agent. The purchase requisition must include a written statement documenting why this vendor has been designated as sole source, approved by the purchasing agent, and public posting of the sole source purchase.

IV. Vendor Setup

- A. To add a vendor, which does not exist in the vendor file, the vendor must complete a Vendor Registration Form. Vendors performing a service (even a one-time service) must be set up as a vendor in the system.
 1. Submit the original, completed form to the Finance Department.
 2. Allow one (1) business day after receipt by Finance for entry.
 3. For emergency purchases, the department can accept a faxed form to submit to Finance, but the original must still be provided when received.

V. Purchasing Module Access

- A. The department must complete the Information Technology Computing Resources Access Authorization form (available on the City's internal web site: www.ci.winchester.va.us/internal/forms) to request menu and approval access in the purchasing module.
- B. Submit the completed form to the Information Technology Department for setup.

VI. Field Purchase Order (FPO)

- A. Use for all purchases of under \$5,000, except as noted in section II.D above or when a hard copy of the purchase order is required.
- B. Enter into the HTE Purchasing module at the department level with a due date of the Thursday of the week the payment will be processed (see Section XI, Payment Schedule, below).
- C. Department Director or designee approves the FPO electronically.
- D. Print and sign (Department Director or designee) the Receiving Report, and submit with the invoice to the Finance Department for payment.
- E. One FPO must be entered for each invoice, which allows tracking and inquiry of the invoice.

VII. Purchase Requisition

- A. Use for purchases of \$5,000 or more, or under \$5,000 when a hard copy of the purchase order is required.
- B. Used for all types of purchases, including any contracts for products or services, except those types specified in Section II.C & D above.
- C. If a contract is awarded for a specified dollar amount for the fiscal year, the department may enter a purchase request for a portion of the annual amount and

increase the purchase order periodically as needed. For example, if the annual amount is \$100,000, the department may add a purchase request for only \$25,000 initially. When that amount is almost used, the department can copy that purchase request and have the purchasing agent merge it into the original purchase order. This process avoids encumbering large dollar amounts too soon, or unnecessarily.

- D. Enter into the HTE Purchasing module at the department level.
- E. Department Director or designee approves the Purchase Requisition electronically.
- F. Other approvals may include Information Technology, Purchasing, Finance, and the City Manager.
- G. The Purchasing Agent will buyer process the requisition after all required approvals are completed electronically.
- H. Once the Purchasing Agent processes the Purchase Requisition into a Purchase Order, the department can then, and only then, place the order for the product or service.
- I. On occasion, an invoice exceeds a purchase order amount. When the invoice amount exceeds the purchase order amount by ten percent (10%) or less, Finance can process the invoice against the purchase order without changes to the purchase order. If the invoice exceeds the purchase order amount by more than 10%, then proper approvals need to be obtained for the increased amount. To do this, the department will add a new requisition for the amount of the increase (use the copy function to save time), and request that it be merged with the existing purchase order. The reason line on the purchase requisition must indicate "Over PO amount, merge w/PO #xxxxxx."
- J. Once an invoice is received and accepted for the product or service, the department uses the Receipt Processing function to electronically initiate the payment processing. It is important that the department input only the amount actually received. Do not electronically receive a quantity greater than the amount that has been actually shipped.
- K. After completing Receipt Processing, print and sign (Department Director or designee) the Receiving Report, and submit with the invoice to the Finance Department for payment.

IX. Blanket Purchase Orders

- A. Use for purchases that do not require advance approval to purchase, such as utility bills and items or services on contract.
- B. The Finance Department will enter the blanket purchase orders at the beginning of each fiscal year and furnish each department with a list of the blanket purchase order numbers. New blanket purchase orders can be added by Finance upon the request of a department.
- C. Upon receipt of the invoice the department uses the Receipt Processing function to electronically initiate the payment processing. Each invoice must be entered in a separate line item on the blanket purchase order, in order to allow tracking and inquiry of the invoice.
- D. Print and sign (Department Director or designee) the Receiving Report, and submit with the invoice(s) to the Finance Department for payment.

X. Manual Payment Request (GM Accounting Transactions)

- A. Finance will continue to process invoices of the payment types specified in Section II.D. These items are exempted from purchase order processing requirements.
- B. Prepare a payment request form, sign the form and submit to Finance for payment.
- C. In addition, for travel requests, the approved travel form must be submitted to the Finance Department with the invoice.

XI. Payment Schedule

- A. Invoices received in the Finance Department by noon on Wednesday will be processed for payment that week. Those received later will be processed in the next week.
- B. Periodically during shortened workweeks, or unusual workloads, a delay in payment processing may occur and invoices that are not yet due may be processed in the next week.
- C. For Field Purchase Orders, use a due date of the Thursday of the week that the Receiving Report and invoice will be submitted to the Finance Department.

XII. Year end Processing

See the Fiscal Year End Purchases & Payment Processing Procedure.

Prepared by	Finance Department
Updated	6/18/2003 & 5/18/2005 & 9/25/07
Approved by	City Council
Date	April 20, 1999 & September 11, 2007

**INVITATION TO BID (ITB) or REQUEST FOR PROPOSAL (RFP)
SOLICITATION AND FILE CHECKLIST**
(Guide for procurements over \$50,000 – Centralized Purchasing Authority)

✓	ITB/RFP SOLICITATION CHECKLIST	✓	FILE CHECKLIST
	<u>Approval</u> : If an approval is required, it should be obtained prior to preparing the solicitation and a copy placed in the solicitation file.		Special Approval
	<u>ITB/RFP Format</u> : Purchasing office shall use the most revised format available for the formal bid. These are sealed bids requiring VPPA and City Code governance.		
	<u>Specifications/Scope of Work</u> : The most important part of every solicitation, the specifications or scope of work is a detailed description of what is to be procured. It establishes the quality level that is used to determine the acceptability of the goods or services delivered. The solicitation should clearly state what is wanted, where, when, and how many or how much.		
	<u>Prebid Conferences/Site Visits (Appendix A-5)</u> : If a prebid conference or site visit is to be held, the solicitation must state the date, time, place, and whether attendance is optional or mandatory.		Prebid sign-in sheet
	<u>General Terms and Conditions (Appendix B-1)</u> : The general terms and conditions or “boilerplate” must be included in every solicitation. These may be referenced in your solicitation advising offerors to review them by going to (www.winchesterva.gov/purchasing). The Insurance clause is not normally required for purchases of goods.		
	<u>Special Terms and Conditions (Appendix B-2, B-3, B-4)</u> : Each procurement is different, and for each solicitation the special terms and conditions used should be carefully reviewed to ensure that the proper ones are included. They should be essential to the requirement, protect the interests of the City, and assist the bidder in understanding the department’s intent.		
	<u>Method of Award</u> : The method of award must be stated in the solicitation, and be based on the requirements stated therein. If the award is based on other than line item, lot, or grand total, a pricing scenario should be included to illustrate how the low bid will be determined.		
	<u>Method of Payment</u> : all payments are made upon receipt and acceptance of the goods or service. Any deviation, shall be authorized by the purchasing office if payment is to be made prior to final acceptance of the service or goods to be provided; i.e. progress payments, partial payments, etc.		
	<u>References (Appendix I)</u> : If references are required, the number and type should be specified in the solicitation, and those listed should be checked.		Results of Reference Checks (if requested)

Pre-Award, Receipt & Evaluation, and Post-Award Activities:

	<u>Bidders List</u> : Purchasing office maintains a commodity based bidders list as well as using bidders lists from past procurements to assist in finding responsible bidders and creating competition.		Bidders List: Name, addresses of Bidders solicited
	<u>Public Notice</u> : Public notice of the solicitation is required at least ten days prior to the date set for receipt of bids by posting on the City’s web site.		Posted notice of solicitation from City web site and other
	<u>Solicitation</u> : Original ITB, as issued.		Original solicitation
	<u>Addenda</u> : Any changes to the original solicitation must be made by written addendum, sent to each bidder attending a mandatory prebid conference, or each bidder on the bidder’s list. A copy of all addenda issued must be maintained in the file.		Addenda issued and uploaded to the City’s web site.

<u>Questions/Responses:</u> Answers to questions from potential bidders, which do not require a change to the solicitation, should be shared with all bidders on the bidder's list (or only those attending a mandatory prebid conference).	Q&A Bulletin Board
<u>Bid Opening and Evaluation:</u> Bids are closed at the date and time specified in the solicitation, then opened in public and tabulated. Other factors may be used in the evaluation of the lowest responsive and responsible bidder if stipulated in the solicitation.	Bid tabulation sheet
<u>Notice of Award or Notice of Intent to Award:</u> Post a Notice of Intent to Award for 10 calendar days if a protest of the award is anticipated; otherwise, issue the Notice of Award and wait 10 days for opportunity to protest.	Award document
<u>Successful Bid:</u> A copy of the successful bid is retained in the active procurement file.	Successful bid
<u>Contract Administration:</u> If the contract requires administration by other than the buyer, those responsibilities are assigned in writing.	Contract Administrator assignment
<u>Insurance/Licenses/References:</u> If other information was required of the contractor, these items must be retained in the procurement file.	
<u>Unsuccessful Bids:</u> Copies of the unsuccessful bids are retained as a part of the inactive permanent record.	Unsuccessful bids

The following items should be considered when developing the solicitation and other Special Terms and Conditions (Appendix B-2, B-3, B-4) may apply:

For BOTH Goods and Service Procurements:
<u>Bonds (Appendix L):</u> For the procurement of goods or services other than construction, for any dollar amount consider if bid, performance or payment bonds are necessary to protect the City's interest.
<u>Cancellation Clause:</u> If the solicitation will result in a term contract this clause should be included. This is not an appropriate clause for spot purchases.
<u>Liquidated Damages:</u> If time and delivery are critical, it may be necessary to include a provision for liquidated damages. The basis for the amount of liquidated damages assessed must be supportable and reasonable, considering the service or goods being purchased and the impact of delay on the City. A liquidated damages clause is <u>not</u> to be used as a penalty but as a means to access for damages which may be incurred by late delivery.
<u>Ownership of Documents:</u> If the contract will result in the production of plans, camera ready copy, art work, or any other material that has been paid for by the Commonwealth and is required for subsequent or future production, then the appropriate special clause should be used in the solicitation to ensure ownership and retention by the Commonwealth.
<u>Performance Period:</u> The performance period stated in the contract must include a starting and ending date, or the contract period must be for a specific period of time after a starting point; e.g., 120 days after date of award. If an option to renew the contract for an additional period is desired, the option must be stated in the solicitation.
<u>Prompt Payment and Discount:</u> all payments must be made within 30 days, unless the purchasing office authorizes a shorter or longer payment plan and it is written within the solicitation. Purchasing office will consider if there is a certainty that payment can be made within a specified period, then a solicitation may be issued including a provision that discounts offered for prompt payment will be considered in determining the low bid. The provision should establish a minimum number of days that the department/agency will consider; e.g., prompt payment discounts for less than 30 days will not be considered.
<u>Contract Data Sheet (Appendix J):</u> If the agency wishes to check bidder's/offeree's references or to verify the bidder's/offeree's experience, the Vendor Data Sheet should be included as an attachment to the solicitation.

	For Goods Procurements:
	<u>Inside Delivery</u> : If inside delivery is required, the solicitation should so state. Consider specifying access requirements, e.g., elevator, loading dock, stairwell limitations.
	<u>Samples/Demonstration</u> : If samples or demonstration models are required, the type, quantity, size, the place, and time for submission must be stated in the solicitation.
	<u>Technical Data</u> : If technical data will be required for evaluation, the solicitation should specify when and where the data should be submitted.
	<u>Warranty</u> : If a warranty is required, specify the type and minimum warranty period in the solicitation.

	For Service Procurements:
	<u>Bonds (Appendix L)</u> : If personal bonding is desired such as financial or security service, the requirement should be stated in the solicitation.
	<u>Facilities</u> : If the department or agency will provide facilities for use by the contractor, such as a storage area, this should be stated in the solicitation. If the contractor is required to provide equipment or facilities, it should also be stated in the solicitation.
	<u>Hours of Work - Access to City Facilities</u> : If the hours of work and access to the agency's facilities are restricted to certain time periods and dates, the solicitation should so specify. If the resulting contract is not a fixed price contract and overtime work can be anticipated, the pricing schedule should require a statement of overtime rates.
	<u>Licensing Requirements</u> : State any requirements for licensing. Contractors must comply with licensing requirements. The file must show documentation of the contractor's license number when written bids are required.
	<u>Personnel Approval</u> : If the department or agency desires to approve individuals employed by the contractor under the terms of the contract, or to exercise some degree of control over contractor's personnel, the requirement must be included in the solicitation.
	<u>Response Time/Service Calls</u> : If the vendor must respond to a service call within a specific time frame, the time frame must be specified in the solicitation.
	<u>Sub-Contractor Approval</u> : If sub-contractors may be involved in satisfying the requirement and there is a need to approve the sub-contractors on a project, then the solicitation should state what approvals the City wishes to exercise.

	For Construction Procurements:
	<u>Terms and Condition (Appendix M)</u> : construction projects exceeding \$50,000 are very often complex and specialized procurements. Utilize the various forms within Appendix M, in particular the General Conditions and Supplemental Conditions in conjunction with Appendix B-1.
	<u>Bonds</u> : For construction contracts in excess of \$25,000, a bid bond, performance and payment bonds are required.
	<u>Drawings, As-Built</u> : If "as-built drawings" are required, specify the number of copies, when, and to whom they are to be delivered.
	<u>Drawings, Shop</u> : If shop drawings are required, specify when and to whom they are to be submitted, approvals required, and time limits for review or changes, by both the agency and the contractor.
	<u>Material/Supplies</u> : If there is department or agency furnished material to be supplied to the contractor, the solicitation must provide for its control, and return, or disposition. If the contractor is to furnish material or supplies, the quantity, quality, and availability must be specified.

**REQUEST FOR QUOTE (RFQ)
SOLICITATION AND FILE CHECKLIST**

(Guide for procurements less than \$50,000 –Delegated Purchase Authority for Departments and Agencies)

✓	RFQ SOLICITATION CHECKLIST	✓	FILE CHECKLIST
	<u>Approval</u> : If an approval is required, it should be obtained prior to preparing the solicitation and a copy placed in the solicitation file.		Special Approval
	<u>Boiler Plate (Appendix E)</u> : Utilize the boiler plate RFQ (goods or service) found within the Procurement Manual. These are unsealed solicitations only, not formal bids.		
	<u>Specifications/Scope of Work</u> : The most important part of every solicitation, the specifications or scope of work is a detailed description of what is to be procured. It establishes the quality level that is used to determine the acceptability of the goods or services delivered. The solicitation should clearly state what is wanted, where, when, and how many or how much.		
	<u>Prebid Conferences/Site Visits (Appendix A-5)</u> : If a prebid conference or site visit is to be held, the solicitation must state the date, time, place, and whether attendance is optional or mandatory.		Prebid sign-in sheet
	<u>General Terms and Conditions (Appendix B-1)</u> : The general terms and conditions or "boilerplate" must be included in every solicitation. These may be referenced in your solicitation advising offerors to review them by going to (www.winchesterva.gov/purchasing). The Insurance clause is not normally required for purchases of goods.		
	<u>Special Terms and Conditions (Appendix B-2, B-3, B-4)</u> : Each procurement is different, and for each solicitation the special terms and conditions used should be carefully reviewed to ensure that the proper ones are included. They should be essential to the requirement, protect the interests of the City, and assist the bidder in understanding the department's intent.		
	<u>Method of Award</u> : The method of award must be stated in the solicitation, and be based on the requirements stated therein. If the award is based on other than line item, lot, or grand total, a pricing scenario should be included to illustrate how the low bid will be determined. Special Terms and Conditions, Appendix B-2, has several choices to choose from and please consult purchasing for further direction.		
	<u>Method of Payment</u> : all payments are made upon receipt and acceptance of the goods or service. Any deviation, shall be authorized by the purchasing office if payment is to be made prior to final acceptance of the service or goods to be provided; i.e. progress payments, partial payments, etc.		
	<u>References (Appendix I)</u> : If references are required, the number and type should be specified in the solicitation, and those listed should be checked.		Results of Reference Checks (if requested)

Pre-Award, Receipt & Evaluation, and Post-Award Activities:

	<u>Bidders List</u> : Purchasing office maintains a commodity based bidders list as well as using bidders lists from past procurements to assist in finding responsible bidders and creating competition. Departments or agencies are required to find qualified firms and promote competition.		Bidders List: Name, addresses of Bidders solicited
	<u>Public Notice</u> : Public notice of the solicitation is not required but it is recommended to be publicly posted for increased competition, i.e. bulletin board or other source.		
	<u>Solicitation</u> : Retain original RFQ for audit purposes, as issued.		Final Solicitation
	<u>Addenda</u> : Any changes to the original solicitation must be made by written addendum, sent to each bidder on the bidder's list. A copy of all addenda issued must be maintained in the file.		

<u>Questions/Responses:</u> Answers to questions from potential bidders, which do not require a change to the solicitation, should be shared with all bidders on the bidder's list.	Q&A
<u>Quote Reviewed and Evaluated:</u> Unsealed quotes or proposals are received via fax, mail, or email (written format) and reviewed based on the Method of Award. Other factors may be used in the evaluation of the lowest responsive and responsible bidder if stipulated in the solicitation.	Quote tabulation sheet
<u>Successful Quote:</u> A copy of the successful bid is retained in the active procurement file.	Successful bid
<u>Contract Administration:</u> If the contract requires administration by other than the buyer, those responsibilities are assigned in writing.	Contract Administrator assignment
<u>Insurance/Licenses/References:</u> If other information was required of the contractor, these items must be retained in the procurement file.	Other Qualifying Information
<u>Unsuccessful Quotes:</u> Copies of the unsuccessful bids are retained as a part of the inactive permanent record.	Unsuccessful bids

The following items should be considered when developing the solicitation and other Special Terms and Conditions (Appendix B-2, B-3, B-4) may apply:

For BOTH Goods and Service Procurements:
<u>Bonds (Appendix L):</u> For the procurement of goods or services other than construction, for any dollar amount, consider if bid, performance or payment bonds are necessary to protect the City's interest. Call purchasing office if unsure.
<u>Cancellation Clause:</u> If the solicitation will result in a term contract this clause should be included. This is not an appropriate clause for spot purchases.
<u>Liquidated Damages:</u> If time and delivery are critical, it may be necessary to include a provision for liquidated damages. The basis for the amount of liquidated damages assessed must be supportable and reasonable, considering the service or goods being purchased and the impact of delay on the City. A liquidated damages clause is <u>not</u> to be used as a penalty but as a means to access for damages which may be incurred by late delivery.
<u>Ownership of Documents:</u> If the contract will result in the production of plans, camera ready copy, art work, or any other material that has been paid for by the Commonwealth and is required for subsequent or future production, then the appropriate special clause should be used in the solicitation to ensure ownership and retention by the City.
<u>Performance Period:</u> The performance period stated in the contract must include a starting and ending date, or the contract period must be for a specific period of time after a starting point; e.g., 120 days after date of award. If an option to renew the contract for an additional period is desired, the option must be stated in the solicitation.
<u>Prompt Payment and Discounts:</u> all payments must be made within 30 days, unless the purchasing office authorizes a shorter or longer payment plan and it is written within the solicitation. Purchasing office will consider if there is a certainty that payment can be made within a specified period, then a solicitation may be issued including a provision that discounts offered for prompt payment will be considered in determining the low bid. The provision should establish a minimum number of days that the department/agency will consider; e.g., prompt payment discounts for less than 30 days will not be considered.
<u>Contractor Data Sheet (Appendix J):</u> If the agency wishes to check bidder's/offeror's references or to verify the bidder's offeror's experience, the Contractor Data Sheet should be included as an attachment to the solicitation.

	For Goods Procurements:
	<u>Inside Delivery</u> : If inside delivery is required, the solicitation should so state. Consider specifying access requirements, e.g., elevator, loading dock, stairwell limitations.
	<u>Samples/Demonstration</u> : If samples or demonstration models are required, the type, quantity, size, the place, and time for submission must be stated in the solicitation.
	<u>Technical Data</u> : If technical data will be required for evaluation, the solicitation should specify when and where the data should be submitted.
	<u>Warranty</u> : If a warranty is required, specify the type and minimum warranty period in the solicitation.

	For Service Procurements:
	<u>Bonds (Appendix L)</u> : If personal bonding is desired such as financial or security service, the requirement should be stated in the solicitation.
	<u>Facilities</u> : If the department or agency will provide facilities for use by the contractor, such as a storage area, this should be stated in the solicitation. If the contractor is required to provide equipment or facilities, it should also be stated in the solicitation.
	<u>Hours of Work - Access to City Facilities</u> : If the hours of work and access to the agency's facilities are restricted to certain time periods and dates, the solicitation should so specify. If the resulting contract is not a fixed price contract and overtime work can be anticipated, the pricing schedule should require a statement of overtime rates.
	<u>Licensing Requirements</u> : State any requirements for licensing. Contractors must comply with licensing requirements. The file must show documentation of the contractor's license number when written bids are required.
	<u>Personnel Approval</u> : If the department or agency desires to approve individuals employed by the contractor under the terms of the contract, or to exercise some degree of control over contractor's personnel, the requirement must be included in the solicitation.
	<u>Response Time/Service Calls</u> : If the vendor must respond to a service call within a specific time frame, the time frame must be specified in the solicitation.
	<u>Sub-Contractor Approval</u> : If sub-contractors may be involved in satisfying the requirement and there is a need to approve the sub-contractors on a project, then the solicitation should state what approvals the City wishes to exercise.

	For Construction Procurements:
	<u>Bonds</u> : For construction contracts in excess of \$25,000, a bid bond, performance and payment bonds are required.
	<u>Drawings, As-Built</u> : If "as-built drawings" are required, specify the number of copies, when, and to whom they are to be delivered.
	<u>Drawings, Shop</u> : If shop drawings are required, specify when and to whom they are to be submitted, approvals required, and time limits for review or changes, by both the department/agency and the contractor.
	<u>Material/Supplies</u> : If there is department or agency furnished material to be supplied to the contractor, the solicitation must provide for its control, and return, or disposition. If the contractor is to furnish material or supplies, the quantity, quality, and availability must be specified.

PREBID OR PREPROPOSAL CONFERENCE CHECKLIST

The following points are to be considered when prebid or preproposal conferences are used:

___ Requirement: Prebid or preproposal conferences are required for complex and/or large dollar value (over \$100,000) solicitations.

Preparation:

___ Reserve a meeting room suitable to accommodate the anticipated attendance. Be sure the site is accessible; if outside, specify an alternate date in the event of inclement weather.

___ Coordinate with the user to determine who will speak for the requisitioning activity and conduct the conference and/or site visit.

___ Have extra copies available of the solicitation and all attachments.

___ Electronically record the meeting, or have someone take notes.

___ Have a sign-in register prepared.

Conduct of Conference/Site Visit:

___ Note the date, time, location, and name of solicitation for recorded conferences. If this is a mandatory conference and a cutoff time for late arrivals was stated in the solicitation, remind attendees, and enforce it.

___ Welcome participants, and introduce key people.

___ Require all present to sign the register and include their title or position and the firm or agency they represent.

___ Explain the purpose of the conference/site visit - how it is to be conducted, how any addenda are issued, if necessary, and whether attendance is mandatory or not, etc. Advise all participants if the conference is to be recorded, and request that they state their name and affiliation each time they ask a question or make a statement. Attendees are to be told that no changes resulting from the conference are official unless issued in writing in the form of an addendum.

___ The solicitation serves as the agenda for the conference. Review the solicitation on a page-by-page basis with emphasis on special conditions, specifications, and site conditions that must be addressed in solicitation responses.

After the conference:

___ Review the transcript or recording to determine the need for revising the solicitation by issuing an addendum.

___ If an addendum is to be issued, prepare it as indicated in the example provided in Annex 6-F.

NOTE: The spokesperson for the agency should:

- control the conference/site visit;
- consider all vendor comments;
- encourage vendor participation; and
- repeat all questions and answers to ensure that they are heard and understood; and
- at the conclusion, summarize what was discussed.

City personnel at the conference should not:

- express opinions on the validity of the requirements;
- tell vendors how to do their job;
- discuss the pros and cons of vendor questions with other City personnel in front of the vendors;
- take a vote of the vendors on a question relative to the solicitation; or
- argue with vendors at the conference.

CITY OF WINCHESTER

REQUIRED GENERAL TERMS AND CONDITIONS

- A. APPLICABLE LAWS AND COURTS
- B. ANTI-DISCRIMINATION
- C. ETHICS IN PUBLIC CONTRACTING
- E. IMMIGRATION REFORM AND CONTROL ACT OF 1986
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- AZ. TERMINATION
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- CZ. CONFIDENTIALITY OF PERSONALLY IDENTIFIABLE INFORMATION
- DZ. BID PRICE CURRENCY

These General Terms and Conditions are required for all sealed and unsealed written or verbal solicitations issued by the City of Winchester for procurements that are subject to the Winchester City Code unless changed, deleted or revised by the City Attorney.

- A. **APPLICABLE LAWS AND COURTS:** This solicitation and any resulting contract shall be governed by the laws of the Commonwealth of Virginia. Any dispute arising from the performance or non-performance of this Agreement shall be resolved or otherwise litigated in the Circuit Court for the City of Winchester, Virginia or the Fourth Circuit Federal District Court in Harrisonburg, Virginia. The agency and the contractor are encouraged to resolve any issues in controversy arising from the award of the contract or any contractual dispute following the Winchester City Code, Chapter 21-61. The contractor shall comply with all applicable federal, state and local laws, rules and regulations.
- B. **ANTI-DISCRIMINATION:** By submitting their (bids/proposals), (bidders/offerors) certify to the City of Winchester that they will conform to the provisions of the Federal Civil Rights Act of 1964, as amended, as well as the Virginia Fair Employment Contracting Act of 1975, as amended, where applicable, the Virginians With Disabilities Act, the Americans With Disabilities Act and § 2.2-4311 of the *Virginia Public Procurement Act (VPPA)*. If the award is made to a faith-based organization, the organization shall not discriminate against any recipient of goods, services, or disbursements made pursuant to the contract on the basis of the recipient's religion, religious belief, refusal to participate in a religious practice, or on the basis of race, age, color, gender or national origin and shall be subject to the same rules as other organizations that contract with public bodies to account for the use of the funds provided; however, if the faith-based organization segregates public funds into separate accounts, only the accounts and programs funded with public funds shall be subject to audit by the public body. (*Code of Virginia*, § 2.2-4343.1E).

In every contract over \$10,000 the provisions in 1. and 2. below apply:

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 any 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 these requirements.
2. The contractor will include the provisions of 1. above in every subcontract or purchase order over \$10,000, so that the provisions will be binding upon each subcontractor or vendor.
- C. **ETHICS IN PUBLIC CONTRACTING:** By submitting their (bids/proposals), (bidders/offerors) certify that their (bids/proposals) are made without collusion or fraud and that they have not offered or received any kickbacks or inducements from any other (bidder/offeror), supplier, manufacturer or subcontractor in connection with their (bid/proposal), and that they have not conferred on any public employee having official responsibility for this procurement transaction any payment, loan, subscription, advance, deposit of money, services or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value was exchanged.
- D. **IMMIGRATION REFORM AND CONTROL ACT OF 1986:** By submitting their (bids/proposals), (bidders/offerors) certify that they do not and will not during the performance of this contract employ illegal alien workers or otherwise violate the provisions of the federal Immigration Reform and Control Act of 1986.
- E. **DEBARMENT STATUS:** By submitting their (bids/proposals), (bidders/offerors) certify that they are not currently debarred by the Federal Government, Commonwealth of Virginia, or by any City, Town or County from submitting bids or proposals on contracts for the type of goods and/or services covered by this solicitation, nor are they an agent of any person or entity that is currently so debarred.
- F. **ANTITRUST:** By entering into a contract, the contractor conveys, sells, assigns, and transfers to the City of Winchester all rights, title and interest in and to all causes of action it may now have or hereafter acquire under the antitrust laws of the United States and the Commonwealth of Virginia, relating to the particular goods or services purchased or acquired by the City of Winchester under said contract.
- H. **MANDATORY USE OF CITY FORM AND TERMS AND CONDITIONS:** Failure to submit a bid/proposal on the official City form provided for that purpose may be a cause for rejection of the bid/proposal. Modification of or additions to the General Terms and Conditions of the solicitation may be cause for rejection of the bid/proposal; however, the City of Winchester reserves the right to decide, on a case by case basis, in its sole discretion, whether to reject such a bid/proposal.
- I. **CLARIFICATION OF TERMS:** If any prospective (bidder/offeror) has questions about the specifications or other solicitation documents, the prospective (bidder/offeror) should contact the buyer whose name appears on the face of the solicitation no later than five working days before the due date. Any revisions to the solicitation will be made only by addendum issued by the Purchasing Agent, or designee.
- J. **PAYMENT:**
1. **To Prime Contractor:**
 - a. Invoices for items ordered, delivered and accepted shall be submitted by the contractor directly to the payment address shown on the purchase order/contract. All invoices shall show the state contract number and/or purchase order number; social security number (for individual contractors) or the federal employer identification number (for proprietorships, partnerships, and corporations).
 - b. Any payment terms requiring payment in less than 30 days will be regarded as requiring payment 30 days after invoice or delivery, whichever occurs last. This shall not affect offers of discounts for payment in less than 30 days, however.

- c. All goods or services provided under this contract or purchase order, that are to be paid for with public funds, shall be billed by the contractor at the contract price, regardless of which department is being billed.
- d. The following shall be deemed to be the date of payment: the date of postmark in all cases where payment is made by mail.
- e. **Unreasonable Charges.** Under certain emergency procurements and for most time and material purchases, final job costs cannot be accurately determined at the time orders are placed. In such cases, contractors should be put on notice that final payment in full is contingent on a determination of reasonableness with respect to all invoiced charges. Charges which appear to be unreasonable will be researched and challenged, and that portion of the invoice held in abeyance until a settlement can be reached. Upon determining that invoiced charges are not reasonable, the City of Winchester shall promptly notify the contractor, in writing, as to those charges which it considers unreasonable and the basis for the determination. A contractor may not institute legal action unless a settlement cannot be reached within thirty (30) days of notification. The provisions of this section do not relieve an agency of its prompt payment obligations with respect to those charges which are not in dispute (*Code of Virginia, § 2.2-4363*).

2. To Subcontractors:

- a. A contractor awarded a contract under this solicitation is hereby obligated:
 - (1) To pay the subcontractor(s) within seven (7) days of the contractor's receipt of payment from the City of Winchester for the proportionate share of the payment received for work performed by the subcontractor(s) under the contract; or
 - (2) To notify the agency and the subcontractor(s), in writing, of the contractor's intention to withhold payment and the reason.
- b. The contractor is obligated to pay the subcontractor(s) interest at the rate of one percent per month (unless otherwise provided under the terms of the contract) on all amounts owed by the contractor that remain unpaid seven (7) days following receipt of payment from the City of Winchester, except for amounts withheld as stated in (2) above. The date of mailing of any payment by U. S. Mail is deemed to be payment to the addressee. These provisions apply to each sub-tier contractor performing under the primary contract. A contractor's obligation to pay an interest charge to a subcontractor may not be construed to be an obligation of the City of Winchester.

K. **PRECEDENCE OF TERMS:** The following General Terms and Conditions APPLICABLE LAWS AND COURTS, ANTI-DISCRIMINATION, ETHICS IN PUBLIC CONTRACTING, IMMIGRATION REFORM AND CONTROL ACT OF 1986, DEBARMENT STATUS, ANTITRUST, MANDATORY USE OF CITY FORM AND TERMS AND CONDITIONS, CLARIFICATION OF TERMS, PAYMENT shall apply in all instances. In the event there is a conflict between any of the other General Terms and Conditions and any Special Terms and Conditions in this solicitation, the Special Terms and Conditions shall apply and take precedence.

The City's procurement, Contractor's response and written negotiation summary shall form part of the Contract. In the case of conflicts, discrepancies, errors or omissions among the City's procurement, the Contractor's response, written negotiation summary and the main body of the Contract, the documents and amendments to them shall take precedence and govern in the following order:

1. Contract
2. Negotiation Summary
3. City's Procurement Document(s)
4. Contractor's Response
5. Other Documents

L. **QUALIFICATIONS OF (BIDDERS/OFFERORS):** The City of Winchester may make such reasonable investigations as deemed proper and necessary to determine the ability of the (bidder/offeror) to perform the services/furnish the goods and the (bidder/offeror) shall furnish to the City of Winchester all such information and data for this purpose as may be requested. The City of Winchester reserves the right to inspect (bidder's/offeror's) physical facilities prior to award to satisfy questions regarding the (bidder's/offeror's) capabilities. The City of Winchester further reserves the right to reject any (bid/proposal) if the evidence submitted by, or investigations of, such (bidder/offeror) fails to satisfy the City of Winchester that such (bidder/offeror) is properly qualified to carry out the obligations of the contract and to provide the services and/or furnish the goods contemplated therein.

- M. **TESTING AND INSPECTION:** The City of Winchester reserves the right to conduct any test/inspection it may deem advisable to assure goods and services conform to the specifications.
- N. **ASSIGNMENT OF CONTRACT:** A contract shall not be assignable by the contractor in whole or in part without the written consent of the City of Winchester.
- O. **SEVERABILITY OF CONTRACT:** In the event that any provision shall be adjudged or decreed to be invalid, such ruling shall not invalidate the entire Agreement but shall pertain only to the provision in question and the remaining provisions shall continue to be valid, binding and in full force and effect.
- P. **CHANGES TO THE CONTRACT:**
1. A public 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 ten thousand dollars (\$10,000), whichever is greater, without the advance written approval of the City Council. 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 (Winchester City Code 21-44).
 2. Changes can be made to the contract in any of the following ways:
 - a. The parties may agree in writing to modify the scope of the contract. An increase or decrease in the price of the contract resulting from such modification shall be agreed to by the parties as a part of their written agreement to modify the scope of the contract.
 - b. The City of Winchester may order changes within the general scope of the contract at any time by written notice to the contractor. Changes within the scope of the contract include, but are not limited to, things such as services to be performed, the method of packing or shipment, and the place of delivery or installation. The contractor shall comply with the notice upon receipt. The contractor shall be compensated for any additional costs incurred as the result of such order and shall give the City of Winchester a credit for any savings. Said compensation shall be determined by one of the following methods:
 1. By mutual agreement between the parties in writing; or
 2. By agreeing upon a unit price or using a unit price set forth in the contract, if the work to be done can be expressed in units, and the contractor accounts for the number of units of work performed, subject to the City of Winchester's right to audit the contractor's records and/or to determine the correct number of units independently; or
 3. By ordering the contractor to proceed with the work and keep a record of all costs incurred and savings realized. A markup for overhead and profit may be allowed if provided by the contract. The same markup shall be used for determining a decrease in price as the result of savings realized. The contractor shall present the City of Winchester with all vouchers and records of expenses incurred and savings realized. The City of Winchester shall have the right to audit the records of the contractor as it deems necessary to determine costs or savings. Any claim for an adjustment in price under this provision must be asserted by written notice to the City of Winchester within thirty (30) days from the date of receipt of the written order from the City of Winchester. If the parties fail to agree on an amount of adjustment, the question of an increase or decrease in the contract price or time for performance shall be resolved in accordance with the procedures for resolving disputes provided by the Disputes Clause of this contract or, if there is none, in accordance with the disputes provisions of the City of Winchester Code. Neither the existence of a claim nor a dispute resolution process, litigation or any other provision of this contract shall excuse the contractor from promptly complying with the changes ordered by the City of Winchester or with the performance of the contract generally.
- Q. **DEFAULT:** In case of failure to deliver goods or services in accordance with the contract terms and conditions, the City of Winchester, after due oral or written notice, may procure them from other sources and hold the contractor responsible for any resulting additional purchase and administrative costs. This remedy shall be in addition to any other remedies which the City of Winchester may have.
- R. **TAXES:** Sales to the City of Winchester are normally exempt from State sales tax. State sales and use tax certificates of exemption, Form ST-12, will be issued upon request.

- S. **USE OF BRAND NAMES:** Unless otherwise provided in this solicitation, the name of a certain brand, make or manufacturer does not restrict (bidders/offerors) to the specific brand, make or manufacturer named, but conveys the general style, type, character, and quality of the article desired. Any article which the public body, in its sole discretion, determines to be the equal of that specified, considering quality, workmanship, economy of operation, and suitability for the purpose intended, shall be accepted. The (bidder/offeror) is responsible to clearly and specifically identify the product being offered and to provide sufficient descriptive literature, catalog cuts and technical detail to enable the City of Winchester to determine if the product offered meets the requirements of the solicitation. This is required even if offering the exact brand, make or manufacturer specified. Normally in competitive sealed bidding only the information furnished with the bid will be considered in the evaluation. Failure to furnish adequate data for evaluation purposes may result in declaring a bid nonresponsive. Unless the (bidder/offeror) clearly indicates in its (bid/proposal) that the product offered is an equal product, such (bid/proposal) will be considered to offer the brand name product referenced in the solicitation.
- T. **TRANSPORTATION AND PACKAGING:** By submitting their (bids/proposals), all (bidders/offerors) certify and warrant that the price offered for FOB destination includes only the actual freight rate costs at the lowest and best rate and is based upon the actual weight of the goods to be shipped. Except as otherwise specified herein, standard commercial packaging, packing and shipping containers shall be used. All shipping containers shall be legibly marked or labeled on the outside with purchase order number, commodity description, and quantity.
- U. **INSURANCE:** By signing and submitting a bid or proposal under this solicitation, the bidder or offeror certifies that if awarded the contract, it will have the following insurance coverage at the time the contract is awarded. For construction contracts, if any subcontractors are involved, the subcontractor will have workers' compensation insurance in accordance with §§ 2.2-4332 and 65.2-800 et seq. of the *Code of Virginia*. The bidder or offeror further certifies that the contractor and any subcontractors will maintain these insurance coverage during the entire term of the contract and that all insurance coverage will be provided by insurance companies authorized to sell insurance in Virginia by the Virginia State Corporation Commission.

MINIMUM INSURANCE COVERAGES AND LIMITS REQUIRED FOR MOST CONTRACTS:

1. Workers' Compensation - Statutory requirements and benefits. Coverage is compulsory for employers of three or more employees, to include the employer. Contractors who fail to notify the City of Winchester of increases in the number of employees that change their workers' compensation requirements under the *Code of Virginia* during the course of the contract shall be in noncompliance with the contract. The insurer must have an A.M. Best rating of A- or better.
2. Employer's Liability - \$100,000.
3. Commercial General Liability - \$1,000,000 per occurrence. Commercial General Liability is to include bodily injury and property damage, personal injury and advertising injury, products and completed operations coverage. The City of Winchester must be named as an additional insured and so endorsed on the policy by the insurer. A notation on the certificate of insurance is not sufficient.
4. Automobile Liability - \$1,000,000 per occurrence. (Only used if motor vehicle is to be used in the contract.)

NOTE: In addition, various Professional Liability/Errors and Omissions coverages are required when soliciting those services as follows:

<u>Profession/Service</u>	<u>Limits</u>
Accounting	\$1,000,000 per occurrence, \$3,000,000 aggregate
Architecture	\$2,000,000 per occurrence, \$6,000,000 aggregate
Asbestos Design, Inspection or Abatement Contractors	\$1,000,000 per occurrence, \$3,000,000 aggregate
Health Care Practitioner (to include Dentists, Licensed Dental Hygienists, Optometrists, Registered or Licensed Practical Nurses, Pharmacists, Physicians, Podiatrists, Chiropractors, Physical Therapists, Physical Therapist Assistants, Clinical Psychologists, Clinical Social Workers, Professional Counselors, Hospitals, or Health Maintenance Organizations.)	\$1,925,000 per occurrence, \$3,000,000 aggregate
(Limits increase each July 1 through fiscal year 2008, as follows:	

July 1, 2008 - \$2,000,000. This complies with §8.01-581.15 of the *Code of Virginia*.

Insurance/Risk Management	\$1,000,000 per occurrence, \$3,000,000 aggregate
Landscape/Architecture	\$1,000,000 per occurrence, \$1,000,000 aggregate
Legal	\$1,000,000 per occurrence, \$5,000,000 aggregate
Professional Engineer	\$2,000,000 per occurrence, \$6,000,000 aggregate
Surveying	\$1,000,000 per occurrence, \$1,000,000 aggregate

V. **ANNOUNCEMENT OF AWARD:** Upon the award or the announcement of the decision to award a contract over \$50,000, as a result of this solicitation, the Purchasing Agent will publicly post such notice on the City of Winchester's web site (www.winchesterva.gov/purchasing) for a minimum of 10 days.

W. **DRUG-FREE WORKPLACE:** 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, 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.

X. **NONDISCRIMINATION OF CONTRACTORS:** A bidder, offeror, or contractor shall not be discriminated against in the solicitation or award of this contract because of race, religion, color, sex, national origin, age, disability, faith-based organizational status, any other basis prohibited by state law relating to discrimination in employment or because the bidder or offeror employs ex-offenders unless the state agency, department or institution has made a written determination that employing ex-offenders on the specific contract is not in its best interest. If the award of this contract is made to a faith-based organization and an individual, who applies for or receives goods, services, or disbursements provided pursuant to this contract objects to the religious character of the faith-based organization from which the individual receives or would receive the goods, services, or disbursements, the public body shall offer the individual, within a reasonable period of time after the date of his objection, access to equivalent goods, services, or disbursements from an alternative provider.

Y. **AVAILABILITY OF FUNDS:** In the event that funds are not appropriated for this Contract for any City fiscal year, following the City's current year, the Contract shall terminate automatically as of the last day for which funds were appropriated without the City providing written notice to the Contractor prior to the date of termination. The City shall not consider termination of the Contract pursuant to this section default. Upon such termination, the City shall be released from any obligation to make future payments and shall not be liable for cancellation or termination charges.

Z. **LICENSES AND PERMITS:** Contractors will be responsible for all licenses and permits, if required. Any person, firm, or corporation responding to the City's procurement which is required to have a current and valid City of Winchester business license and, in fact, does not, will not be considered a "responsive bidder" as such term is defined by the Code of Virginia §2.2-4301, as amended. Any bid received from such an entity may be rejected, at the City's sole option, for that reason alone. In addition, the successful bidder or offeror will be required to produce affirmative evidence, satisfactory to the Purchasing Agent, or designee that it has such a license, or is not required to have such a license, prior to approval and execution of any contract to perform the work herein described.

AZ **TERMINATION:**

- a. Termination for Convenience: The City of Winchester may terminate a contract, in whole or in part, whenever the City OF Winchester determines that such termination is in the best interest of the City of Winchester, without showing cause, upon giving ten (10) days written notice to the vendor.
- b. Termination for Default: When the vendor has not performed or has unsatisfactorily performed the contract, the City of Winchester may terminate the contract for default. Upon termination for default, payment may be withheld at the discretion of the City of Winchester. The Vendor will be paid for work satisfactorily performed prior to termination.

- BZ. **HOLD HARMLESS:** Bids/Proposal shall provide that during the term of the contract, including warranty period, for the successful bidder/offeror indemnifying, defending, and holding harmless the City, its officers, employees, agent and representatives thereof from all suits, actions, claims of any kind (including claims for attorney's fees) brought on account of any personal injuries, damages, or violation of rights sustained by any person or property in consequence of any neglect in safeguarding contract work, or on account of any act or omission by the contractor or his employees, or from any claims or amounts arising from violation of any law, bylaw, ordinance, regulation or decree. The vendor agrees that this clause shall include claims involving infringement of patent or copyrights.
- CZ. **CONFIDENTIALITY OF PERSONALLY IDENTIFIABLE INFORMATION:** The contractor assures that information and data obtained as to personal facts and circumstances related to patients or clients will be collected and held confidential, during and following the term of this agreement, and will not be divulged without the individual's and the agency's written consent and only in accordance with federal law or the Code of Virginia. Contractors who utilize, access, or store personally identifiable information as part of the performance of a contract are required to safeguard this information and immediately notify the agency of any breach or suspected breach in the security of such information. Contractors shall allow the City to both participate in the investigation of incidents and exercise control over decisions regarding external reporting. Contractors and their employees working on this project may be required to sign a confidentiality statement.
- DZ. **BID PRICE CURRENCY:** Prices are to be stated in US dollars unless otherwise specified in the solicitation.

SECTION II

SPECIAL TERMS AND CONDITIONS GOODS AND NONPROFESSIONAL SERVICES

The following is an index of Special Terms and Conditions clauses that are to be used at the buyer's discretion in Quotes, IFBs and RFPs as the individual procurement may dictate. These clauses cover a broad spectrum of goods, printing, and services and are followed by a brief explanation (indicated by an asterisk *) of when each should be used. Other special terms and conditions may be developed and included in the solicitation when appropriate.

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1. **ADVERTISING** In the event a contract is awarded for supplies, equipment, or services resulting from this bid/proposal, no indication of such sales or services to the (name of institution) will be used in product literature or advertising. The contractor shall not state in any of its advertising or product literature that the City of Winchester or any agency or department of the City of Winchester has purchased or uses its products or services.

*** When Used: This provision is for use in solicitations for goods or services when the City of Winchester wants to ensure that the use of the goods or services by the state is not used in advertising or product literature.**

2. **ASBESTOS**: Whenever and wherever during the course of performing any work under this contract, the contractor discovers the presence of asbestos or suspects that asbestos is present, he shall stop the work immediately, secure the area, notify the building owner and await positive identification of the suspect material. During the downtime in such a case, the contractor shall not disturb any surrounding surfaces but shall protect the area with suitable dust covers. In the event the contractor is delayed due to the discovery of asbestos or suspected asbestos, then a mutually agreed extension of time to perform the work shall be allowed the contractor but without additional compensation due to the time extension.

*** When Used: For use in service contracts or furnish and install goods contracts when it is possible that the contractor may encounter asbestos during performance of the contract.**

3. **AS BUILT DRAWINGS**: The contractor shall provide the City of Winchester a clean set of reproducible “as built” drawings and wiring diagrams, marked to record all changes made during installation or construction. The contractor shall also provide the City of Winchester with maintenance manuals, parts lists and a copy of all warranties for all equipment. All “as built” drawings and wiring diagrams, maintenance manuals, parts lists and warranties shall be delivered to the City of Winchester upon completion of the work and prior to final payment.

*** When Used: For furnish and install and construction and renovation projects; i.e., fire alarm systems, heating and air conditioning systems, refrigeration rooms, building modifications, major equipment installations, etc.**

4. **AUDIT**: The contractor shall retain all books, records, and other documents relative to this contract for five (5) years after final payment, or until audited by the City of Winchester, whichever is sooner. The agency, its authorized agents, and/or state auditors shall have full access to and the right to examine any of said materials during said period.

*** When Used: Must be included in all term contracts for goods or services and all prime vendor contracts**

5. **ADDITIONAL USERS**: This procurement is being conducted on behalf of state agencies, institutions and other public bodies who may be added or deleted at anytime during the period of the contract. The addition or deletion of authorized users not specifically named in the solicitation shall be made only by written contract modification issued by this agency or institution and upon mutual agreement of the contractor. Such modification shall name the specific agency added or deleted and the effective date. The contractor shall not honor an order citing the resulting contract unless the ordering entity has been added by written contract modification.

***When Used: If the value of the contract, including any renewal periods is within the delegated authority of the lead agency and other agencies and institutions may benefit, the lead agency may issue a solicitation and include this clause on behalf of other public bodies. To obtain maximum pricing advantage, every effort should be made to identify participating agencies and their expected usage in the solicitation.**

6. This section intentionally left blank.

7. **AWARD OF CONTRACT:** All solicitations must specify the method of award. Use the appropriate Award clause below in J. or K. if the total award including all possible renewal periods is expected to exceed \$50,000 and the purchasing agency desires the option to award to a reasonably priced or offeror that is other than the lowest priced bidder or highest ranking offeror. The wording on award to other than the lowest priced bidder or highest ranking offeror may be customized from the selection below to fit the circumstances of the City. Select appropriate clause for the type of procurement:

A. **AWARD:** An award will be made to the lowest responsive and responsible bidder. Evaluation will be based on net prices. Unit prices, extensions and grand total must be shown. In case of arithmetic errors, the unit price will govern. If cash discount for prompt payment is offered, it must be clearly shown in the space provided. Discounts for prompt payment will not be considered in making awards. The City reserves the right to reject any and all bids in whole or in part, to waive any informality, and to delete items prior to making an award.

*** When Used: This award clause can be used in invitation for bids for goods or services.**

B. **AWARD:** The City of Winchester will make the award(s) on _____ basis to the lowest responsive and responsible bidder. The purchasing office reserves the right to conduct any test it may deem advisable and to make all evaluations. The City of Winchester also reserves the right to reject any or all bids, in whole or in part, to waive informalities and to delete items prior to making the award, whenever it is deemed in the sole opinion of the procuring public body to be in its best interest.

*** When Used: For goods or nonprofessional services by filling in the blank, i.e., line item, total sum, lot, etc. This clause shall not be used in a Request for Proposals.**

C. **AWARD:** The right is reserved to make a separate award of each item, a group of items or all items, and to make an award either in whole or in part, whichever is deemed in the best interest of the City of Winchester. The award or awards will be made to the lowest responsive, responsible bidder or bidders as applicable.

*** When Used: For use when multiple line items are involved, provided that multiple awards may result in a savings to the City of Winchester.**

D. **AWARD TO MULTIPLE BIDDERS:**

1. The City of Winchester will make awards on a _____ basis to the lowest responsive and responsible bidders, provided that the next lowest bidders are within ___% of the lowest bidder and provided that different brands are offered. Due consideration will be given to price, quality as judged by tests and previous experience, and of the ability of the bidder to render required services. The City of Winchester reserves the right to conduct any tests it may deem advisable and to make all evaluations. The City of Winchester also reserves the right to reject any or all bids, in whole or in part, to waive informalities and to delete items prior to making the award, whenever it is deemed in the sole opinion of the procuring public body to be in its best interest.

*** When Used: For goods term contracts only when multiple awards will be made based on different brands being offered. Specify how the award will be made, i.e., line item, total sum, lot, etc. plus the number of awards and the percentage figure. This clause shall not be used in a Request for Proposals.**

2. **AWARD TO MULTIPLE BIDDERS:** The City of Winchester reserves the right to make multiple awards as a result of this solicitation. The award(s) will be made to the lowest responsive and responsible bidder(s) meeting the requirements of the solicitation. The City of Winchester reserves the right to conduct any tests it may deem advisable and to make all evaluations. The City of Winchester also reserves the right to reject any or all bids, in whole or in part, to waive informalities and to delete items prior to making the award, whenever it is deemed in the sole opinion of the procuring public body to be in its best interest.

*** When Used: For goods or nonprofessional services when multiple awards may be made in order to meet the requirements of the City. This clause shall not be used for construction or professional services.**

- E. **AWARD:** 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 evaluation factors included in the Request for Proposals, including price, if so stated in the Request for Proposals. Negotiations shall be conducted with the offerors so selected. Price shall be considered, but need not be the sole determining factor. After negotiations have been conducted with each offeror so selected, the agency shall select the offeror which, in its opinion, has made the best proposal, and shall award the contract to that offeror. The City of Winchester may cancel this Request for Proposals or reject proposals at any time prior to an award, and is not required to furnish a statement of the reasons why a particular proposal was not deemed to be the most advantageous (*Code of Virginia*, § 2.2-4359D). Should the City of Winchester 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. The award document will be a contract incorporating by reference all the requirements, terms and conditions of the solicitation and the contractor's proposal as negotiated.

*** When Used: For goods and nonprofessional services when competitive negotiation will be used. This clause shall not be used in an Invitation for Bids or a professional services Request for Proposals.**

- F. **AWARD TO MULTIPLE OFFERORS:** 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 evaluation factors included in the Request for Proposals, including price, if so stated in the Request for Proposals. Negotiations shall be conducted with the offerors so selected. Price shall be considered, but need not be the sole determining factor. After negotiations have been conducted with each offeror so selected, the agency shall select the offeror which, in its opinion, has made the best proposal, and shall award the contract to that offeror. The City of Winchester reserves the right to make multiple awards as a result of this solicitation. The City of Winchester may cancel this Request for Proposals or reject proposals at any time prior to an award, and is not required to furnish a statement of the reasons why a particular proposal was not deemed to be the most advantageous (*Code of Virginia*, § 2.2-4359D). Should the City of Winchester 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. The award document will be a contract incorporating by reference all the requirements, terms and conditions of the solicitation and the contractor's proposal as negotiated.

*** When Used: For goods and nonprofessional services when competitive negotiation will be used and multiple awards are desired to meet the requirements of the City. This clause shall not be used in an Invitation for Bids or a professional services Request for Proposals.**

- G. **AWARD:** The City of Winchester shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence, to provide the required services. Repetitive informal interviews shall be permissible. Such offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. At the discussion stage the public body may discuss non-binding estimates of total project costs, including, but not limited to, life-cycle costing, and, where appropriate, non-binding estimates of price for services. Proprietary information from competing offerors shall not be disclosed to the public or to competitors. At the conclusion of the informal interviews, on the basis of evaluation factors published in the Request for Proposals and all information developed in the selection process to this point, the purchasing agency 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 purchasing agency 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. The City of Winchester reserves the right to make multiple awards as a result of this solicitation. Should the City of Winchester 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.

*** When Used: Professional services only. This clause shall not be used in an Invitation for Bids or to procure non-professional services.**

- H. **UNSEALED BEST VALUE AWARD(S)**: Selection shall be made of the offeror(s) deemed to be fully qualified and best suited among those submitting proposals on the basis of the evaluation factors included in this solicitation, including price, if so stated. Negotiations shall be conducted with the offeror(s) so selected. Cost and price factors shall be considered in relation to the evaluation factors stated in the solicitation, but need not be the sole determining factor. The City of Winchester will make the award(s) on a best value basis to the Offeror(s) which, in its opinion, represents the most advantageous and best offer. The City of Winchester may cancel this solicitation or reject proposals at any time prior to an award, and is not required to furnish a statement of the reasons why a particular proposal was not deemed to be the most advantageous (*Code of Virginia, § 2.2-4359 D*).

*** When Used: For goods and nonprofessional services in an Unsealed Best Value Acquisition solicitation, and a single award or multiple awards are desired to meet the requirements of the City. Note: A single award shall not exceed \$50,000 and if making multiple awards, the total sum of all awards shall not exceed \$50,000.**

- I. **BEST VALUE AWARD(S)**: Selection shall be made of two or more offeror(s) deemed to be fully qualified and best suited among those submitting best value proposals on the basis of the evaluation factors included in this solicitation, including price, if so stated. Negotiations shall be conducted with the Offeror(s) whose proposal(s) represent the most advantageous and best offer. Awards may be made to a reasonably ranked DMBE-certified small business offeror that is other than the highest ranking offeror. Awards will be made on a best value basis to the Offeror(s) which, in its opinion, represents the best overall combination of quality, price, and various elements of required goods/services, as stated in this solicitation, that in total are optimal relative to the agency's needs. The City of Winchester may cancel this solicitation or reject proposals at any time prior to an award, and is not required to furnish a statement of the reasons why a particular proposal was not deemed to be the most advantageous (*Code of Virginia, § 2.2-4359 D*). The award document will be a contract incorporating by reference all the requirements, terms and conditions of the solicitation and the contractor's offer as negotiated.

*** When Used: For goods and nonprofessional services when competitive negotiation will be used in a sealed Best Value Acquisition solicitation, and a single award or multiple awards are desired to meet the requirements of the agency/institution. This clause may be used for multiple awards. This clause may be used for procurements over \$50,000.**

- J. **AWARD TO OTHER THAN THE LOWEST PRICED BIDDER(S)**: An award(s) will be made to the lowest responsive and responsible bidder(s) however; the award may be made to a reasonably priced DMBE-certified small business bidder(s) that is other than the lowest priced bidder(s). Evaluation will be based on net prices. Unit prices, extensions and grand total must be shown. In case of arithmetic errors, the unit price will govern. If cash discount for prompt payment is offered, it must be clearly shown in the space provided. Discounts for prompt payment will not be considered in making awards. The right is reserved to make a separate award of each item, a group of items or all items, and to make an award either in whole or in part, whichever is deemed in the best interest of the City of Winchester. The City reserves the right to reject any and all bids in whole or in part, to waive any informality, and to delete items prior to making an award.

*** When Used: This award clause may be used in Invitation for Bids for goods or services for competitive bidding where the award is expected to exceed \$50,000 to allow for award to a reasonably priced DMBE-certified small business bidder, other than the lowest priced responsive and responsible bidder or bidders, in the case of multiple awards. This clause may be used for procurements over \$50,000.**

- K. **AWARD TO OTHER THAN THE HIGHEST RANKING OFFEROR(S)**: 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 evaluation factors included in the Request for Proposals, including price, if so stated in the Request for Proposals. Negotiations shall be conducted with the offerors so selected. Price shall be considered, but need not be the sole determining factor. After negotiations have been conducted with each offeror so selected, the agency shall select the offeror(s) which, in its opinion, has made the best proposal(s) and shall award the contract to that offeror; however, the contract may be awarded to a reasonably ranked DMBE-certified small business offeror(s), that is other than the highest ranking offeror(s). The City of Winchester may cancel this Request for Proposals or reject proposals at any time prior to an award, and is not required to furnish a statement of the reasons why a particular

proposal was not deemed to be the most advantageous (*Code of Virginia, § 2.2-4359D*). Should the City of Winchester 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. The award document will be a contract incorporating by reference all the requirements, terms and conditions of the solicitation and the contractor's proposal as negotiated.

*** When Used: For goods and nonprofessional services when competitive negotiation will be used. This clause shall not be used in an Invitation for Bids or a professional services Request for Proposals. This clause may be used for procurements over \$50,000**

8. **BEST AND FINAL OFFER (BAFO):** At the conclusion of negotiations, the offeror(s) may be asked to submit in writing, a Best And Final Offer (BAFO). After the BAFO is submitted, no further negotiations shall be conducted with the offeror(s). The offeror's proposal will be rescored to combine and include the information contained in the BAFO. The decision to award will be based on the final evaluation including the BAFO.

*** When Used: Used only in Request for Proposals. This clause should not be used as a matter of routine. If it is anticipated that because of the nature of the requirement, the negotiations could linger, this provision should be used to show clearly when negotiations would end or to cut off negotiations at a particular point called for by the contract officer.**

9. **BID ACCEPTANCE PERIOD:** Any bid in response to this solicitation shall be valid for () days. At the end of the () days the bid may be withdrawn at the written request of the bidder. If the bid is not withdrawn at that time it remains in effect until an award is made or the solicitation is canceled.

*** When Used: Bids must be valid for the number of days stated.**

10. **BID BOND OR GUARANTEE:** Each bid shall be accompanied by a bid bond or guarantee of five percent (5%) of the amount of the bid, which shall be a certified check, cash escrow or a bid bond payable to the Treasurer of the City of Winchester. The sureties of all bonds shall be of such surety company or companies as are approved by the State and are authorized to transact business in the Commonwealth of Virginia. Such bid bond or check shall be submitted with the understanding that it shall guarantee that the bidder will not withdraw such bid during the period of _____ days following the opening of bids; that if such bid is accepted, the bidder will accept and perform under the terms of the Invitation for Bids and purchase order or contract. The bid guarantee will be returned upon award of contract.

*** When Used: Must be used in all solicitations for construction type contracts over \$25,000. Insert the same number of days in the space provided as entered in the Bid Acceptance Period Clause. This clause may also be used for construction type services under \$100,000, as well as for goods or services of any dollar amount. Do not use in RFPs.**

11. **BID PRICES:** Bid shall be in the form of a firm unit price for each item during the contract period.

*** When Used: In annual goods contracts without a price escalation/de-escalation clause. A different version of this clause, specifically worded to fit the situation, should be used in solicitations for various types of services, and in solicitations for the lease or rental of equipment.**

12. **BLANKET FIDELITY BOND:** Contractor shall maintain a blanket fidelity bond obtained from an insurance company licensed to conduct fidelity business in the home state of the contractor and which has earned an A.M. Best Company, Inc. rating of "A" or better, as reflected in their most current publication, covering all personnel under contract to the City of Winchester, with a penalty amount of not less than \$_____, naming the City of Winchester as co-obligee. Certificate of such protection must be presented to the purchasing agency prior to the start of the service showing name of surety, limit and type of coverage, term of coverage, co-obligee provision and name and address of licensed Virginia insurance agent. The contractor agrees to maintain such bond until one year after the completion of the contract.

*** When Used: Debt collection type services. The amount to be inserted in the blank space should be based on the total value of accounts expected to be turned over to the contractor at any one time for collection and not the entire amount of the agency's outstanding accounts.**

13. **CANCELLATION OF CONTRACT:** The City reserves the right to cancel and terminate any resulting contract, in part or in whole, without penalty, upon 60 days written notice to the contractor. In the event the initial contract period is for more than 12 months, the resulting contract may be terminated by either party, without penalty, after the initial 12 months of the contract period upon 60 days written notice to the other party. Any contract cancellation notice shall not

relieve the contractor of the obligation to deliver and/or perform on all outstanding orders issued prior to the effective date of cancellation.

*** When Used: Include in all term contracts for goods or services. This clause is not appropriate for use in spot purchases.**

14. **CERTIFICATION OF MEAT PRODUCTS:** By my signature on this solicitation, I hereby certify and warrant that all products offered for delivery meet or exceed the requirements of the Federal Institutional Meat Purchase Specifications (IMPS), Virginia Department of Agriculture Regulations, Federal Food, Drug and Cosmetic Act, and the Federal Wholesome Meat Act. All products awarded and delivered against this solicitation shall be subject to inspection at destination for specification compliance.

*** When Used: All solicitations for meat products.**

15. **CERTIFIED TEST REPORT:** Each bidder shall provide a copy of a certified test report with their bid. The certified test report shall be from a recognized independent testing laboratory or manufacturer's quality control laboratory showing all test results and full compliance with the appropriate specifications indicated herein. However, the City of Winchester reserves the right to perform any tests or inspections when and as deemed necessary to verify the certified test report.

*** When Used: For solicitation of goods where a certified test report may be the only method of determining an item offered would meet specifications.**

16. **CONTRACTOR/SUBCONTRACTOR LICENSE REQUIREMENT:** By my signature on this solicitation, I certify that this firm/individual and subcontractor is properly licensed for providing the goods/services specified.

Contractor Name: _____ Subcontractor Name: _____

License # _____ Type _____

*** When Used: Include in all solicitations for specific types of services for which State statutes or regulatory agencies require contractors to be properly registered, licensed or hold a permit prior to performing such work.**

17. **CONTRACTOR REGISTRATION:** If a contract for construction, removal, repair or improvement of a building or other real property is for one hundred and twenty thousand dollars (\$120,000) or more, or if the total value of all such contracts undertaken by bidder/offeror within any 12-month period is seven hundred and fifty thousand dollars (\$750,000) or more, the bidder/offeror is required under Title 54.1-1100, *Code of Virginia* (1950), as amended, to be licensed by the State Board of Contractors a "CLASS A CONTRACTOR." If such a contract is for seventy-five hundred dollars (\$7,500) or more but less than one hundred and twenty thousand dollars (\$120,000), or if the total value of all such contracts undertaken by bidder/offeror within any 12-month period is between one hundred and fifty thousand dollars (\$150,000) and seven hundred and fifty thousand dollars (\$750,000) or more, the bidder is required to be licensed as a "CLASS B CONTRACTOR." If such a contract is for one-thousand dollars (\$1,000) or more but less than seventy-five hundred dollars (\$7,500), or if the contractor does less than \$150,000 in business in a 12-month period, the bidder is required to be licensed as a "CLASS C CONTRACTOR." The board shall require a master tradesmen license as a condition of licensure for electrical, plumbing and heating, ventilation and air conditioning contractors. The bidder/offeror shall place on the outside of the envelope containing the bid/proposal and shall place in the bid/proposal over his signature whichever of the following notations is appropriate, inserting his contractor license number:

Licensed Class A Virginia Contractor No. _____ Specialty _____

Licensed Class B Virginia Contractor No. _____ Specialty _____

Licensed Class C Virginia Contractor No. _____ Specialty _____

If the bidder/offeror shall fail to provide this information on his bid/proposal or on the envelope containing the bid/proposal and shall fail to promptly provide said contractor license number to the City of Winchester in writing when requested to do so before or after the opening of bids/proposals, he shall be deemed to be in violation of § 54.1-1115 of the *Code of Virginia* (1950), as amended, and his bid/proposal will not be considered.

If a bidder/offeror shall fail to obtain the required license prior to submission of his bid/proposal, the bid/proposal shall not be considered.

*** When Used:** Required to be used in all solicitations by the *Code of Virginia* for all construction, removal, repair or improvements to facilities to be performed by a contractor and its subcontractors. This includes almost all specialty trades, i.e., glue down carpet, painting, fencing, roofing, mechanical, plumbing, electrical, carpentry, etc. When in doubt as to whether or not this clause should be included in the solicitation, contact the Department of Professional and Occupational Regulation, State Board for Contractors, at 804-367-2785.

18. **CONTRACTOR'S TITLE TO MATERIALS:** No materials or supplies for the work shall be purchased by the contractor or by any subcontractor subject to any chattel mortgage or under a conditional sales or other agreement by which an interest is retained by the seller. The contractor warrants that he has clear title to all materials and supplies for which he invoices for payment.

*** When Used:** For use in solicitations for construction and for furnish and install equipment.

19. **DELIVERY:** State your earliest firm delivery or performance date: _____ 20____. This date may be a factor in making the award.

*** When Used:** When delivery time is critical for either goods or services.

20. **DELIVERY AND STORAGE:** It shall be the responsibility of the contractor to make all arrangements for delivery, unloading, receiving and storing materials in the building during installation. The owner will not assume any responsibility for receiving these shipments. Contractor shall check with the owner and make necessary arrangements for security and storage space in the building during installation.

*** When Used:** For furnish and install solicitations, if applicable.

21. **DELIVERY NOTIFICATION:** The City shall be notified ____ hours prior to delivery of any items so that personnel may be available to allow access to the building and verify items received. Notification shall be made to :

Name	Phone
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*** When Used:** Use in solicitations for goods if the receiving facility is not staffed at all times during normal working hours.

22. A. **PROMPT PAYMENT DISCOUNTS:** Agency will pay within ____ days after acceptance. A prompt payment discount offered for prompt payment of () calendar days or longer will be calculated in determining net low bid.

*** When Used:** When the agency knows payments can be made within the time frame specified.

- B. **SPECIAL EDUCATIONAL OR PROMOTIONAL DISCOUNTS:** The contractor shall extend any special educational or promotional sale prices or discounts immediately to the City of Winchester during the term of the contract. Such notice shall also advise the duration of the specific sale or discount price.

*** When Used:** This clause should be considered for use when soliciting bids for products where it is known that vendors or manufacturers have promotional sales opportunities.

23. **EXTRA CHARGES NOT ALLOWED:** The bid price shall be for complete installation ready for the City of Winchester's use, and shall include all applicable freight and installation charges; extra charges will not be allowed.

*** When Used:** For furnish and install solicitations. Also may be used for inside delivery by changing the wording.

24. **FINAL INSPECTION:** At the conclusion of the work, the contractor shall demonstrate to the authorized owners representative that the work is fully operational and in compliance with contract specifications and codes. Any deficiencies shall be promptly and permanently corrected by the contractor at the contractor's sole expense prior to final acceptance of the work.

*** When Used:** For furnish and install solicitations.

25. **FLAME RETARDANT CERTIFICATE:** Each bidder/offeror shall submit a certification in writing with their bid/proposal that all materials used in fabricating draperies or curtains are inherently flame retardant or have been treated to meet NFPA Standard 701 (latest version), large or small scale test.

*** When Used: Must be used in solicitations for draperies or curtains that will be installed in office spaces and dormitories, but not state-owned housing.**

26. **IDENTIFICATION OF BID/PROPOSAL ENVELOPE:** If a special envelope is not furnished, or if return in the special envelope is not possible, the signed bid/proposal should be returned in a separate envelope or package, sealed and identified as follows:

From: _____
Name of Bidder/Offeror Due Date Time

_____ _____
Street or Box Number IFB No./RFP No.

_____ _____
City, State, Zip Code IFB/RFP Title

Name of Contract/Purchase Officer or Buyer _____

The envelope should be addressed as directed on Page 1 of the solicitation.

If a bid/proposal not contained in the special envelope is mailed, the bidder or offeror takes the risk that the envelope, even if marked as described above, may be inadvertently opened and the information compromised which may cause the bid or proposal to be disqualified. Bids/proposals may be hand delivered to the designated location in the office issuing the solicitation. No other correspondence or other bids/proposals should be placed in the envelope.

*** When Used: For use in solicitations for which the purchasing agency has not furnished a special bid/proposal return envelope or the envelope furnished is not adequate. If the solicitation is a combined two-step IFB, the bidders should be instructed to identify the outside of both the technical proposal and the pricing envelopes to show the bidder's name, company name and address, and bid reference number.**

27. **INDEMNIFICATION:** Contractor agrees to indemnify, defend and hold harmless the City of Winchester, its officers, agents, and employees from any claims, damages and actions of any kind or nature, whether at law or in equity, arising from or caused by the use of any materials, goods, or equipment of any kind or nature furnished by the contractor/any services of any kind or nature furnished by the contractor, provided that such liability is not attributable to the sole negligence of the using agency or to failure of the using agency to use the materials, goods, or equipment in the manner already and permanently described by the contractor on the materials, goods or equipment delivered.

*** When Used: For all contracts involving substantial risk of third party injuries/claims. Authorization to use this clause must be granted by the Risk Manager or be directed to the City Attorney.**

28. **INSPECTION OF JOB SITE:** My signature on this solicitation constitutes certification that I have inspected the job site and am aware of the conditions under which the work must be accomplished. Claims, as a result of failure to inspect the job site, will not be considered by the City of Winchester.

*** When Used: Should be used in furnish and install, services and non-capital outlay construction projects.**

29. **INSTALLATION:** All items must be assembled and set in place, ready for use. All crating and other debris must be removed from the premises.

*** When Used: For inside delivery of goods which require unpacking and assembly.**

30. **INSURANCE, MONEY AND SECURITIES:** Contractor shall maintain a Broad Form Money and Securities Insurance Policy obtained from an insurance company licensed to conduct crime insurance business in the home state of the contractor and which has earned an A.M. Best Company, Inc. rating of A or better, as reflected in their most current

publication, covering all money and property entrusted to the contractor by the City of Winchester, with limits of coverage of not less than \$_____ for Loss Inside the Premises Coverage and not less than \$_____ for Loss Outside the Premises Coverage, naming the City of Winchester as additional named insured with respect to this contract. Certificate of such protection must be presented to the purchasing agency prior to the start of the service showing name of insurance company, limits and type of coverage, term of coverage, additional insured provision and name and address of licensed insurance agent. The contractor agrees to maintain such policy until the completion of the contract and all money and property of the City of Winchester is remitted to the City of Winchester.

*** When Used: Required for contracts covering the collection, handling, safekeeping, and/or transporting state monies or securities. The amounts to be entered by the agency should be equal to the estimated maximum amount of monies or securities that would be in the contractor's possession at any one time.**

31. **LABELING OF HAZARDOUS SUBSTANCES:** If the items or products requested by this solicitation are "Hazardous Substances" as defined by § 1261 of Title 15 of the United States Code (U.S.C.) or "Pesticides" as defined in § 136 of Title 7 of the United States Code, then the bidder/offeror, by submitting his bid/proposal, certifies and warrants that the items or products to be delivered under this contract shall be properly labeled as required by the foregoing sections and that by delivering the items or products the bidder/offeror does not violate any of the prohibitions of Title 15 U.S.C. § 1263 or Title 7 U.S.C. § 136.

*** When Used: Must be included in all solicitations for the purchase of chemicals or compounds which may contain toxic or hazardous substances, i.e., cleaning, janitorial supplies, pesticides, chemicals of all types, etc. (see clause #35).**

32. **LIMITATION OF LIABILITY:**

- A. To the maximum extent permitted by applicable law, the contractor will not be liable under this contract for an indirect, incidental, special or consequential damages, or damages from loss of profits, revenue, data or use of the supplies, equipment and/or services delivered under this contract. This limitation of liability will not apply, however, to liability arising from: (a) personal injury or death; (b) defect or deficiency caused by willful misconduct or negligence on the part of the contractor; or (c) circumstances where the contract expressly provides a right to damages, indemnification or reimbursement.

*** When Used: This clause should be used on an exception basis and only when it is anticipated that liability may be an issue and the risk and liability to the City of Winchester is negligible. In such cases, the above clause should be included in written solicitations and contracts, as well as procurements made on a sole source or emergency basis. Examples are: office supplies and equipment, paper products, printing, furniture, audio/visual equipment, consultant services, media services, equipment maintenance, etc. Prior review by risk management and/or legal counsel is recommended before including in a solicitation or contract. Note: The clause may be modified, as applicable, depending on the intended use of the goods and/or services.**

- B. **LIMITATION OF LIABILITY:** To the maximum extent permitted by applicable law, the contractor's liability under this contract for loss or damages to government property caused by use of any defective or deficient supplies, products, equipment and/or services delivered under this contract shall not exceed the greater of \$_____ or _____ times the amount of money paid to the contractor under this contract during the twelve month period preceding the event or circumstance giving rise to such liability. The contractor will not be liable under this contract for any indirect, incidental, special or consequential damages, or damages from loss of profits, revenue, data or use of the supplies, equipment and/or services delivered under this contract. The above limitation of liability is per incident. The limitation and exclusion of damages in the foregoing sentences will not apply, however, to liability arising from: (a) personal injury or death; (b) defect or deficiency caused by willful misconduct or negligence on the part of the contractor; or (c) circumstances where the contract expressly provides a right to damages, indemnification or reimbursement.

*** When Used: This clause should be used on an exception basis and only when it is anticipated that liability will be an issue and the risk to the City of Winchester may be extensive. In such cases, the above clause should be included in written solicitations and contracts, as well as procurements made on a sole source or emergency basis. Examples are: software; hardware; two-way communication devices; telephone equipment; medical, dental and laboratory equipment and supplies; elevator maintenance and inspection services; food service; medical service, etc. Caution: The potential risk must be calculated in dollars and indicated in the first blank. Delete the remaining part of the sentence. If the risk value cannot be determined within a reasonable amount and the contract is for indefinite quantity (e.g., annual contract),**

estimate the approximate annual value and fill in the dollar amount. Enter a multiplication factor in the second blank, such as two (2) or some other reasonable number. Prior review by risk management and/or legal counsel is recommended before including in a solicitation or contract. The clause may be modified, as applicable, depending on the intended use of the goods and/or services.

33. **LIQUIDATED DAMAGES:** (Note: Review the guidance contained in the General Comments and Procedures below before deciding to include one of the following clauses in a solicitation.

- A. **LIQUIDATED DAMAGES, GOODS AND NONPROFESSIONAL SERVICES:** Delivery is required not later than _____. It is understood and agreed by the bidder/offeror that time is of the essence in the delivery of supplies, services, materials, or equipment of the character and quality specified in the bid/proposal document. In the event these specified supplies, services, materials, or equipment are not delivered by the date specified there will be deducted, not as a penalty but as liquidated damages, the sum of \$_____ per day for each and every calendar day of delay beyond the time specified; except that if the delivery be delayed by any act, negligence, or default on the part of the City of Winchester, public enemy, war, embargo, fire, or explosion not caused by the negligence or intentional act of the contractor or his supplier(s), or by riot, sabotage, or labor trouble that results from a cause or causes entirely beyond the control or fault of the contractor or his supplier(s), a reasonable extension of time as the procuring public body deems appropriate may be granted. Upon receipt of a written request and justification for any extension from the contractor, the purchasing office may extend the time for performance of the contract or delivery of goods herein specified, at the purchasing office's sole discretion, for good cause shown.

*** When Used:** For critical delivery of goods or services. The required delivery date and the dollar amount must be filled in by the agency.

- B. **LIQUIDATED DAMAGES, FURNISH AND INSTALL:** Work shall begin ____ calendar days after receipt of purchase order or contract and all work shall be completed in ____ calendar days. It is hereby understood and agreed by the bidder that time is of the essence in the delivery of supplies, services, materials, or equipment of the character and quality specified in the bid document. In the event these specified supplies, services, materials, or equipment are not delivered by the date specified, there will be deducted, not as a penalty but as liquidated damages, the sum of \$_____ per day for each and every calendar day of delay beyond the time specified; except that if the delivery be delayed by any act, negligence, or default on the part of the City of Winchester, public enemy, war, embargo, fire, or explosion not caused by the negligence or intentional act of the contractor or his supplier(s), or by riot, sabotage, or labor trouble that results from a cause or causes entirely beyond the control or fault of the contractor or his supplier(s), a reasonable extension of time as the procuring public body deems appropriate may be granted. Upon receipt of a written request and justification for an extension from the contractor, the purchasing office may extend the time for performance of the contract or delivery of goods herein specified at the purchasing office's sole discretion for good cause shown.

*** When Used:** For furnish and install contracts covering modifications, repair and other non-capital outlay construction-type contracts. The dollar amount must be filled in by the agency. The two blanks for the number of calendar days may be filled in by the agency prior to issuing the solicitation or the bidder/offeror may be required to fill in the number of days with the bid/proposal. The dollar amount must be reasonable.

NOTE: GENERAL COMMENTS:

These clauses are not to be used as a penalty, but as a means to assess damages when both (1) the time of delivery or performance is such an important factor in the award of the contract that the City of Winchester may reasonably expect to suffer damage if the delivery or performance is delinquent, and (2) the extent or amount of such damage would be difficult or impossible to ascertain or prove. In deciding whether to include a liquidated damages clause in a contract, the purchase officer should consider the probable effect on such matters as pricing, competition, and the costs and difficulties of contract administration.

When a liquidated damages clause is to be used in a contract, the applicable clause and appropriate rate(s) of liquidated damages shall be included in the solicitation. The rate of liquidated damages used must be reasonable and considered on a case-by-case basis since liquidated damages fixed without any reference to probable actual damages may be held to be a penalty, and therefore unenforceable.

When a liquidated damages clause is used in a construction, modification, or repair contract, the rate(s) of liquidated damages to be assessed against the contractor should be for each day of delay and the rate(s) should,

as a minimum, cover the estimated cost of inspection and superintendence for each day of delay in completion. Whenever the City of Winchester will suffer other specific losses due to the failure of the contractor to complete the work on time, the rate(s) should also include an amount for these items. Examples of specific losses are:

- (1) The cost of substitute facilities;
- (2) The rental of buildings and/or equipment.

ASSESSMENT PROCEDURES:

If a liquidated damages clause is included in a contract and the contractor is late or behind schedule and the delay is not an excusable one, the purchase officer should (1) issue a Notice of Contract Deficiency or "Cure Letter" to the contractor (see Chapter 10, Contract Administration); and (2) in addition, if there is a performance bond, send a copy of the cure letter to the bonding company. If the contractor does not comply with the cure letter, notify the bonding company that they are responsible to complete the contract and at the same time, terminate the contract for default (see Chapter 10, Contract Administration).

If there is no performance bond with the contract, (1) send a cure letter to the contractor. If the contractor does not correct the problem, issue a termination for default letter and re-bid the requirement. Assess liquidated damages against the contractor from the date the project was to be completed, as stated in the liquidated damages clause, to the date of the termination of default letter. In addition, any excess costs encountered in the re-purchase action may also be held against the defaulted contractor.

- 34. **MAINTENANCE MANUALS:** The contractor shall provide with each piece of equipment an operations and maintenance manual with wiring diagrams, parts list, and a copy of all warranties.

*** When Used:** For solicitations to purchase or furnish and install major equipment or systems.

- 35. **MATERIAL SAFETY DATA SHEETS:** Material Safety Data Sheets and descriptive literature shall be provided with the bid/proposal for each chemical and/or compound offered. Failure on the part of the bidder/offeror to submit such data sheets may be cause for declaring the bid/proposal as nonresponsive.

*** When Used:** Must be used for the purchase of all chemicals or compounds which may contain toxic or hazardous substances, i.e., cleaning, janitorial supplies, chemicals of all types (See clause #31).

- 36. This section intentionally left blank

- 37. **NAME OF MANUFACTURER AND SHIPPING POINT:** Each bidder/offeror shall supply in the space below the name and address of the manufacturer of each item offered and the shipping point.

ITEM NUMBER(S): _____
MANUFACTURER: _____
ADDRESS: _____

SHIPPING POINT: _____

*** When Used:** For spot purchases or annual contracts for goods if the agency desires this information.

- 38. **NEGOTIATION WITH THE LOWEST BIDDER:** Unless all bids are cancelled or rejected, the City of Winchester reserves the right granted by § 2.2-4318 of the *Code of Virginia* to negotiate with the lowest responsive, responsible bidder to obtain a contract price within the funds available to the agency whenever such low bid exceeds the agency's available funds. For the purpose of determining when such negotiations may take place, the term "available funds" shall mean those funds which were budgeted by the agency for this contract prior to the issuance of the written Invitation for Bids. Negotiations with the low bidder may include both modifications of the bid price and the Scope of Work/Specifications to be performed. The agency shall initiate such negotiations by written notice to the lowest responsive, responsible bidder that its bid exceeds the available funds and that the agency wishes to negotiate a lower contract price. The times, places, and manner of negotiating shall be agreed to by the agency and the lowest responsive, responsible bidder.

*** When Used:** This clause may be used in those circumstances where, due to unknown cost factors, there may be a need to negotiate to remain within available fund limitation. For use only in an Invitation for Bids, for goods or services. This clause shall not be used as a matter of routine.

39. **ORDERING OPTION:** The City of Winchester, may during the first sixty (60) days after this contract is awarded, with the concurrence of the contractor, place additional orders under the contract at the original unit price through the issuance of separate purchase orders. The aggregate of such additional orders shall not exceed 100% of the quantity originally stated in the contract.

*** When Used:** This can be used when purchasing goods on a spot basis and the contracting officer anticipates that there might be an additional requirement for the same goods within the next sixty (60) days. When it is used in a solicitation, a statement on the face of the invitation should direct the bidder's attention to this clause. It is not to be used for term type contracts.

40. **PERFORMANCE AND PAYMENT BONDS:** The successful bidder shall deliver to the purchasing office executed City of Winchester of Virginia Standard Performance and Labor and Material Payment Bonds, each in the sum of the contract amount, with the City of Winchester as obligee. The surety shall be a surety company or companies approved by the State Corporation Commission to transact business in the Commonwealth of Virginia. No payment shall be due and payable to the contractor, even if the contract has been performed in whole or in part, until the bonds have been delivered to and approved by the purchasing office. Standard bond forms will be provided by the purchasing office prior to or at the time of award.

*** When Used:** Must be used in all solicitations for construction which exceed \$25,000.

41. **PREBID/PREPROPOSAL CONFERENCE - MANDATORY/OPTIONAL:** (Note: Select one of the following two clauses if a mandatory or optional prebid or preproposal conference is desired and include it in the solicitation.)

- A. **MANDATORY PREBID/PREPROPOSAL CONFERENCE:** A mandatory prebid/preproposal conference will be at _____ (time and date) _____ at the _____ (place) _____. The purpose of this conference is to allow potential bidders/offerors an opportunity to present questions and obtain clarification relative to any facet of this solicitation.

Due to the importance of all bidders/offerors having a clear understanding of the specifications/scope of work and requirements of this solicitation, attendance at this conference will be a prerequisite for submitting a bid/proposal. Bids/Proposals will only be accepted from those bidders/offerors who are represented at this prebid/preproposal conference. Attendance at the conference will be evidenced by the representative's signature on the attendance roster. No one will be admitted after _____ (time) _____.

Bring a copy of the solicitation with you. Any changes resulting from this conference will be issued in a written addendum to the solicitation.

*** When Used:** For use in complex procurements when clarification of the contents of the solicitation to potential bidders/offerors will greatly enhance understanding of what is sought to be procured. **CAUTION:** Use of this clause may limit competition because only those that attend may submit a bid/proposal. Use wording appropriate to the type of solicitation, i.e., prebid, bid, bidder in an IFB and preproposal, proposal, offeror in an RFP.

- B. **OPTIONAL PREBID/PREPROPOSAL CONFERENCE:** An optional prebid/preproposal conference will be held at _____ (time) and (date) _____ at the _____ (place) _____. The purpose of this conference is to allow potential bidders/offerors an opportunity to present questions and obtain clarification relative to any facet of this solicitation.

While attendance at this conference will not be a prerequisite to submitting a bid/proposal, bidders/offerors who intend to submit a bid/proposal are encouraged to attend. Bring a copy of the solicitation with you. Any changes resulting from this conference will be issued in a written addendum to the solicitation.

*** When Used:** For use in less complex procurements when vendor input is desired. Bidders/Offerors that do not attend may still submit a bid/proposal. Use wording appropriate to the type of solicitation.

42. **PREVENTIVE MAINTENANCE:** The contractor shall provide necessary preventive maintenance, required testing and inspection, calibration and/or other work necessary to maintain the equipment in complete operational condition during the warranty period.

*** When Used: For equipment purchases only in conjunction with a warranty clause which requires preventive maintenance during the warranty period.**

43. **PRICE ESCALATION/DE-ESCALATION:** Price adjustments may be permitted for changes in the contractor's cost of materials not to exceed the increase in the following index/indices: _____. No price increases will be authorized for ___ calendar days after the effective date of the contract. Price escalation may be permitted only at the end of this period and each ___ days thereafter and only where verified to the satisfaction of the purchasing office. However, "across the board" price decreases are subject to implementation at any time and shall be immediately conveyed to the City of Winchester.

Contractor shall give not less than 30 days advance notice of any price increase to the purchasing office. Any approved price changes will be effective only at the beginning of the calendar month following the end of the full 30 day notification period. The contractor shall document the amount and proposed effective date of any general change in the price of materials. Documentation shall be supplied with the contractor's request for increase which will: (1) verify that the requested price increase is general in scope and not applicable just to the City of Winchester of Virginia; and (2) verify the amount or percentage of increase which is being passed on to the contractor by the contractor's suppliers.

The purchasing office will notify the using agencies and contractor in writing of the effective date of any increase which it approves. However, the contractor shall fill all purchase orders received prior to the effective date of the price adjustment at the old contract prices. The contractor is further advised that decreases which affect the cost of materials are required to be communicated immediately to the purchasing office.

*** When Used: For annual goods contracts where, because of rapidly changing market conditions, a firm fixed price cannot be secured for one (1) year or more. Enter the appropriate number of days in the blank space, such as 30, 60, 90 or 180 days, depending on the commodity and how frequently costs change. Examples of indices to be used are the Producer Price Index (PPI) and the Consumer Price Index (CPI).**

44. **PRIME CONTRACTOR RESPONSIBILITIES:** The contractor shall be responsible for completely supervising and directing the work under this contract and all subcontractors that he may utilize, using his best skill and attention. Subcontractors who perform work under this contract shall be responsible to the prime contractor. The contractor agrees that he is as fully responsible for the acts and omissions of his subcontractors and of persons employed by them as he is for the acts and omissions of his own employees.

*** When Used: For use in solicitations to furnish and install goods or provide services when subcontracting will be permitted.**

45. **PRINTING:** (Note: Select any or all of the following clauses, as may be appropriate, and include in solicitations for printing.)

A. **OVERRUNS/UNDERRUNS:** Bids for printing will be rejected if the quoted overrun cost equals or exceeds the base lot price quoted for the equivalent incremental unit quantity. On bids for multiple part forms, envelopes, and signage, the additional overrun quoted shall not exceed the base lot price quoted for the equivalent incremental quantity. The agency may at its discretion accept an underrun, provided credit is allowed the agency at the full base price per unit for the quantity of the underrun.

*** When Used: Must be included in all printing solicitations.**

B. **ACCEPTABLE MILL BRANDS:** Only those papers listed in the latest edition of The Competitive Grade Finder Directory fine paper directory book, will be considered as equal.

*** When Used: Whenever a specific paper is specified along with the phrase "or equal."**

C. **OWNERSHIP OF PRINTING MATERIALS:** All artwork, camera-ready copy, negative, dies, photos, and similar materials used to produce a printing job shall become the property of the City of Winchester. Any

furnished materials shall remain the property of the City of Winchester. All such items and materials shall be delivered to the ordering agency in usable condition after completion of the work, and prior to submission of the invoice for payment.

*** When Used: Must be included in all printing solicitations.**

- D. **PRINTING PICK-UPS/DELIVERIES:** Contractor shall be responsible for all pick-ups and deliveries of all materials.

*** When Used: Include in all printing solicitations when the contractor will be required to pick up artwork, negatives, etc. for the job and deliver the finished product to the agency.**

- E. **QUALITY COLOR PRINTING:** Contractor shall analyze each four-color subject and make separations individually. Contractor shall allow for color correction, dot etching, etc., in order to achieve top-quality production from each separation made.

*** When Used: Include in all printing solicitations involving four-color process of more than one picture.**

46. **PRINTING DEFINITIONS:** (Note: Include one of the appropriate definitions in the solicitation whenever any of the following terms are used to describe the quality of the printing requirement.)

- A. **CLASS 1 - CRITICAL QUALITY PRINTING:** This class shall be used for four-color process printing where critical color matches are necessary or where engraved and/or embossed invitations are required. Typical examples: matching artist's original paintings or sculptures, or product colors so that they represent true colors or materials used in creating the original are accurately represented, and reproduction of medical slides where true color may be critical. This is a step above "pleasing colors." Finishing and bindery operations shall be of this same critical quality.

- B. **CLASS 2 - EXCELLENT QUALITY PRINTING:** This class shall be used when good clean, crisp reproduction is required. One color or multiple color jobs may be classified as "Class 1." Four-color process subjects shall have pleasing color matches with good skin tones; some color correction may be necessary. PMS color matches may be required. Very fine lines and drawings may be required. Normally half-tones or screen tints will require 133, 150, or 200 line screens. There is to be large reverse areas, and/or large solid areas where good even ink coverage is necessary. Because of the overall design, very accurate registration is required. Camera-ready copy is generally furnished. Metallic inks may be used. Finishing and bindery operations shall be of the same excellent quality.

- C. **CLASS 3 - GOOD QUALITY PRINTING:** This class shall be used for the majority of black and white or one color jobs where no critical registration is required or when no colors overprint. Multiple color jobs may be classified as "Class 2." Original copy is uniform and may have medium lines and drawings, medium-sized halftones and screens, medium-sized reverses and solid areas. Normally halftones and screen tints would be produced with 120 or 133 line screens. Metallic inks and process work are not generally included in the class. Normally metal plates and negatives are required. No cut lines or spots are acceptable. Finishing and bindery operations shall be of the same good quality.

- D. **CLASS 4 - MEDIUM QUALITY PRINTING:** This class denotes the least expensive kind of printing and shall be used for short-run, reproduction duplicator-type work where electrostatic or other direct plate methods are acceptable. Original copy is usually type written and may have coarse lines, drawings, and small reverses or solid areas. Evenness of ink coverage is not required. Coarse screen halftones or coarse screens may be used. No colors overprint each other and no metallic inks are used. Finishing and bindery operations would normally be simple stapling or punching.

47. **PRODUCT INFORMATION:** The bidder/offeror shall clearly and specifically identify the product being offered and enclose complete and detailed descriptive literature, catalog cuts and specifications with the bid/proposal to enable the City of Winchester to determine if the product offered meets the requirements of the solicitation. Failure to do so may cause the bid/proposal to be considered nonresponsive.

*** When Used: For solicitations to furnish and install or deliver goods when detailed specifications are required to properly evaluate items offered.**

48. **QUANTITIES:** Quantities set forth in this solicitation are estimates only, and the contractor shall supply at bid prices actual quantities as ordered, regardless of whether such total quantities are more or less than those shown.
*** When Used: For term contract solicitations only.**

49. **RECYCLED PAPER:** The agency (or institution name) in determining the award of any contract for paper and paper products, shall procure using competitive bidding and shall award to the lowest responsive and responsible bidder bidding recycled paper and paper products of a quality suitable for the purpose intended, and in accordance with current EPA procurement guidelines for paper and paper products, so long as the bid price is not more than ten percent (10%) greater than the bid price of the lowest responsive and responsible bidder offering a product that does not contain recycled materials.

Bidder agrees to furnish upon request, a minimum of fifty (50) sheets of paper stock offered. Paper stock to be used for testing on agency (or institution name) equipment (may specify equipment that paper will be tested on) to ensure compatibility. If requested, samples must be delivered within five (5) days.

*** When Used: Use in solicitations for paper and paper products.**

50. **REFERENCES:** Bidders shall provide a list of at least 3 references where similar goods and/or services have been provided. Each reference shall include the name of the organization, the complete mailing address, the name of the contact person and telephone number.

	<u>ORGANIZATION</u>	<u>ADDRESS</u>	<u>CONTACT PERSON</u>	<u>TELEPHONE</u>
1.	_____	_____	_____	_____
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____

*** When Used: For furnish and install solicitations where contractor must have knowledge of proper installation or for the procurement of complex goods or services.**

51. **RENEWAL OF CONTRACT:** (NOTE: A term contract may not be renewed unless a renewal clause is included in the solicitation. Select one of the following clauses if an option to renew the contract beyond the original period of the contract is desired. Select either "one year" or complete the blank, indicating the number of "successive one year periods" the contract may be renewed.)

A. **RENEWAL OF CONTRACT:** This contract may be renewed by the City of Winchester upon written agreement of both parties for (one year)/(____ successive one year periods), under the terms of the current contract, and at a reasonable time (approximately 90 days) prior to the expiration.

*** When Used: Include in solicitations for term contracts for goods and services, if desired, to permit renewal of the contract for a specific period of time, i.e., one year, two successive one-year periods, etc., at the same price(s), terms and conditions as in the original contract. Renegotiation of the price(s), terms and conditions is not permitted. If market prices are not expected to remain stable for goods, the Price Escalation/De-escalation clause (No. 43) should be considered for use with this provision.**

B. **RENEWAL OF CONTRACT:** This contract may be renewed by the City of Winchester for (one year)/(____ successive one year periods) under the terms and conditions of the original contract except as stated in 1. and 2. below. Price increases may be negotiated only at the time of renewal. Written notice of the City of Winchester's intention to renew shall be given approximately 90 days prior to the expiration date of each contract period.

1. If the City of Winchester elects to exercise the option to renew the contract for an additional one-year period, the contract price(s) for the additional one year shall not exceed the contract price(s) of the original contract increased/decreased by more than the percentage increase/decrease of the _____ category of the CPI-W section of the Consumer Price Index of the United States Bureau of Labor Statistics for the latest twelve months for which statistics are available.

2. If during any subsequent renewal periods, the City of Winchester elects to exercise the option to renew the contract, the contract price(s) for the subsequent renewal period shall not exceed the contract price(s) of the

previous renewal period increased/decreased by more than the percentage increase/decrease of the _____ category of the CPI-W section of the Consumer Price Index of the United States Bureau of Labor Statistics for the latest twelve months for which statistics are available.

- **When Used:** For service contracts, use of this clause permits renewal of a contract with an increase/decrease in the labor rate portion only of the original contract. This clause should only be used when renewal of the contract may be desirable and price adjustments may be necessary. Select the most appropriate category that would apply to the contract and fill in the blank. If only a one-year renewal is desired, delete paragraph 2. of the clause. For recent Consumer Price Index statistics, contact the Bureau of Labor Statistics at their website <http://stats.bls.gov/news.release/cpi.toc.htm> or by telephone at 202-691-7000. A link to the Bureau of Labor Statistics is on the DGS/DPS website at www.dgs.state.va.us/dps. Click on the "references" tab along the top of the screen and a link to their web site is listed under "Bureau of Labor Statistics."

52. **SECURITY LICENSE:** In accordance with § 9.1-139 of the *Code of Virginia* (1950), the bidder/offeree shall be licensed by the Department of Criminal Justice Services for solicitations which include the following work: installation, service, maintenance, or design of security equipment; security officer service; and/or private investigator service. Licenses must be obtained prior to submitting a bid/offer. The bidder/offeree shall place their license number in the space provided below:

Private Security Services Business License Number: _____

For assistance, bidders/offerees may contact the Department of Criminal Justice Services at 804-786-0460.

*** When used:** In all solicitations for the installation, service, maintenance, or design of security equipment, security officer service, central station alarm condition monitoring service, and/or private investigator service require the contractor to have a Private Security Services Business License issued by the Department of Criminal Justice Services under § 9.1-139 of the *Code of Virginia*.

53. **SUBCONTRACTS:** No portion of the work shall be subcontracted without prior written consent of the purchasing agency. In the event that the contractor desires to subcontract some part of the work specified herein, the contractor shall furnish the purchasing agency the names, qualifications and experience of their proposed subcontractors. The contractor shall, however, remain fully liable and responsible for the work to be done by its subcontractor(s) and shall assure compliance with all requirements of the contract.

*** When Used:** In solicitations to furnish and install or specialty services when subcontracting will be permitted only upon prior approval of the purchasing agency. Use also when a contractor's or a subcontractor's license is required to perform the specialty service.

54. **USE OF RECYCLED MATERIALS:** Notwithstanding the prohibition against used, damaged or obsolete items, vendors are encouraged to use secondary or recycled materials in the manufacture of products to the maximum extent practicable without jeopardizing the performance or intended end use of the product unless such use is precluded due to health and welfare or safety requirements or product specifications contained herein. Please provide the following information in this regard:

1. Do any of the goods offered contain recycled materials? ____ Yes ____ No.

2. If so, please qualify the recycled material content. _____.

*** When Used:** Include in solicitations for goods that have a high probability for the use of recycled materials.

55. **WARRANTY:** All materials and equipment shall be fully guaranteed against defects in material and workmanship for a period of _____ following date of delivery. Should any defect be noted by the owner, the Purchasing Office will notify the contractor of such defect or non-conformance. Notification will state either (1) that the contractor shall replace or correct, or (2) the owner does not require replacement or correction, but an equitable adjustment to the contract price will be negotiated. If the contractor is required to correct or replace, it shall be at no cost to the City of Winchester and shall be subject to all provisions of this clause to the same extent as materials initially delivered. If the contractor fails or refuses to replace or correct the deficiency, the office issuing the purchase order may have the materials corrected or replaced with similar items and charge the contractor the costs occasioned thereby or obtain an equitable adjustment in the contract price.

*** When Used: Include in solicitations to furnish and install or deliver goods when the procuring agency wants to specify the length of time the warranty is to run; i.e., equipment 1 year, compressor 5 years, piano 10 years, etc.**

56. **WARRANTY (COMMERCIAL):** The contractor agrees that the goods or services furnished under any award resulting from this solicitation shall be covered by the most favorable commercial warranties the contractor gives any customer for such goods or services and that the rights and remedies provided therein are in addition to and do not limit those available to the City of Winchester by any other clause of this solicitation. A copy of this warranty should be furnished with the bid/proposal.

*** When Used: Include in solicitations for goods, furnish and install or services when commercial warranty provisions for a particular item or service are acceptable.**

57. **WORK SITE DAMAGES:** Any damage to existing utilities, equipment or finished surfaces resulting from the performance of this contract shall be repaired to the City of Winchester's satisfaction at the contractor's expense.

*** When Used: Include in solicitations to furnish and install equipment. May also be used in solicitations for services such as moving, maintenance, removal of equipment, non-capital outlay construction projects, etc.**

58. **WORK ESTIMATES (TIME AND MATERIAL CONTRACTS):** Under this time and material contract, the contractor shall furnish the agency with a non-binding written estimate of the total costs to complete the work required. The estimate must include the labor category(ies), the contractor's hourly rates specified in the contract, and the total material cost. Material costs shall be billed at contractor's actual invoice costs (contractor shall furnish copies of all invoices for materials) or discount off the list price, whichever is specified in the contract. If the agency determines that the estimated price is not fair and reasonable, the agency has the right to ask the contractor to reevaluate the estimate. If the revised estimate is determined to be not fair and reasonable, the agency reserves the right to obtain additional quotes from other vendors. A work order will be issued to the contractor, as the authority to proceed with the work, which will incorporate the contractor's estimate and the terms and conditions of the contract. The contractor and his/her personnel shall log in with the designated contract administrator each day before and after work to confirm labor hours.

*** When Used: This clause may be used for all time and material contracts where the contractor furnishes estimates prior to starting work for particular projects. Agencies should take the necessary steps to ensure that it is protected from those cases where a contractor submits a low estimate and the invoice is much higher. Use of this clause will provide that protection as long as the contractor is held to the terms of this clause.**

59. This section intentionally left blank

60. **NONPROFIT SHELTERED WORKSHOPS AND NONPROFIT ORGANIZATIONS:**

- A. Where it is practicable for any portion of the awarded contract to be subcontracted, the contractor is encouraged to offer such business to nonprofit sheltered workshops and nonprofit organizations serving the handicapped. A list of nonprofit sheltered workshops and nonprofit organizations of Virginia serving the handicapped can be found at www.vadrs.org.
- B. Each prime contractor who is awarded a contract where using a non profit sheltered workshop or nonprofit organization serving the handicapped is a condition of the award, shall deliver to the agency or institution, on or before request for final payment, evidence and certification of compliance. When a portion of the contract has been subcontracted to these organizations and upon completion of the contract, the contractor agrees to furnish the purchasing office, at a minimum, the following information: name of nonprofit sheltered workshop or nonprofit organization serving the handicapped, telephone number, total dollar amount subcontracted, and type of product/service provided. Final payment under the contract may be withheld until such certification is delivered or other appropriate remedies may be assessed in lieu of withholding such payment.

*** When Used: Use paragraph A. if the solicitation involves the packaging or assemblage of goods where the individual item weighs less than 50 pounds and can be performed by a nonprofit sheltered workshop or nonprofit organization serving the handicapped. Use paragraph B. in solicitations for goods, and nonprofessional services, that involves the packaging or assemblage of goods where the individual items weighs less than 50 pounds when a use of a nonprofit sheltered workshop or nonprofit organization serving the handicapped is a condition of the award (see 2.2 c.).**

**ADDITIONAL TERMS AND CONDITIONS FOR NON-CAPITAL
OUTLAY CONSTRUCTION PROJECTS**

City departments use the following Additional Terms and Conditions in all solicitations for non-capital outlay projects that involve building, altering, repairing, improving or demolishing any structure, building or paving project (other than highways), and any draining, dredging, excavation, grading or similar work upon real property which do not require the use of capital outlay procedures. These Additional Terms and Conditions shall be included in the IFB in addition to those listed in Appendix B, Section I. The *Virginia Public Procurement Act (VPPA)* requires the use of competitive sealed bidding for construction projects unless the use of competitive negotiation can be justified under the provisions of § 2.2-4303D of the *Code of Virginia*.

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1. **DEFINITIONS:** Whenever used in this solicitation or in the contract documents, the following terms have the meanings indicated, which are applicable to both the singular and plural and the male and female gender thereof:
- (a) **Agency:** The term, agency, unless otherwise indicated, shall mean the owner.
 - (b) **City:** The term "City" shall mean the owner which is the City of Winchester through the governing Body, the City Manager, or other agent with authority to execute the contract for the institution or agency involved. The City's agent is the official with the authority to sign the contract on behalf of the City.
 - (c) **Construction:** As used in these documents shall include new construction, reconstruction, renovation, restoration, major repair, demolition and all similar work upon buildings and ancillary facilities owned or to be acquired by the Commonwealth and any draining, dredging, excavation, grading, or similar work upon real property.
 - (d) **Contractor:** The person, firm or corporation with whom the owner has entered into a contractual agreement and includes the plural number and the feminine gender when such are named in the contract as the contractor.
 - (e) **Defective:** An adjective which when modifying the word work, refers to work that is unsatisfactory, faulty, or deficient, or does not conform to the contract documents, or does not meet the requirements of any inspections, standard, test, or approval referred to in the contract documents, or has been damaged prior to final payment.

- (f) **Emergency:** Any unforeseen combination of circumstances or a resulting state that poses imminent danger to health, life, or property.
- (g) **Final Acceptance:** The agency's acceptance of the project from the contractor upon confirmation from the project inspector and the contractor that the project is totally complete in accordance with the contract requirements and that all defects have been eliminated. Final acceptance is confirmed by the making of final payment of the contract amount including any change orders or adjustment thereto.
- (h) **Notice:** All written notices, demands, instructions, claims, approvals, and disapprovals required to obtain compliance with the contract requirements. Any written notice by either party to the contract shall be sufficiently given if delivered to or at the last known business address of the person, firm or corporation constituting the party to the contract, or to his, their or its authorized agent, representative or officer, or when enclosed in a postage prepaid envelope addressed to such last known business address and deposited in a United States mailbox.
- (i) **Notice to Proceed:** A written notice given by the owner to the contractor fixing the date on which the contract time will commence for the contractor to begin the prosecution of the work in accordance with the requirements of the contract documents.
- (j) **Owner:** The City of Winchester, i.e., an department, agency, institution, or department, with whom the contractor has entered into a contract and for whom the work or services is to be provided.
- (k) **Project Inspector:** One or more individuals employed by the owner to inspect the work and/or to act as clerk of the works to the extent required by the owner. The owner shall notify the contractor in writing of the appointment of such project inspector(s).
- (l) **Provide:** Shall mean furnish and install ready for its intended use.
- (m) **Submittal:** All drawings, diagrams, illustrations, schedules, and other data required by the contract documents which are specifically prepared by or for the contractor to illustrate some portion of the work and all illustrations, brochures, standard schedules, performance charts, instructions, diagrams, and other information prepared by a supplier and submitted by the contractor to illustrate material or equipment for some portion of the work.
- (n) **Subcontractor:** An individual, partnership or corporation having a direct contract with contractor or with any other subcontractor for the performance of the work. It includes one who provides on-site labor but does not include one who only furnishes or supplies materials for the project.
- (o) **Substantial Completion:** The work which is sufficiently complete, in accordance with the contract documents, so that the project can be utilized by the owner for the purposes for which it is intended.
- (p) **Supplier:** A manufacturer, fabricator, distributor, materialman, or vendor who provides material for the project but does not provide on-site labor.
- (q) **Underground Facilities:** All pipelines, conduits, ducts, cables, wires, manholes, vaults, tanks, tunnels, or other such facilities or attachments, and any encasements containing such facilities which are or have been installed underground to furnish any of the following services or materials: electricity, gases, steam, liquid petroleum products, telephone, or other communications, cable television, sewage and drainage removal, traffic, or other control systems or water.
- (r) **Work:** The entire completed construction or the various separately identifiable parts thereof required to be furnished under the contract documents. Work is the result of performing services, furnishing labor, and furnishing and incorporating materials and equipment into the construction, all as required by the contract documents.

2. CONTRACT DOCUMENTS:

- (a) The contract entered into by the parties shall consist of the Invitation for Bids, the bid submitted by the contractor; General Terms and Conditions, these Additional Terms and Conditions; the Special Terms and Conditions; the drawings, if any; the specifications; and all modifications and addenda to the foregoing documents, all of which shall be referred to collectively as the contract documents.
- (b) All time limits stated in the contract documents, including but not limited to the time for completion of the work, are of the essence of the contract.
- (c) Anything called for by one of the contract documents and not called for by the others shall be of like effect as if required or called for by all, except that a provision clearly designed to negate or alter a provision contained in one or more of the other contract documents shall have the intended effect.

3. **LAWS AND REGULATIONS:**

- (a) The contractor shall comply with all laws, ordinances, rules, regulations, and lawful orders of any public authority bearing on the performance of the work and shall give all notices required thereby.
- (b) This contract and all other contracts and subcontracts are subject to the provisions of Articles 3 and 5, Chapter 4, Title 40.1, *Code of Virginia*, relating to labor unions and the "right to work." The contractor and its subcontractors, whether residents or nonresidents of the Commonwealth of Virginia or City of Winchester, who perform any work related to the project shall comply with all of the said provisions.
- (c) The provisions of all rules and regulations governing safety as adopted by the Safety Codes Commission of the Commonwealth of Virginia and as issued by the Department of Labor and Industry under Title 40.1 of the *Code of Virginia* shall apply to all work under this contract. Inspectors from the Department of Labor and Industry shall be granted access to the work for inspection without first obtaining a search warrant from the court.
- (d) Building Permit: Because this is a project of the City of Winchester, codes or zoning ordinances of local political subdivisions shall apply. Building permits where required will be obtained and paid for by the contractor. This includes any local license fees, business fees or similar assessments which may be imposed by the appropriate political subdivision.
- (e) The contractor, if not licensed as an asbestos abatement contractor or a RFS contractor in accordance with § 54.1-514, *Code of Virginia*, shall have all asbestos related work performed by subcontractors who are duly licensed as asbestos contractors or RFS contractors as appropriate for the work required.

4. **PREPARATION AND SUBMISSION OF BIDS:** Bids must give the full business address of the bidder and be signed by him/her with his/her usual signature. Bids by partnerships must furnish the full name of all partners and must be signed in the partnership name by one of the members of the partnership or any authorized representative, followed by the designation of the person signing. Bids by corporations must be signed with the legal name of the corporation followed by the name of the State in which it is incorporated and by the signature and designation of the president, secretary, or other person authorized to bind it in the matter. The name of each person signing shall also be typed or printed below the signature. A bid by a person who affixes to the signature the word "President," "Secretary," "Agent" or other designation without disclosing the principal, may be held to be the bid of the individual signing. When requested by the City, satisfactory evidence of the authority of the officer signing in behalf of the corporation shall be furnished.

5. **WITHDRAWAL OR MODIFICATION OF BIDS:** Bids may be withdrawn or modified by written notice received from bidders prior to the deadline fixed for bid receipt. The withdrawal or modification may be made by the person signing the bid or by an individual(s) who is authorized by him/her on the face of the bid. Written modifications may be made on the bid form itself, on the envelope in which the bid is enclosed, or on a separate document. Written modifications, whether the original is delivered, or transmitted by facsimile, must be signed by the person making the modification or withdrawal.

6. **RECEIPT AND OPENING OF BIDS:**

- (a) It is the responsibility of the bidder to assure that his/her bid is delivered to the place designated for receipt of bids and prior to the time set for receipt of bids. Bids received after the time designated for receipt of bids will not be considered.
- (b) Bids will be opened at the time and place stated in the advertisement, and their contents made public for the information of bidders and others interested who may be present either in person or by representative. The officer or agent of the owner, whose duty it is to open them, will decide when the specified time has arrived. No responsibility will be attached to any officer or agent for the premature opening of a bid not properly addressed and identified.
- (c) The provisions of § 2.2-4342 of the *Code of Virginia*, as amended, shall be applicable to the inspection of bids received.

7. **ERRORS IN BIDS:** Errors in bids will be handled in accordance with the Winchester City Code, Chapter 21.

8. **SUBCONTRACTS:**

- (a) The contractor shall as soon as practicable after the signing of the contract, notify the owner in writing of the names of subcontractors proposed for the principal parts of the work. The contractor shall not employ any subcontractor that the owner may, within a reasonable time, object to as unsuitable. The owner will not direct the contractor to contract with any particular subcontractor unless provided in the specifications or bid form.
- (b) The owner shall, on request, furnish to any subcontractor, if practicable, the amounts of payments made to the contractor, the Schedule of Values and Requests for Payment submitted by the contractor, and any other documentation submitted by the contractor which would tend to show what amounts are due and payable by the contractor to the subcontractor.
- (c) The contractor agrees that he is as fully responsible to the owner for the acts and omissions of his subcontractors, suppliers, and invitee upon the site of the project and of persons either directly or indirectly employed by them, as he is for the acts and omissions of persons directly employed by him.

9. **SEPARATE CONTRACTS:**

- (a) The owner reserves the right to let other contracts in connection with the project, the work under which may proceed simultaneously with the execution of this contract. The contractor shall afford other separate contractors reasonable opportunity for the introduction and storage of their materials and the execution of their work. The contractor shall cooperate with them and shall take all reasonable action to coordinate his work with theirs. If the owner has listed other separate contracts in the Invitation for Bids which it expects to proceed simultaneously with the work of the contractor, and has included the estimated timing of such other contracts in the Invitation for Bids, the contractor shall integrate the schedule of those separate contracts into his scheduling. The contractor shall make every reasonable effort to assist the owner in maintaining the schedule for all separate contracts. If the work performed by the separate contractor is defective or performed so as to prevent this contractor from carrying out his work according to the drawings and specifications of this contract, this contractor shall immediately notify the owner upon discovering such conditions.
- (b) If a dispute arises between the contractor and separate contractors as to their responsibility for cleaning up as required by Sections 18(c) and 18(d) of these Additional Terms and Conditions, the owner may clean up and charge the cost thereof to the respective contractors in proportion to their responsibility. If a contractor disputes the owner's apportionment of clean-up costs, it shall be that contractor's burden to demonstrate and prove the correct apportionment.

10. **TAXES:** The contractor shall, without additional expense to the owner, pay all applicable federal, state, and local taxes, fees, and assessments except the taxes, fees, and assessments on the real property comprising the site of the project. If the State Building Official elects to have the local building official inspect the work as provided by § 36-98.1 of the *Code of Virginia*, the owner will pay the resulting fees to the local building official.

11. **PATENTS:** The contractor shall obtain all licenses necessary to use any invention, article, appliance, process, or technique of whatever kind and shall pay all royalties and license fees. The contractor shall hold and save the owner, its officers, agents, and employees, harmless from any loss or liability for or on account of the infringement of any patent rights in connection with any invention, process, technique, article or appliance manufactured or used in the performance of the contract, including its use by the owner, unless such invention, process, technique, article, or appliance is specifically named in the specifications or drawings as acceptable for use in carrying out the work. If, before using any invention, process, technique, article, or appliance specifically named in the specifications or drawings as acceptable for use in carrying out the work, the contractor has or acquires information that the same is covered by letters of patent making it necessary to secure the permission of the patentee, or other, for the use of the same, he shall promptly advise the owner. The owner may direct that some other invention, process, technique, article, or appliance be used. Should the contractor have reason to believe that the invention, process, technique, article, or appliance so specified is an infringement of a patent, and fail to inform the owner, he shall be responsible for any loss due to the infringement.
12. **INSPECTION:**
- a. All material and workmanship shall be subject to inspection, examination, and test by the owner and its project inspector at any and all times during construction. The project inspector shall have authority to reject defective material and workmanship and require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefore, and the contractor shall promptly segregate and remove the rejected material from the premises. If the contractor fails to proceed at once with replacement of rejected material and/or the correction of defective workmanship, the owner may, by contract or otherwise, replace such material and/or correct such workmanship and charge the cost to the contractor, or may terminate the right of the contractor to proceed, the contractor and surety being liable for any damages.
 - b. Job-site inspections, tests conducted on site or tests of materials gathered on site, which the contract requires to be performed by independent testing entities, shall be contracted and paid for by the owner. Examples of such tests are the testing of cast in-place concrete, foundation materials, soil compaction, pile installations, caisson bearings, and steel framing connections. Although conducted by independent testing entities, the owner will not contract and pay for tests or certifications of materials, manufactured products, or assemblies which the contract, codes, standards, etc. require to be tested and/or certified for compliance with industry standards such as Underwriters Laboratories, Factory Mutual, or ASTM. If there are any fees to be paid for such tests and certifications, they will be paid by the contractor. The contractor shall also pay for all inspections, tests, and certifications which the contract specifically requires him to perform or pay, together with any inspections and tests which he chooses to perform for his own quality control purposes. The contractor shall promptly furnish, without additional charge, all reasonable facilities, labor, and materials necessary and convenient for making such tests. Except as provided in (c) below, whenever such examination and testing finds defective materials, equipment, or workmanship, the contractor shall reimburse the owner for the cost of re-examination and retesting.
 - c. Should it be considered necessary or advisable by the owner at any time before final acceptance of the entire work to make an examination of any part of the work already completed, by removing or tearing out portions of the work, the contractor shall on request promptly furnish all necessary facilities, labor and material to expose the work to be tested to the extent required. If such work is found to be defective in any respect, due to the fault of the contractor or his subcontractors, he shall defray all the expenses of uncovering the work, of examination and testing, and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of the contractor's labor and material necessarily involved in uncovering the work, the cost of examination and testing, and contractor's cost of material and labor necessary for replacement shall be paid to the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time.
 - d. The project inspector will recommend to the owner that the work be suspended when in his judgment the drawings and specifications are not being followed. Any such suspension shall be continued only until the matter in question is resolved to the satisfaction of the owner. The cost of any such work stoppage shall be borne by the contractor unless it is later determined that no fault existed in the contractor's work.
 - e. The project inspector has no authority to and shall not:
 - (1) Authorize deviations from the contract documents;
 - (2) Enter into the area of responsibility of the contractor's superintendent;

- (3) Issue directions relative to any aspect of construction means, methods, techniques, sequences or procedures, or in regard to safety precautions and programs in connection with the work;
- (4) Authorize or suggest that the owner occupy the project, in whole or in part;
- (5) Issue a certificate for payment.

13. **SUPERINTENDENCE BY CONTRACTOR:**

- a. The contractor shall have a competent foreman or superintendent, satisfactory to the owner, on the job site at all times during the progress of the work. The contractor shall be responsible for all construction means, methods, techniques, sequences, and procedures for coordinating all portions of the work under the contract except where otherwise specified in the contract documents, and for all safety and worker health programs and practices. The contractor shall notify the owner, in writing, of any proposed change in superintendent including the reason therefore prior to making such change.
- b. The contractor shall, at all times, enforce strict discipline and good order among the workers on the project, and shall not employ on the work any unfit person, anyone not skilled in the work assigned to him, or anyone who will not work in harmony with those employed by the contractor, the subcontractors, the owner or the owner's separate contractors and their subcontractors.
- c. The owner may, in writing, require the contractor to remove from the work any employee the owner deems to be incompetent, careless, not working in harmony with others on the site, or otherwise objectionable.

14. **ACCESS TO WORK:** The owner, the owner's inspectors and other testing personnel, and inspectors from the Department of Labor and Industry shall have access to the work at all times. The contractor shall provide proper facilities for access and inspection.

15. **AVAILABILITY OF MATERIALS:** If material specified in the contract documents is not available on the present market, alternate materials may be proposed by the contractor for approval of the owner.

16. **CONTRACTOR'S TITLE TO MATERIALS:** No materials or supplies for the work shall be purchased by the contractor or by any subcontractor subject to any security interest, installment or sales contract or any other agreement or lien by which an interest is retained by the seller or is given to a secured party. The contractor warrants that he has clear title to all materials and supplies which he uses in the work or for which he accepts payment in whole or in part.

17. **WARRANTY OF MATERIALS AND WORKMANSHIP:**

- a. The contractor warrants that, unless otherwise specified, all materials and equipment incorporated in the work under the contract shall be new, in first class condition, and in accordance with the contract documents. The contractor further warrants that all workmanship shall be of the highest quality and in accordance with contract documents and shall be performed by persons qualified at their respective trades.
- b. Work not conforming to these warranties shall be considered defective.
- c. This warranty of materials and workmanship is separate and independent from and in addition to any of the contractor's other guarantees or obligations in this contract.

18. **USE OF PREMISES AND REMOVAL OF DEBRIS:**

- a. The contractor shall:
 - (1) Perform his contract in such a manner as not to interrupt or interfere with the operation of any existing activity on the premises or with the work of any contractor;
 - (2) Store his apparatus, materials, supplies, and equipment in such orderly fashion at the site of the work as will not unduly interfere with the progress of his work or the work of any other contractor; and

- (3) Place upon the work or any part thereof only such loads as are consistent with the safety of that portion of the work.
- b. The contractor expressly undertakes, either directly or through his subcontractor(s), to effect all cutting, filling, or patching of his work required to make the same conform to the drawings and specifications, and, except with the consent of the owner, not to cut or otherwise alter the work of any other contractor. The contractor shall not damage or endanger any portion of the work or premises, including existing improvements, unless called for by the contract.
 - c. The contractor expressly undertakes, either directly or through his subcontractor(s), to clean up frequently all refuse, rubbish, scrap materials, and debris caused by his operations, to the end that at all times the site of the work shall present a neat, orderly, and workmanlike appearance. No such refuse, rubbish, scrap material, and debris shall be left within the completed work nor buried on the building site, but shall be removed from the site and properly disposed of in a licensed landfill or otherwise as required by law.
 - d. The contractor expressly undertakes, either directly or through his subcontractor(s), before final payment, to remove all surplus material, false work, temporary structures, including foundations thereof, plants of any description and debris of every nature resulting from his operations and to put the site in a neat, orderly condition; to thoroughly clean and leave reasonably dust free all finished surfaces including all equipment, piping, etc., on the interior of all buildings included in the contract; and to thoroughly clean all glass installed under the contract including the removal of all paint and mortar splatters and other defacements. If a contractor fails to clean up at the completion of the work, the owner may do so and charge for costs thereof to the contractor.
 - e. During and at completion of the work, the contractor shall prevent site soil erosion, the runoff of silt and/or debris carrying water from the site, and the blowing of debris off the site in accordance with the applicable requirements and standards of the *Virginia Erosion and Sediment Control Handbook*, latest edition, and of the contract documents.
 - f. The contractor shall not operate or disturb the setting of any valves, switches or electrical equipment on the service lines to the building except by proper previous arrangement with the owner. The contractor shall give ample advance notice of the need for cut-offs which will be scheduled at the convenience of the owner.

19. **PROTECTION OF PERSONS AND PROPERTY:**

- a. The contractor expressly undertakes, both directly and through its subcontractor(s), to take every precaution at all times for the protection of persons and property which may come on the building site or be affected by the contractor's operation in connection with the work.
- b. The contractor shall be solely responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the work.
- c. The provisions of all rules and regulations governing safety as adopted by the Safety Codes Commission of the Commonwealth of Virginia, issued by the Department of Labor and Industry under Title 40.1 of the *Code of Virginia* shall apply to all work under this contract.
- d. The contractor shall continuously maintain adequate protection of all his work from damage and shall protect the owner's property from injury or loss arising in connection with this contract. He shall make good any such damage, injury, or loss, except such as may be directly due to errors in the contract documents or caused by agents or employees of the owner. He shall adequately protect adjacent property to prevent any damage to it or loss of use and enjoyment by its owners. He shall provide and maintain all passageways, guard fences, lights, and other facilities for protection required by public authority, local conditions, any of the contract documents or erected for the fulfillment of his obligations for the protection of persons and property.
- e. In an emergency affecting the safety or life of persons or of the work, or of the adjoining property, the contractor, without special instruction or authorization from the owner, shall act, at his discretion, to prevent such threatened loss or injury. Also, should he, to prevent threatened loss or injury, be instructed or authorized to act by the owner, he shall so act immediately, without appeal. Any additional compensation or extension of time claimed by the contractor on account of any emergency work shall be determined as provided by in the General Terms and Conditions.

20. **CONTRACTOR'S RIGHT TO STOP WORK OR TERMINATE THE CONTRACT:** If the work should be stopped under any order of any court or other public authority for a period of ninety (90) days through no fault of the contractor or of anyone employed by him, or if the owner should fail to pay to the contractor within thirty (30) days when no dispute exists as to the sum, then the contractor may, upon ten (10) calendar days written notice to the owner, stop work or terminate the contract and recover from the owner payment for the cost of the work actually performed, together with overhead and profit thereon, but profit shall be recovered only to the extent that the contractor can demonstrate that he would have had profit on the entire contract if he had completed the work. The contractor may not receive profit or any other type of compensation for parts of the work not performed. The contractor may recover the cost of physically closing down the job site, but no other costs of termination. The owner may offset any claims it may have against the contractor against the amounts due to the contractor. In no event shall termination of the contract by the contractor terminate the obligations of the contractor's surety on its payment and performance bonds.

21. **OWNER'S RIGHT TO TERMINATE THE CONTRACT FOR CAUSE:**

- a. If the contractor should be adjudged as bankrupt, or if he should make a general assignment for the benefit of his creditors, or if a receiver should be appointed on account of his insolvency, the owner may terminate the contract. If the contractor should persistently or repeatedly refuse or should fail, except in cases for which extension of time is provided, to supply enough properly skilled workmen or proper materials, or if he should fail to make prompt payment to subcontractors or suppliers of material or labor, or persistently disregards laws, ordinances, or the written instructions of the owner, or otherwise be guilty of a substantial violation of any provision of the contract, then the owner may terminate the contract.
- b. Prior to termination of the contract, the owner shall give the contractor and his surety ten (10) calendar days written notice, during which the contractor and/or his surety may rectify the cause of the termination. If rectified to the satisfaction of the owner within said ten (10) days, the owner may rescind his notice of termination. If it does not, the termination for cause shall become effective at the end of the ten-day (10) notice period. In the alternative, the owner may postpone the effective date of the termination notice, at his sole discretion, if he should receive reassurances from the contractor and/or its surety that the causes of termination will be remedied in a time and manner which the owner finds acceptable. If at any time more than ten (10) days after the notice of termination, the owner determines that contractor and/or its surety has not or is not likely to rectify the causes of termination in an acceptable manner or within the time allowed, then the owner may immediately terminate the contract for cause by giving written notice to the contractor and its surety. In no event shall termination for cause terminate the obligations of the contractor's surety on its payment and performance bonds.
- c. Notice of terminations, whether initial or given after a period of postponement, may be served upon the contractor and the surety by mail or any other means at their last known places of business in Virginia or elsewhere, by delivery to any officer or management/supervisory employee of either wherever they may be found, or, if no such officer, employee or place of business is known or can be found by reasonable inquiry within three (3) days, by posting the notice at the job site. Failure to accept or pick up registered or certified mail addressed to the last known address shall be deemed to be delivery.
- d. Upon termination of the contract, the owner shall take possession of the premises and of all materials, tools, and appliances thereon and finish the work by whatever method he may deem expedient. In such case the contractor shall not be entitled to receive any further payment. If the expense of finishing the work, including compensation for additional managerial and administrative services shall exceed the unpaid balance of the contract price, the contractor shall pay the difference to the owner, together with any other expenses of terminating the contract and having it completed by others.
- e. If it should be judicially determined that the owner improperly terminated this contract for cause, then the termination shall be deemed to be a termination for the convenience of the owner.
- f. Termination of the contract under this section is without prejudice to any other right or remedy of the owner.

22. **TERMINATION BY OWNER FOR CONVENIENCE:**

- a. Owner may terminate this contract at any time without cause, in whole or in part, upon giving the contractor notice of such termination. Upon such termination, the contractor shall immediately cease work and remove from the project site all of its labor forces and such of its materials as owner elects not to purchase or to assume in the manner hereinafter provided. Upon such termination, the contractor shall take such steps as owner may require to

assign to the owner the contractor's interest in all subcontracts and purchase orders designated by owner. After all such steps have been taken to owner's satisfaction, the contractor shall receive as full compensation for termination and assignment the following:

- (1) All amounts then otherwise due under the terms of this contract,
 - (2) Amounts due for work performed subsequent to the latest Request for Payment through the date of termination,
 - (3) Reasonable compensation for the actual cost of demobilization incurred by the contractor as a direct result of such termination. The contractor shall not be entitled to any compensation for lost profits or for any other type of contractual compensation or damage other than those provided by the preceding sentence. Upon payment of the forgoing, owner shall have no further obligations to the contractor of any nature.
- b. In no event shall termination for the convenience of the owner terminate the obligations of the contractor's surety on its payment and performance bonds.

23. **GUARANTEE OF WORK:**

- a. Except as otherwise specified, all work shall be guaranteed by the contractor against defects resulting from the use of inferior materials, equipment, or workmanship for one (1) year from the date of final acceptance of the entire project by the owner in writing. Equipment and facilities, which have seasonal limitations on their operation, shall be guaranteed for one (1) full year from the date of seasonally appropriate tests and acceptance, in writing, by the owner.
- b. If, within the guarantee period, defects are noticed by the owner which require repairs or changes in connection with the guaranteed work, those repairs or changes being in the opinion of the owner rendered necessary as the result of the use of materials, equipment or workmanship, which are defective, or inferior or not in accordance with the terms of the contract, then the contractor shall, promptly upon receipt of notice from the owner, such notice being given not more than two weeks after the guarantee period expires, and without expense to the owner:
 - (1) Place in satisfactory condition in every particular all of such guaranteed work and correct all defects therein;
 - (2) Make good all damage to the structure, site, equipment, or contents thereof, which is the result of the use of materials, equipment, or workmanship which are inferior, defective, or not in accordance with the terms of the contracts; and
 - (3) Make good any work, materials, equipment, contents of structures, and/or disturbance of the site in fulfilling any such guarantee.
- c. In any case, where in fulfilling the requirements of the contract or any guarantee embraced in or required thereby, the contractor disturbs any work guaranteed under contract, he shall restore such work to a condition satisfactory to the owner and guarantee such restored work to the same extent as it was guaranteed under such other contract.
- d. If the contractor, after notice, fails to proceed promptly to comply with the terms of the guarantee, the owner may have the defects corrected and the contractor and his surety shall be liable for all expense incurred.
- e. All special guarantees applicable to definite parts of the work that may be stipulated in the specifications or other papers forming a part of the contract shall be subject to the term of this section during the first year of the life of such special guarantee.
- f. Nothing contained in this section shall be construed to establish a period of limitation with respect to any other obligation which the contractor might have under the contract documents, including liability for defective work under Section 17 of these additional terms and conditions. This paragraph relates only to the specific obligation of the contractor contained in this section to correct the work and does not limit the time within which his obligation to comply with the contract documents may be sought to be enforced, nor of the time within which proceedings may be commenced to establish the contractor's liability with respect to his other obligations under this contract.
- g. In the event the work of the contractor is to be modified by another contractor, either before or after the final inspection, the first contractor shall remain responsible in all respects under the guarantee of work and under any

other warranties provided in the contract or by law. However, the contractor shall not be responsible for any defects in material or workmanship introduced by the contractor modifying its work. Both the first contractor and the contractor making the modifications shall each be responsible solely for the work done by each. The contractor modifying the earlier work shall be responsible for any damage to or defect introduced into the work which he is modifying. If any contractor shall claim that another contractor has introduced defects of materials and/or workmanship into the work of the first, it shall be the burden of the contractor making the claim to clearly demonstrate the nature and extent of such introduced defects and the responsibility of the other contractor. Any contractor modifying the work of another shall have the same burden if he asserts defects to have been caused by the contractor whose work he is modifying.

24. **ASBESTOS:**

- a. This subsection applies to projects involving existing buildings where asbestos abatement is not a part of the work. If the contractor discovers or inadvertently disturbs any material that may contain asbestos that has not been previously identified, that was overlooked during the removal, or which was deemed not to be friable or which was encapsulated, the contractor shall stop work in the area containing the asbestos, secure the area, and notify the owner immediately by telephone or in person with written notice as soon as possible. The owner will have the suspect material sampled.

If the sample is positive and must be disturbed in the course of the work, the owner will have the material repaired or removed and will pay for the bulk sample analysis.

If the material disturbed is not within the contractor's authorized work and/or work area or under this contract, the contractor will pay for all associated sampling and abatement costs.

- b. If asbestos abatement is included as a part of the work, the contractor shall assure that the asbestos abatement work is accomplished by those duly licensed in accordance with the specific requirements of the contract documents.
- c. If asbestos abatement is included as part of the work, the licensed asbestos subcontractor shall, in the insurance required, name the City of Winchester and the contractor as additional insured.

25. **TRAINING, OPERATION, AND MAINTENANCE OF EQUIPMENT:**

- a. The contractor, in conjunction with his subcontractors and suppliers, shall provide the owner's operations and maintenance personnel with instruction and training in the proper operation and maintenance of the equipment and related controls provided or altered in the work.
- b. The contractor shall provide the owner with a minimum of two (2) copies of operating, maintenance and parts manuals for all equipment provided in the project. Further specific requirements may be indicated in the specifications.

NOTE TO CITY DEPARTMENTS: Select from Appendix B, Section II, appropriate Special Terms and Conditions to be included in the solicitation. The following Special Terms and Conditions shall be used as applicable:

1. Inspection of the Job Site
2. Bid Bond or Guaranty (optional - required for contracts over \$25,000)
3. Performance and Payment Bonds (optional - required for contracts over \$25,000)
4. Liquidated Damages (optional)
5. Contractor Registration
6. Bid Acceptance Period
7. Award
8. Identification of Bid/Proposal Envelope
9. Drawings
10. Work Site Damage

**SPECIAL TERMS AND CONDITIONS
INFORMATION TECHNOLOGY GOODS AND SERVICES**

The following is a list of Special Terms and Conditions that may be used at the Purchasing Agent's discretion in Information Technology IFBs and RFPs, or at the requesting department's discretion in Information Technology quotes as appropriate. The City's General Terms & Conditions, any other special terms and conditions as listed in previous sections of this appendix, and any specific terms developed by the buyer should also be included as needed.

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1. **CERTIFICATION TESTING PERIOD - SYSTEMS:** The system specified in the contract shall be considered ready for testing upon receipt of documentation from the contractor that a successful system audit or diagnostic test was performed at the site demonstrating that the system meets the minimum design/performance capabilities stipulated in the purchase agreement. The ___ day testing period shall commence on the next calendar day following receipt of this documentation. Upon request, the procuring agency will provide written confirmation of its acceptance following successful completion of the certification period. Such acceptance shall not be conclusive of complete conformance in all respects to the contract specifications and other requirements, or the nonexistence of potential latent defects.

When Used: In solicitations for computer systems requiring the installation of multiple components and configuration prior to system operation. **NOTE:** Specific certification criteria should be stated either in the specification or as a part of this provision.

CERTIFICATION TESTING PERIOD - HARDWARE: Equipment ordered herein shall be subject to inspection and a 30-day testing period by the procuring agency. Contractor equipment which is found to not meet the specifications or other requirements of the purchase agreement may be rejected and returned to the vendor at no cost (including return transportation) by the procuring agency. Unless otherwise notified or mutually agreed, acceptance

shall become effective at the end of the 30-day testing period. Such acceptance shall not be conclusive of complete conformance in all respects to the contract specifications and other requirements, or the nonexistence of potential latent defects.

When Used: In solicitations for computer hardware requiring the integration of multiple components for utilization. Specific certification/performance criteria should be stated either in the specification or as a part of this provision.

2. **CONFIDENTIALITY (City):** The City agrees that neither it nor its employees, representatives, or agents shall knowingly divulge any proprietary information with respect to the operation of the software, the technology embodied therein, or any other trade secret or proprietary information related thereto, except as specifically authorized by the contractor in writing or as required by the Freedom of Information Act or similar law. It shall be the contractor's responsibility to fully comply with § 2.2-4342F of the *Code of Virginia*. All trade secrets or proprietary information must be identified in writing or other tangible form and conspicuously labeled as "proprietary" either prior to or at the time of submission to the City.

CONFIDENTIALITY (Contractor): The contractor assures that information and data obtained as to personal facts and circumstances related to patients or clients will be collected and held confidential, during and following the term of this agreement, and will not be divulged without the individual's and the agency's written consent. Any information to be disclosed, except to the agency, must be in summary, statistical, or other form which does not identify particular individuals. Contractors and their employees working on this project will be required to sign the Confidentiality statement in this solicitation.

When Used: Solicitations for commercially developed software that has been patented, copyrighted, otherwise protected by law, or when it is anticipated the vendor may claim that the software contains trade secrets or proprietary information.

3. **DEFINITION - EQUIPMENT:** As used herein, the terms equipment, product, or system shall include hardware and software (when applicable) and any materials or supporting documentation. Such documentation may include but is not limited to: users' guides, operations manuals with part lists, copies of all applicable warranties, and any other pertinent information necessary for the proper operation and maintenance of the equipment being acquired.

When Used: In solicitations for hardware and software to assure that the City receives all supporting materials needed for utilization and maintenance of the purchased equipment.

DEFINITION - SOFTWARE: As used herein, the terms software, product, or software products shall include all related materials and documentation whether in machine readable or printed form.

When Used: In solicitations for software to assure that the City receives all materials, including source code (when appropriate), supporting documentation, and user's information related to utilization of the software being acquired.

4. **DEMONSTRATIONS:** By submitting a bid or proposal, the bidder or offeror certifies that the specified equipment is in productive use and capable of demonstration in the proposed configuration. The City reserves the right to require bidders or offerors to demonstrate the functionality of proposed equipment to its satisfaction prior to making an award decision. Such demonstration is intended to show that a vendor's products will perform in a completely satisfactory manner and that they will meet or exceed the performance specifications contained in the solicitation. Failure by a vendor to promptly comply with a request for demonstration could result in their bid being rejected. Failure to reject shall not relieve the vendor of its obligation to fully comply with all requirements of the contract.

When Used: Equipment purchases in which the agency has a concern that proposed equipment may not be currently available or capable of performing as promised.

5. **EQUIPMENT ENVIRONMENT:** Environmental specifications for any equipment to be delivered under the resulting contract shall be furnished in writing along with the vendor's bid or proposal, should any such requirements be applicable. These specifications must be in sufficient detail to permit all installed equipment to function efficiently from an environmental perspective. Unless otherwise stated in the solicitation, it will be the procuring agency's responsibility to prepare the site at its own expense to meet the environmental specifications provided.

When Used: For equipment purchases when it is anticipated that the equipment must function in a controlled environment, i.e., a regulated temperature or humidity range, or the absence of electromagnetic interference.

6. **EXCESSIVE DOWNTIME:** Equipment or software furnished under the contract shall be capable of continuous operation. Should the equipment or software become inoperable for a period of more than 24 hours, the contractor agrees to pro-rate maintenance charges to account for each full day of inoperability. The period of inoperability shall commence upon initial notification. In the event the equipment or software remains inoperable for more than ___ consecutive calendar days, the contractor shall promptly replace the equipment or software at no charge upon request of the procuring agency. Such replacement shall be with new, unused product(s) of comparable quality, and must be installed and operational within ___ days following the request for replacement.

When Used: In solicitations for hardware or software to be used on a continuous basis to support essential activities, and the contractor is responsible for providing full service maintenance.

7. **LATEST SOFTWARE VERSION:** Any software product(s) provided under the contract shall be the latest version available to the general public as of the due date of this solicitation.

When Used: For purchases where other than the latest available version of a software package is not acceptable.

8. **LIMITATION OF USE:** The City's right to use computer software developed entirely at private expense may be limited by the contractor as stipulated in this contract. Notwithstanding any provision to the contrary however, the City shall have at a minimum: unlimited use of the software on the equipment for which it is purchased; use of the software on a secondary system for backup purposes should the primary system become unavailable, malfunction, or is otherwise rendered inoperable; use of the software at another City site should the system be entirely transferred to that location; the right to make a backup copy for safekeeping; the right to modify or combine the software with other programs or materials at the City's risk; and the right to reproduce any and all documentation provided such reproduction is for the sole use of the City. These rights are perpetual and irrevocable; in the event of any actual or alleged breach by the City, the contractor's sole remedy shall be to pursue a monetary claim in accordance with § 2.2-4363 of the *Code of Virginia*.

When Used: In solicitations which will result in the acquisition of commercially developed software, when the agency intends to use such software to support critical activities or functions.

9. **MAINTENANCE:** Upon expiration of the specified warranty period and at the City's option, the contractor shall provide up to ___ additional one-year periods of on-site maintenance (including labor, parts, and travel) at the prices set forth in the pricing schedule. Maintenance shall not include external electrical work, providing supplies, and adding or removing accessories not provided for in the contract. Maintenance shall also not include repairs of damage resulting from: acts of God, transportation between state locations, negligence by state personnel, or other causes not related to ordinary use in the production environment in which installed. Each successive year of maintenance may be ordered by the City in writing at least ___ days prior to expiration of the existing maintenance period.

When Used: In solicitations for computer hardware and software, when maintenance services beyond the basic warranty period are desired, and such extended maintenance service is included in the solicitation's pricing schedule. This clause should be used in conjunction with one of the "service period" clauses. **NOTE:** The specific maintenance requirements or duties must be stated either in the specifications or as a separate condition of the contract.

10. **NEW EQUIPMENT:** Unless otherwise expressly stated in this solicitation, any equipment furnished under the contract shall be new, unused equipment.

When Used: For purchases where used, reconditioned, or remanufactured equipment and components are not acceptable.

11. **OPERATIONAL COMPONENTS:** Unless otherwise requested in the solicitation, stated equipment prices shall include all cables, connectors, interfaces, documentation for all components, and any other items necessary for full systems operation at the user site. This does not include consumable supplies such as paper, tapes, disks, etc., unless such supplies are expressly identified in the pricing schedule.

When Used: For system purchases requiring incidental hardware for the interconnection of system components.

12. **OWNERSHIP OF INTELLECTUAL PROPERTY:** All copyright and patent rights to all papers, reports, forms, materials, creations, or inventions created or developed in the performance of this contract shall become the sole property of the City. On request, the contractor shall promptly provide an acknowledgment or assignment in a tangible form satisfactory to the City to evidence the City's sole ownership of specifically identified intellectual property created or developed in the performance of the contract.

When Used: For purchases of software or applications development services which result in deliverables that were developed to specifically meet the state's performance requirements, or when state employees will participate in the creation or invention of any copyright or patentable material.

13. **PRODUCT SUBSTITUTION:** During the term of any contract resulting from this solicitation, the vendor is not authorized to substitute any item for that product and/or software identified in the solicitation without the prior written consent of the contracting officer whose name appears on the front of this solicitation, or their designee.

When Used: Purchases where the vendor will be responsible for maintenance after the sale, and the agency desires to protect against item substitutions.

14. **QUALIFIED REPAIR PERSONNEL:** All warranty or maintenance services to be performed on the items specified in this solicitation as well as any associated hardware or software shall be performed by qualified technicians properly authorized by the manufacturer to perform such services. The City reserves the right to require proof of certification prior to award and at any time during the term of the contract.

When Used: In solicitations for hardware or software when the performance of warranty/maintenance must be performed by qualified personnel so as not to invalidate any warranty or support provided by the product manufacturer.

15. **RELOCATION OF EQUIPMENT:** Should it become necessary to move equipment covered by the contract to another location, the City reserves the right to do so at its own expense. If contractor supervision is required, the City will provide prior written notice of the move at least thirty (30) days in advance, in which case the contractor shall provide the required services and be reasonably compensated by the City. Both the compensation to be paid and any adjustment to the maintenance terms resulting from the move shall be as mutually agreed between the parties. Regular maintenance charges shall be suspended on the day the equipment is dismantled and resume once the equipment is again certified ready for operational use.

When Used: In solicitations for the acquisition of major computer components or systems for which the contractor is normally the sole provider of maintenance services.

16. **RENEWAL OF MAINTENANCE:** Maintenance of the hardware or software specified in the resultant contract may be renewed by the mutual written agreement of both parties for an additional ____ one-year period(s), under the terms and conditions of the original contract except as noted herein. Price changes may be negotiated at time of renewal; however, in no case shall the maintenance costs for a succeeding one-year period exceed the prior year's contract price(s), increased or decreased by more than the percentage increase or decrease in the _____ category of the CPI-W section of the US Bureau of Labor Statistics Consumer Price Index, for the latest twelve months for which statistics are available.

When Used: In solicitations for hardware or software where extended maintenance beyond the warranty period is not included in the pricing schedule, but the agency wishes to retain the option to acquire such maintenance services with a pre-established cap on the future cost of such services.

17. **REPAIR PARTS:** In the event that the performance of maintenance services under the contract results in a need to replace defective parts, such items may only be replaced by new parts. In no instance shall the contractor be permitted to replace defective items with refurbished, remanufactured, or surplus items without prior written authorization of the City.

When Used: In solicitations for computer hardware that require maintenance after the sale, and the agency wishes to have defective parts replaced only by new parts.

18. **SERVICE PERIOD (EXTENDED):** Due to the criticality of the applications for which the equipment and/or software is purchased, the contractor shall provide 24 hours a day, 7 days a week, maintenance support, including state holidays.

On-site response time shall be within ____ hours following initial notification. All necessary repairs or corrections shall be completed within ____ hours of the initial notification.

When Used: In solicitations for hardware or software when it is essential that the equipment remain in continuous operation due to the criticality of the process or function for which it was obtained.

19. **SERVICE PERIOD (ROUTINE)**: Contractor shall provide 24 hour toll-free phone support with a ____ hour return call response time. On-site maintenance services shall carry a ____ hour response time following initial notification and be available during the normal working hours of 8 A.M. to 5 P.M. Monday through Friday, excluding state holidays. All necessary repairs or corrections shall be completed within ____ hours of the initial notification.

When Used: In solicitations for hardware or software which require regular maintenance support but which are not of such a critical nature as to require expeditious response times or after hours support.

20. **SERVICE REPORTS**: Upon completion of any maintenance call, the contractor shall provide the agency with a signed service report that includes, at a minimum: a general statement as to the problem, action taken, any materials or parts furnished or used, and the number of hours required to complete the repairs.

When Used: In solicitations requiring maintenance services when the agency intends to maintain detailed service records. This clause should always be included in any solicitation where maintenance is to be performed on a time and materials basis.

21. **SOFTWARE UPGRADES**: The City shall be entitled to any and all upgraded versions of the software covered in the contract that becomes available from the contractor. The maximum charge for upgrade shall not exceed the total difference between the cost of the City's current version and the price the contractor sells or licenses the upgraded software under similar circumstances.

When Used: In solicitations for the purchase of computer software when the agency desires the opportunity to acquire future upgrades as they become available, and the availability of upgrades is not a condition stated elsewhere in the contract.

22. **SOFTWARE DISPOSITION**: Unless otherwise instructed by the contractor, the City shall render unusable all copies of software acquired under the contract within thirty (30) days of termination of its license, except that the City does reserve the right to retain one copy of the software for archival purposes when appropriate.

When Used: In solicitations for software when it is anticipated that the software license will only be maintained for a limited period of time.

23. **SOURCE CODE**: In the event the contractor ceases to maintain experienced staff and the resources needed to provide required software maintenance, the City shall be entitled to have, use, and duplicate for its own use, a copy of the source code and associated documentation for the software products covered by the contract. Until such time as a complete copy of such material is provided, the City shall have exclusive right to possess all physical embodiments of such contractor owned materials. The rights of the City in this respect shall survive for a period of twenty (20) years after the expiration or termination of the contract. All lease and royalty fees necessary to support this right are included in the initial license fee as contained in the pricing schedule.

When Used: In solicitations for the purchase of computer software when it is necessary to assure either the availability of program support or the opportunity to provide internal program support.

24. **TERM OF SOFTWARE LICENSE**: Unless otherwise stated in the solicitation, the software license(s) identified in the pricing schedule shall be purchased on a perpetual basis and shall continue in perpetuity. However the City reserves the right to terminate the license at any time, although the mere expiration or termination of this contract shall not be construed as an intent to terminate the license. All acquired license(s) shall be for use at any computing facilities, on any equipment, by any number of users, and for any purposes for which it is procured. The City further reserves the right to transfer all rights under the license to another City agency to which some or all of its functions are transferred.

When Used: In all software procurements when the City intends to acquire unlimited rights to use computer software for an indefinite amount of time.

25. **THIRD PARTY ACQUISITION OF SOFTWARE:** The contractor shall notify the procuring agency in writing should the intellectual property, associated business, or all of its assets be acquired by a third party. The contractor further agrees that the contract's terms and conditions, including any and all license rights and related services, shall not be affected by the acquisition. Prior to completion of the acquisition, the contractor shall obtain, for the City's benefit and deliver thereto, the assignee's agreement to fully honor the terms of the contract.

When Used: In solicitations for commercial software when it is necessary to maintain continuity of support even in the event of sale or transfer of rights to another party.

26. **TITLE TO SOFTWARE:** By submitting a bid or proposal, the bidder or offeror represents and warrants that it is the sole owner of the software or, if not the owner, that it has received all legally required authorizations from the owner to license the software, has the full power to grant the rights required by this solicitation, and that neither the software nor its use in accordance with the contract will violate or infringe upon any patent, copyright, trade secret, or any other property rights of another person or organization.

When Used: All solicitations for the procurement of computer software for the purpose of assuring the agency only acquires software from an entity legally authorized to market it.

27. **WARRANTY AGAINST SHUTDOWN DEVICES:** The contractor warrants that the equipment and software provided under the contract shall not contain any lock, counter, CPU reference, virus, worm, or other device capable of halting operations or erasing or altering data or programs. Contractor further warrants that neither it, nor its agents, employees, or subcontractors shall insert any shutdown device following delivery of the equipment and software.

When Used: In solicitations for hardware or software when the agency wishes to protect both its purchase and existing information resources from possible damage or destruction due to computer viruses or other shutdown devices.

28. **WARRANTY OF SOFTWARE:** The contractor warrants the operation of all software products for a period of ___ months from the date of acceptance. During the warranty period, the contractor shall provide ___ hour toll free phone support and all patches, fixes, revisions, updates, upgrades, and minor releases to both the software and its supporting documentation. In addition, the contractor shall provide a two hour return call response time and complete all necessary patches/fixes within ___ hours of initial notification.

When Used: In software purchases where the software will be used to support critical agency activities that cannot endure extended periods of downtime. NOTE: The warranty requirements or duties are not cited and need to either be added to this clause or included in the specification.

29. **YEAR 2000 COMPLIANT (AND ENABLEMENT) WARRANTY:** The contractor warrants that all software, firmware and hardware product(s) delivered to the City of Virginia under any agreement, and which is used in accordance with the product documentation provided by the contractor, shall be 4-digit Year 2000 compliant (or approved enabled). All products shall accurately process all date-change data from start to finish, including, but not limited to, twentieth, twenty-first centuries and leap year calculations.

Any product provided under this Agreement discovered not to be compliant after acceptance shall be corrected by the contractor at no additional cost to the City. Failure to correct the deficiency shall subject the contractor to default action.

INCLUDE THE FOLLOWING PARAGRAPH WHEN THE REQUIREMENT IS FOR A SYSTEM AND/OR CUSTOMIZED SOFTWARE WHICH WILL BE USED IN COMBINATION WITH AGENCY OWNED PRODUCT(S) OR SOURCE(S) OF DATA AND WHICH ARE IDENTIFIED IN THE SOLICITATION:

The contractor shall not be responsible for correcting any product(s) (e.g., hardware, software, firmware) which were not provided under this agreement or for correcting any previously owned City products that are used in combination with the contractor's product(s); however, if this solicitation identifies any product or sources of data to be used in combination with the product(s) delivered under the resulting agreement, the contractor shall be responsible for providing all necessary interface(s) or other appropriate means for assuring that date data output from such other product(s) or source(s) is automatically corrected before being processed by the product(s) or system provided under this agreement.

When Used: In all solicitations for software and computer and microprocessor based products, including, but not limited to, control systems, security systems, fire alarm systems, telecommunications systems, etc. CAUTION: Should the above paragraph be included, ensure that the agency owned product(s) or source(s) of data are identified in the solicitation. Space must be provided in the pricing schedule for the bidder/offeror to itemize any additional product and/or cost to meet this requirement.

30. **NONVISUAL ACCESS TO TECHNOLOGY**: All information technology which, pursuant to this agreement, is purchased or upgraded by or for the use of any City department, agency or institution or political subdivision of the Commonwealth (the "Technology") shall comply with the following nonvisual access standards from the date of purchase or upgrade until the expiration of this agreement:
- (i) effective, interactive control and use of the Technology shall be readily achievable by nonvisual means;
 - (ii) the Technology equipped for nonvisual access shall be compatible with information technology used by other individuals with whom any blind or visually impaired user of the technology interacts;
 - (iii) Nonvisual Access Technology shall be integrated into any networks used to share communications among employees, program participants or the public; and
 - (iv) the Technology for nonvisual access shall have the capability of providing equivalent access by nonvisual means to telecommunications or other interconnected network services used by persons who are not blind or visually impaired.

Compliance with the foregoing nonvisual access standards shall not be required if the head of the using agency, institution or political subdivision determines that (i) the Technology is not available with nonvisual access because the essential elements of the Technology are visual and (ii) nonvisual equivalence is not available.

Installation of hardware, software or peripheral devices used for nonvisual access is not required when the Technology is being used exclusively by individuals who are not blind or visually impaired, but applications programs and underlying operating systems (including the format of the data) used for the manipulation and presentation of information shall permit the installation and effective use of nonvisual access software and peripheral devices.

If requested, the Contractor must provide a detailed explanation of how compliance with the foregoing nonvisual access standards is achieved and a validation of concept demonstration.

The requirements of this Paragraph shall be construed to achieve full compliance with the Information Technology Access Act, §§ 2.2-3500 through 2.2-3504 of the *Code of Virginia*.

When Used: In all contracts for the procurement of electronic information processing hardware and software, including telecommunications. The head of the using agency may, with respect to nonvisual access software or peripheral devices, approve the exclusion of this clause only to the extent that the cost of such software or devices for the using agency would increase the total cost of the procurement by more than five percent. All exclusions of this clause from any contract must be reported to the Secretary of Technology no later than 30 days after the close of the fiscal year in which the contract was awarded.

SOLE-SOURCE JUSTIFICATION FORM

INSTRUCTIONS: Complete this form for all "sole source" purchases that will exceed \$5,000. Competition is not available in a sole source; thus distinguishing it from a proprietary purchase where the product required is restricted to the manufacturer(s) stipulated, but is sold through distributors and competition between them can be obtained.

Requisition Number:	Amount:	Date*:
Product or Service Description:		
Proposed Vendor:	Vendor Number:	
Prepared By:	Dept:	Ext:

I. Explain why this is the only product or service that can meet the needs of the City:

<input type="checkbox"/>	One of a Kind – No competitive product or service in existence.
<input type="checkbox"/>	Compatibility – Must match existing piece or brand of equipment for compatibility.
<input type="checkbox"/>	Replacement/Maintenance – Repair or maintenance for specific brand of existing equipment.
<input type="checkbox"/>	Other (Explanation must appear below)

II. Provide full explanations, complete descriptions, and/or list all relevant reasons to support the determination of why this vendor is the only practicably available source:

III. Explain why the price is considered reasonable and describe the efforts that were made to conduct a noncompetitive negotiation to get the best possible price:

IV. By submitting this request, I certify that the above justification is accurate and complete to the best of my knowledge and that I have no financial or other interest in selecting this vendor to provide the supplies or services indicated.

(Requester)

(Date)

V. Based on the above and (any) attached documents, I concur this to be a sole source with no other vendor available.

(Purchasing Agent)

(Effective Date)

*Sole source approvals are valid one year from the effective date and must be re-approved each year to ensure no competition exists in the market.



CITY OF WINCHESTER, VIRGINIA

Rouss City Hall
15 North Cameron Street
Winchester, VA 22601

Telephone: (540)667-1815
FAX: (540)723-0238

City of Winchester, VA
Unsealed Request for Quotation
[TITLE & PURCHASE DESCRIPTION OF GOOD(s)]

DUE DATE: February 20, 2008, 3:00 p.m. local time

SUBMISSION: Submit this form, completed in full with any additional information to support the contractor's ability to provide the specifications requested herein to:

ISSUING DEPARTMENT NAME
Attn: NAME AND TITLE
ADDRESS
ADDRESS
Phone: 540-xxx-xxxx
Fax: 540-xxx-xxxx

BACKGROUND: [Add whatever Background language necessary to make an introduction of you, your department, agency or the City to the prospective offerors. Below is one choice]

1.) Winchester, founded in 1744, is the oldest Virginia City west of the Blue Ridge Mountains. Located at the northern entrance of the Shenandoah Valley, the City encompasses 9.3 sq. miles and is the medical, governmental, commercial and financial center for the surrounding areas. The City has a population of approximately 26,000 with 7,650 single family detached and attached homes and over 4,000 multi-family dwellings. Mission Statement: The City of Winchester is dedicated to providing quality services to our citizens in a cost-effective and efficient manner, while anticipating the future needs of our community.

PERIOD OF CONTRACT: [Keep in mind that the total years of an agreement cannot exceed \$50,000 without being re-quoted or formally bid. Choices of language are below, pick one or modify to meet your requirements.]

- 1.) One time spot purchase.
- 2.) Shall be a period of twelve (12) months from date of award. The City reserves the right to cancel and terminate this Contract, without penalty, upon ten (10) days written notice to contractor. The parties understand and agree that upon mutual agreement that this contract may renew for two (2) additional twelve (12) month periods.

PRE-QUOTE CONFERENCE OR SITE VISIT: [Choices of language are below, pick one or modify to your requirements.]

- 1.) None scheduled.
- 2.) Scheduled for 10:00am on November 19, 2007 at the 4th Floor Exhibit Hall, Rouss City Hall, 15 N. Cameron Street, Winchester, VA 22601. All bidders are encouraged to attend the pre-quote meeting to review Specifications and ask questions.
- 3.) Site visits may be scheduled at the offerors Due to the high number of potential sites, site visits will be at the bidders

SPECIFICATIONS: [The most important part of purchasing is telling prospective offerors what you want or need. This section is your space to describe in detail the goods or parts or service necessary to make your purchase a success. Purchasing is about buying the right quality, price, source, time, place, service and quantity. Below is some starter language that may help you better compose your specifications:

The City is soliciting a written quotation from qualified contractors to

I. STATEMENT OF NEEDS:

- a. [Consider Color, Make, Model, Sizes, Dimensions, Performance Specifications, Design Specifications, Follow-up procedures/reports, desired communication between you and the Contractor, Types of Reports, Quantities, Volumes, Name Brands (if justifiable), Disposal, Storage, Debris Removal, Quality, Warranties, Inspection, Acceptance, Training, Contractor Responsibilities, City responsibilities, definitions, Safety Considerations, Hazardous Chemicals, Optional Services/Goods, Performance Measures, Minimum Services Requirements, etc.]
- b. F.O.B. shipping destination: [Add address of your receiving location]. All purchases must be delivered before payment.
- c. Training: Successful bidder will be required to provide one (1) day of operator training and certification per manufacture regulations. Training will be scheduled at mutually agreeable time and date.
- d. Vehicle Condition: Fire, frame, or water damage will not be accepted. All vehicles shall be new, free of wear, defect or damage and contain no evidence of prior usage. Vehicles shall not have any record of having been stolen.
- e. Delivery Schedule: Contractor agrees to a sixty (60) day delivery schedule from time of order. Owner and Contractor recognize that the time is of essence in this Purchase Order, and if the product is not delivered within the specified time, plus any extensions allowed, then the Contract will be terminated for breach of contract.
- f. Contract Document: The City of Winchester reserves the right to utilize a purchase order as our contract document. All provisions of this RFQ shall be fully incorporated into the purchase order and any subsequent purchase order(s) during renewal, change order or time extension.

GENERAL TERMS AND CONDITIONS: The City's mandatory terms and conditions are herein incorporated as if set out in full and a copy may be downloaded from the City's official web site at: <http://www.winchesterva.gov/purchasing/>, or by requesting a hardcopy from the City Purchasing Agent, 540-667-1815 Ext. 1477.

SPECIAL TERMS AND CONDITIONS: [[These may be added and specialized as necessary. If you have special needs, i.e. subcontractors, audits, renewals and more, please contact Purchasing to assist you. Below are some examples often used in a RFQ for goods and it is up to your department or agency to pick the rest from Appendix B-2, B-3, B-4, as necessary:

ADVERTISING In the event a contract is awarded for supplies, equipment, or services resulting from this bid/proposal, no indication of such sales or services to the (name of institution) will be used in product literature or advertising. The contractor shall not state in any of its advertising or product literature that the City of Winchester or any agency or department of the City of Winchester has purchased or uses its products or services.

AUDIT: The contractor shall retain all books, records, and other documents relative to this contract for five (5) years after final payment, or until audited by the City of Winchester, whichever is sooner. The agency, its authorized agents, and/or state auditors shall have full access to and the right to examine any of said materials during said period.

BID PRICES: Bid shall be in the form of a firm unit price during the contract period.

DELIVERY: State your earliest firm delivery or performance date: _____. This date may be a factor in making the award.

EXTRA CHARGES NOT ALLOWED: The bid price shall be for complete delivery and installation ready for the City of Winchester's use, and shall include all applicable freight and installation charges; extra charges will not be allowed.

FINAL INSPECTION: At the conclusion of the delivery/work, the contractor shall demonstrate to the authorized owners representative that the work is fully operational and in compliance with contract specifications and codes. Any deficiencies shall be promptly and permanently corrected by the contractor at the contractor's sole expense prior to final acceptance of the work.

PRODUCT INFORMATION: The bidder/offeror shall clearly and specifically identify the product being offered and enclose complete and detailed descriptive literature, catalog cuts and specifications with the bid/proposal to enable the City of Winchester to determine if the product offered meets the requirements of the solicitation. Failure to do so may cause the bid/proposal to be considered nonresponsive.

REFERENCES: Bidders shall provide a list of at least 3 references where similar goods and/or services have been provided. Each reference shall include the name of the organization, the complete mailing address, the name of the contact person and telephone number.

<u>ORGANIZATION</u>	<u>ADDRESS</u>	<u>CONTACT PERSON</u>	<u>TELEPHONE</u>
1. _____	_____	_____	_____
2. _____	_____	_____	_____
3. _____	_____	_____	_____

WARRANTY: All materials and equipment shall be fully guaranteed against defects in material and workmanship for a period of twelve (12) months following date of delivery. Should any defect be noted by the owner, the Purchasing Office will notify the contractor of such defect or non-conformance. Notification will state either (1) that the contractor shall replace or correct, or (2) the owner does not require replacement or correction, but an equitable adjustment to the contract price will be negotiated. If the contractor is required to correct or replace, it shall be at no cost to the City of Winchester and shall be subject to all provisions of this clause to the same extent as materials initially delivered. If the contractor fails or refuses to replace or correct the deficiency, the office issuing the purchase order may have the materials corrected or replaced with similar items and charge the contractor the costs occasioned thereby or obtain an equitable adjustment in the contract price.

AWARD: [You must advise the offerors the basis for an award and how you plan to make it. If you write it, then you must do it. Below are a few options to consider and pick one or contact purchasing to assist in refining the award language:]

- 1.) An award will be made to the lowest responsive and responsible bidder. Evaluation will be based on net prices. Unit prices, extensions and grand total must be shown. In case of arithmetic errors, the unit price will govern. If cash discount for prompt payment is offered, it must be clearly shown in the space provided. Discounts for prompt payment will not be considered in making awards. The City reserves the right to reject any and all bids in whole or in part, to waive any informality, and to delete items prior to making an award.
- 2.) The right is reserved to make a separate award of each item, a group of items or all items, and to make an award either in whole or in part, whichever is deemed in the best interest of the City of Winchester. The award or awards will be made to the lowest responsive, responsible bidder or bidders as applicable.
- 2.) Contact Purchasing if these do not meet your needs.

WRITTEN QUOTE: [The City may ask each offeror to complete our enclosed bid form (which standardizes your received responses), or you may ask them to provide a written quote on their letterhead. Either way, all offerors must sign this form. Furthermore, below are a few options on how to request pricing:]

Delivered, Lump Sum Price for Four (4) Widgets:	\$ _____
All Inclusive Monthly Price for Dumping Services:	\$ _____
Hourly Rate to Install Specified Gadget:	\$ _____
Delivered, Unit Price for Specified Widget:	\$ _____

Written quotes shall be mailed or hand delivered to the Issuing Department shown above. In compliance with the Request for Quotation and to all the conditions imposed therein, including all general and special terms and conditions, the undersigned offers and agrees to furnish the goods/services at the price(s) indicated in the pricing schedule.

Name and Address of Firm: _____ Date: _____

_____ By: _____

_____ (Signature in Ink)

_____ Name: _____

_____ Title: _____

FEI/FIN No. _____ Tel No. () _____

E-mail: _____ Fax No.() _____

QUESTIONS: Any questions should be directed to ... [provide all the contact information for the responsible buyer].



CITY OF WINCHESTER, VIRGINIA

Rouss City Hall
15 North Cameron Street
Winchester, VA 22601

Telephone: (540)667-1815
FAX: (540)723-0238

City of Winchester, VA
Unsealed Request for Proposal
[TITLE & PURCHASE DESCRIPTION OF SERVICE(s)]

DUE DATE: February 20, 2009, 3:00 p.m. local time

SUBMISSION: Submit this form, completed in full with any additional information to support the contractor's ability to provide the specifications requested herein to:

ISSUING DEPARTMENT NAME
Attn: NAME AND TITLE
ADDRESS
ADDRESS
Phone: 540-xxx-xxxx
Fax: 540-xxx-xxxx

BACKGROUND: [Add whatever language necessary to make an introduction of you, your department, agency or the City to the prospective offerors. Below is one choice]:

1.) Winchester, founded in 1744, is the oldest Virginia city west of the Blue Ridge Mountains. Located at the northern entrance of the Shenandoah Valley, the City encompasses 9.3 sq. miles and is the medical, governmental, commercial and financial center for the surrounding areas. The City has a population of approximately 26,000 with 7,650 single family detached and attached homes and over 4,000 multi-family dwellings. Mission Statement: The City of Winchester is dedicated to providing quality services to our citizens in a cost-effective and efficient manner, while anticipating the future needs of our community.

PURPOSE: [Add whatever language necessary to explain why your departmental or agency have a need for these services and/or making a change to the prospective offerors. Below is an example]:

1.) The City of Winchester is soliciting quotes for broker services in order to assist the Administration Department in the management of our Section 125 Cafeteria Benefits Plan, including Winflex, health, dental, short-term disability, cancer, critical illness, long-term care and pre-paid legal services. Currently, the City utilizes BB&T broker services.

PERIOD OF CONTRACT: [Keep in mind that the total years of an agreement cannot exceed \$50,000 without being re-quoted or formally bid. Choices of language are below, pick one or modify to meet your requirements]

- 1.) One time spot purchase.
- 2.) Original term shall be a period of twelve (12) months from date of award. The City reserves the right to cancel and terminate this Contract, without penalty, upon ten (10) days written notice to contractor. The parties understand and agree that upon mutual agreement that this contract may renew for two (2) additional twelve (12) month periods.
- 3.) Original term shall be one hundred eighty (180) days from time of Award.

PRE-QUOTE CONFERENCE OR SITE VISIT: : [Choices of language are below, pick one or modify to your requirements]

- 1.) None scheduled.
- 2.) Scheduled for 10:00am on November 19, 2007 at the 4th Floor Exhibit Hall, Rouss City Hall, 15 N. Cameron Street, Winchester, VA 22601. All bidders are encouraged to attend the pre-quote meeting to review Specifications and ask questions.
- 3.) Site visits may be scheduled as necessary by contacting the Issuing Department.

SPECIFICATIONS: [The most important part of purchasing is telling prospective offerors what you want or need. This section is your space to describe in detail the goods or parts or service necessary to make your purchase a success. Purchasing is about buying the right quality, price, source, time, place, service and quantity. Below is some starter language that may help you better compose your specifications:

The City is soliciting a written quotation from qualified contractors to provide the following minimum services, but not limited to:

I. STATEMENT OF NEEDS:

- a. [Consider Deliverables, Performance, Follow-up Procedures/Reports, Quality of Work, Desired Communication between You and the Contractor, Types of Reports, Quantities, Volumes, Disposal, Storage, Debris Removal, Labor Guarantee, Warranties, Inspection, Acceptance, Training, Contractor Responsibilities, City Responsibilities, Definitions, Safety Considerations, Hazardous Chemicals, Optional or Alternative Services/Goods, Performance Measures, Minimum Services Requirements, etc.]
- b. Advise them how this service is being done today.
- c. and ask for their feedback within the proposal.
- d. Tell the offeror what you expect of them.
- e. Clearly explain the services.
- f. If you have questions, ask them for their feedback within their 'submittal content' section.

GENERAL TERMS AND CONDITIONS: The City's mandatory terms and conditions are herein incorporated as if set out in full and a copy may be downloaded from the City's official web site at: <http://www.winchesterva.gov/purchasing/>, or by requesting a hardcopy from the City Purchasing Agent, 540-667-1815 Ext. 1477.

SPECIAL TERMS AND CONDITIONS: [These may be added and specialized as necessary. If you have special needs, i.e. subcontractors, audits, renewals and more, please contact Purchasing to assist you. Below are some examples often used in a RFQ for services and it is up to your department or agency to pick the rest from Appendix B-2, B-3, B-4, as necessary:

ADVERTISING In the event a contract is awarded for supplies, equipment, or services resulting from this bid/proposal, no indication of such sales or services to the (name of institution) will be used in product literature or advertising. The contractor shall not state in any of its advertising or product literature that the City of Winchester or any agency or department of the City of Winchester has purchased or uses its products or services.

AUDIT: The contractor shall retain all books, records, and other documents relative to this contract for five (5) years after final payment, or until audited by the City of Winchester, whichever is sooner. The agency, its authorized agents, and/or state auditors shall have full access to and the right to examine any of said materials during said period.

BID PRICES: Bid shall be in the form of a firm unit price during the contract period.

RENEWAL OF CONTRACT: This contract may be renewed by the City of Winchester upon written agreement of both parties for up to three (3) year, under the terms of the current contract, and at a reasonable time (approximately 30 days) prior to the expiration. The total value of the contract may not exceed \$50,000.

SUBCONTRACTS: No portion of the work shall be subcontracted without prior written consent of the City. In the event that the contractor desires to subcontract some part of the work specified herein, the contractor shall furnish the City the names, qualifications and experience of their proposed subcontractors. The contractor shall, however, remain fully liable and responsible for the work to be done by its subcontractor(s) and shall assure compliance with all requirements of the contract.

REFERENCES: Bidders shall provide a list of at least 3 references where similar goods and/or services have been provided. Each reference shall include the name of the organization, the complete mailing address, the name of the contact person and telephone number.

<u>ORGANIZATION</u>	<u>ADDRESS</u>	<u>CONTACT PERSON</u>	<u>TELEPHONE</u>
1. _____	_____	_____	_____
2. _____	_____	_____	_____
3. _____	_____	_____	_____

SUBMITTAL REQUIREMENTS AND INSTRUCTIONS: [The highlighted information may be changed to suit your procurement. All service oriented procurements will require different evaluation criteria and questions so use your judgement and select appropriately. Enclosed are some ideas.]:

a. GENERAL INSTRUCTIONS:

- i. Response: In order to be considered for selection, offerors must submit a complete response to this RFQ. One (1) original hardcopy and three (3) copies are to be submitted in a sealed or unsealed envelope bearing the company name, mailing address, the RFQ name, the date and the time due mailed or delivered to Issuing Department. No other distribution of the proposal shall be made by the offeror. Offerors must clearly label the original with the word "ORIGINAL" on the cover and must clearly label all copies with the word "COPY" on the cover.
- ii. Late Proposals: It is the responsibility of the firm to insure the Issuing Department receives the submittal by the proposal due date and time. Late Proposals will be returned to offeror unopened, if the container is properly identified with the firm's return address.

b. PROPOSAL PREPARATION:

- i. Proposals shall be signed by an authorized representative of the offeror. All information requested should be submitted. Failure to submit information requested may result in the Issuing Department requiring prompt submission of missing information and/or giving a lowered evaluation of the proposal. Proposals which are substantially incomplete or lack key information may be rejected. Mandatory requirements are those required by law or regulation or are such that they cannot be waived and are not subject to negotiation.
- ii. Proposals shall be prepared simply and economically, providing a straightforward, concise description of capabilities to satisfy the requirements of the RFQ. Emphasis should be placed on completeness and clarity of content. Avoid excessive content and unrelated work samples.
- iii. Proposals should be organized in the order in which the requirements are presented in the RFQ. All pages of the proposal should be numbered.
- iv. Each copy of the proposal should be bound or stapled, and contained in a single volume where practical. All documentation submitted with the proposal should be contained in that single volume.
- v. Ownership of all data, materials and documentation originated and prepared for the City pursuant to the RFQ shall belong exclusively to the City and be subjected to public inspection in accordance with the Virginia Freedom of Information Act. Trade secrets or proprietary

information submitted by an offeror shall not be subject to the public disclosure under the Virginia Freedom of Information Act; however, the offeror must invoke the protections of §2.24342F of the Code of Virginia, in writing, either before or at the time the data or other material is submitted. The written notice must specifically identify the data or materials to be protected and state the reasons why protection is necessary. The proprietary or trade secret submitted must be identified by some distinct method such as highlighting or underlining and must indicate only the specific words, figures, or paragraphs that constitute trade secrets or proprietary information. The classification of an entire proposal document, line item prices, and/or total proposal prices as proprietary or trade secrets is not acceptable and will result in rejection of the proposal.

- c. **SUBMITTAL CONTENT:** Written proposals **shall** contain the answers to the below questions and presented in the following order: [Ask whatever questions will allow you to review the various firms and compare who will provide the best service to the City]
- i. **Business background and credentials:** In detail, outline your firm including year established, available resources and services, location(s), and history of business.
 - ii. **Personnel:** list the firm's staff to be assigned to the City and provide partial or full resumes of key personnel.
 - iii. **Quality:** Provide details on how the firm will ensure quality throughout the project work including the personnel and resources assigned to quality assurance.
 - iv. **Deliverables:** Explain how information will be gathered and reported to the City, including timeliness, formatting, benchmarks, and communication.
 - v. **Pricing:** Provide a lump sum rate schedule.
 - vi. **References** from a minimum of 3 clients familiar with similar work assignments over the past 2 years.

SELECTION PROCEDURES

This unsealed Request for Proposal is divided into two parts:

- Part I- Written Submission of Firm Experience and Qualifications; and
- Part II- Interviews and Presentations from Part I short-listed firms, only.

EVALUATION CRITERIA

The Issuing Department will evaluate each firm on the basis of the following criteria. The Issuing Department will then develop a composite ranking of each firm and rank the firms from first to last.

PART I - Evaluation Criteria of Written Proposals:	Score (Pts):
▪ Experience and qualifications of key individuals to be assigned to the work.	20
▪ Qualifications and experience of the firm in performing similar projects.	20
▪ Quality Control Measures:	20
▪ References:	20
▪ Annual Fee:	20

PART II - Evaluation Criteria of Oral Presentations (Optional)

- Final adjustments to Part I criteria may be made by the Issuing Department upon conclusion of the interview.
- Issuing Department selects a firm to begin negotiations.

Compensation: Offeror will not be compensated for the cost of proposal preparation whether or not an award is consummated.

Investigations: The Issuing Department may make such reasonable investigations, as it deems proper and necessary to determine the ability of the firm to perform the work. The Issuing Department and/or its representative(s) reserves the right to inspect

the firm's physical premises prior to award to satisfy questions regarding the firm's capabilities.

AWARD: [You must advise the offerors the basis for an award and how you plan to make it. If you write it, then you must do it. Below is the typical service oriented award language. If your department or agency plan to procure a professional service (i.e. physician, engineer, lawyer, actuary, accounting/auditor, architecture, and land surveyor) over \$30,000, then a formal RFP will be handled by the purchasing office.]

1.) Selection shall be made of two or more offerors deemed to be fully qualified and best suited among those submitting proposals. Negotiations shall be conducted with the offerors so selected. Price shall be considered, but need not be the sole determining factor. After negotiations have been conducted with each offeror so selected, the agency shall select the offeror which, in its opinion, has made the best proposal, and shall award the contract to that offeror. The City of Winchester may cancel this Request for Quote or reject proposals at any time prior to an award, and is not required to furnish a statement of the reasons why a particular proposal was not deemed to be the most advantageous (*Code of Virginia, § 2.2-4359D*). Should the City of Winchester 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. The award document will be a purchase order incorporating by reference all the requirements, terms and conditions of the solicitation and the contractor's proposal as negotiated.

WRITTEN PROPOSAL: Complete all of the enclosed forms, spaces and requesting information. By signing this quote sheet, bidder acknowledges that he completely understands all Specifications, General Conditions, Special Conditions and Instructions to Bidders. Failure to provide all of the requested information, and to completely fill out or sign the below form may result in a non-responsive quote.

Written proposals shall be mailed, faxed or hand delivered to the Issuing Department shown above. In compliance with the Request for Quotation and to all the conditions imposed therein, including all general and special terms and conditions, the undersigned offers and agrees to furnish the goods/services at the price(s) indicated in the pricing schedule.

Name and Address of Firm:	Date: _____
_____	By: _____
_____	(Signature in Ink)
_____	Name: _____
_____	Title: _____
FEI/FIN No. _____	Tel No. () _____
E-mail: _____	Fax No.() _____

QUESTIONS: Any questions should be directed to [Name] by calling [phone number], or [email address]

Request for Quote (RFQ) – CONTRACTOR ACCEPTANCE FORM

(City Department shall use this form when requesting written quotes for goods or non-professional services under the formal bid limit of \$50,000 to ensure Contractor compliance to the City's General Terms and Conditions, Non-Collusion, Conflict of Interest and Insurance Requirements)

My signature certifies that the quote as submitted complies with all the required specifications and the firm is agreeable to the *City's Required General Terms and Conditions* as posted online at: www.winchesterva.gov/purchasing

My signature certifies that upon Award but prior to the commencement of any work, the firm will furnish a Certificate of Insurance listing the City of Winchester as additional insured as required within the *City's Required General Terms and Conditions*, Paragraph U.

My signature also certifies that the accompanying proposal is not the result of, or affected by, any unlawful act of collusion with another person or company engaged in the same line of business or commerce, or any act of fraud punishable under Title 18.2, Chapter 12, Article 1.1 of the *Code of Virginia*, 1950 as amended. Furthermore, I understand that fraud and unlawful collusion are crimes under the Virginia Antitrust Act Federal Law, and can result in fines, prison sentences, and civil damage awards.

My signature also certifies that this firm has no business or personal relationships with any other companies or persons that could be considered as a conflict of interest or potential conflict of interest to the City of Winchester, and that there are no principals, officers, agents, employees, or representatives of this firm that have any business or personal relationships with any other companies or persons that could be considered as a conflict of interest or a potential conflict of interest to the City of Winchester, pertaining to any and all work or services to be performed as a result of this request and any resulting contract with the City of Winchester.

I hereby certify that I am authorized to sign as a Representative for the Firm:

Firm Name _____

Address _____

FEIN _____ Phone _____

Fax _____ Email _____

Commonwealth of Virginia License to do Business # _____

City of Winchester Business License # _____

Authorized Signature _____

Name/Title (please print) _____

Date _____

References for: _____

Bidders shall provide references on this form.

1. Firm Name _____
Contact _____
Title _____ E-mail _____
Mailing Address _____
Phone _____ Fax _____
2. Firm Name _____
Contact _____
Title _____ E-mail _____
Mailing Address _____
Phone _____ Fax _____
3. Firm Name _____
Contact _____
Title _____ E-mail _____
Mailing Address _____
Phone _____ Fax _____
4. Firm Name _____
Contact _____
Title _____ E-mail _____
Mailing Address _____
Phone _____ Fax _____
5. Firm Name _____
Contact _____
Title _____ E-mail _____
Mailing Address _____
Phone _____ Fax _____

Contractor Data Sheet

Note: The following information is required as part of your response to this solicitation. Failure to complete and provide this sheet may result in finding your bid nonresponsive. (In the case of a two-step ITB, it may cause the proposal portion to be determined to be not acceptable.)

1. Qualification: The vendor must have the capability and capacity in all respects to satisfy fully all of the contractual requirements.
2. Debarment or Suspension: Is your firm or are any of your sub-contractors currently debarred or suspended from any local, state or federal entity (circle one)? YES or NO If 'no', explain the circumstances in your response.
3. Vendor's Primary Contact:

Name: _____ Phone: _____ Email: _____

4. Years in Business: Indicate the length of time you have been in business providing this type of good or service:

_____ Years _____ Months

5. Vendor Information:

FIN or FEI Number: _____ If Company, Corporation, or Partnership
Social Security Number: _____ If Individual

6. Indicate below a listing of at least four (4) current or recent accounts, either commercial or governmental, that your company is servicing, has serviced, or has provided similar goods. Include the length of service and the name, address, and telephone number of the point of contact.

A. Company: _____ Contact: _____

Phone: (____) _____ Fax: (____) _____

Project: _____

Dates of Service: _____ \$ Value: _____

B. Company: _____ Contact: _____

Phone: (____) _____ Fax: (____) _____

Project: _____

Dates of Service: _____ \$ Value: _____

C. Company: _____ Contact: _____

Phone: (____) _____ Fax: _____

Project: _____

Dates of Service: _____ \$ Value: _____

D. Company: _____ Contact: _____

Phone: (____) _____ Fax: (____) _____

Project: _____

Dates of Service: _____ \$ Value: _____

I certify the accuracy of this information.

Signed: _____ Title: _____ Date: _____

When used: This form is used as an attachment to a solicitation when the agency or institution wishes to check the bidder's/offeror's references or to verify the bidder's offeror's experience.

BID BOND

KNOW ALL MEN BY THESE PRESENTS THAT _____

(Here insert the name & address or legal title of the Contractor)

as Principal, hereinafter called the Contractor and _____

(Here insert the legal title of the Surety)

as Surety, hereinafter called the Surety, are held and firmly bound unto the City of Winchester, Virginia, as obligee, hereinafter called the Owner, in the amount of

(Dollars)

(\$_____) for the payment whereof Contractor and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has submitted a Bid for:

ITB # _____ - Project Description

in accordance with Drawing and Specifications prepared by the City of Winchester, Virginia.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that, if the Obligee shall accept the Bid of the Principal and the Principal shall enter into a Contract with the Obligee in accordance with terms of such Bid, and give such bonds as specified in the Contract Documents with good and sufficient surety for the faithful performance of such Contract and for the prompt payment of labor and material furnished in the prosecution thereof, or in the event of the failure of the Principal to enter such Contract and give such bonds, if the Principal shall pay the Obligee the difference not to exceed the penalty hereof between the amount specified in said Bid and such larger amount for which the Obligee may in good faith contract with another party to perform the Work covered by said Bid, then this obligation shall be null and void, otherwise to remain in full force and effect.

SIGNED AND SEALED THIS _____ DAY OF _____ A.D., 2009.

PRINCIPAL

TITLE

WITNESS

SURETY

TITLE

WITNESS

LABOR AND MATERIAL PAYMENT BOND

KNOW ALL MEN BY THESE PRESENTS, that we _____

_____ as Principal, hereinafter

called Contractor, and _____

Surety Company, with General Offices in _____

_____, a corporation organized under the laws of the State of _____ and authorized to transact business in the State of Virginia as Surety, hereinafter called Surety, are held and firmly bound unto the City of Winchester, Virginia, as Obligee, hereinafter called Owner, in the penal sum

(_____)Dollars, lawful money of the United States, for the payment of which sum, will and truly be made, the Said Contractor and Surety bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Signed, sealed and delivered this _____ day of _____ 2009.

WHEREAS, the above named and bounded Contractor has entered into a written contract with the Owner, dated _____, 2009 for:

ITB # _____ - Project Description

in accordance with the Drawings and Specifications prepared by the City of Winchester, Virginia, which Contract is by reference made a part hereof, and is hereinafter referred to as the Contract.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that, if the Contractor shall promptly make payment to all claimants as hereinafter defined, for all labor and material used or reasonably required for use in the performance of the Contract, then this obligation shall be void; otherwise it shall remain full force and effect, subject, however, to the following conditions:

1. A claimant is defined as one having a direct contract with the Principal or with a Subcontractor of the Principal for labor, material, or both, used or reasonably required for use in the performance of the Contract, labor and material being construed to include that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental of equipment directly applicable to the Contract.
2. The above named Principal and Surety hereby jointly and severally agree with the Owner that every claimant as herein defined, who has not been paid in full before the expiration of a period of ninety (90) days after the date on which the

last of such claimant's work or labor was done or performed, or materials were furnished by such claimant, may sue on this bond for the use of such claimant, prosecute the suit to final judgement for such sum or sums as may be justly due claimant, and have execution thereon. The Owner shall not be liable for the payment of any costs or expenses of any such suit.

3. No suit or action shall be commenced hereunder by any claimant:
 - a) Unless claimant, other than the one having a direct Contract with the Principal, shall have given written notice to any two of the following: the Principal, the Owner, or the Surety above named, within (90) days after such claimant did or performed the last of the work or labor, or furnished the last of the materials for which said claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the materials were furnished, or for whom the work or labor was done or performed. Such notice shall be served by mailing the same by registered mail or certified mail, postage paid, in an envelope addressed to the Principal, Owner or Surety, at any place where an office is regularly maintained for the transaction of business, or served in any manner in which legal process may be served in the state in which the aforesaid project is located, save that such service need not be made by a public officer.
 - b) After the expiration of one (1) year following the date on which Principal ceased work on said Contract, it being understood, however, that if any limitation embodied in this bond is prohibited by any law controlling the construction hereof such limitation shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law.
 - c) Other than in a state court of competent jurisdiction in and for the county or other political subdivision of the state in which the project, or any part thereof, is situated, or in the United States District Court for the district in which the project, or any part thereof, is situated, and not elsewhere.
4. The amount of this bond shall be reduced by and to the extent of any payment or payments made in good faith hereunder, inclusive of the payment by Surety of mechanic's liens which may be filed of record against said improvement, whether or not claim for the amount of such lien be presented under and against this bond.

Signed and sealed this _____ day of _____, 2009.

PRINCIPAL

TITLE

WITNESS

SURETY

TITLE

WITNESS

PERFORMANCE BOND

KNOW ALL MEN BY THESE PRESENTS, that we _____

_____ as Principal, hereinafter

called Contractor, and _____

Surety Company, with General Offices in _____

_____, a corporation organized under the laws of the State of _____ and authorized to transact business in the State of Virginia as Surety, hereinafter called Surety, are held and firmly bound onto the City of Winchester, Virginia, as Oblige, hereinafter called Owner, in the penal sum _____

(_____)Dollars, lawful money of the United States, for the payment of which sum, will and truly be made, the Said Contractor and Surety bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Signed, sealed and delivered this _____ day of _____, 2009.

WHEREAS, the above named and bounded Contractor has entered into a written contract with the Owner, dated _____, 2009 for:

ITB # _____ - Project Description

in accordance with the Drawings and Specifications prepared by the City of Winchester, Virginia, which Contract is by reference made a part hereof, and is hereinafter referred to as the Contract.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that, if the Contractor shall promptly and faithfully perform said Contract, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

The Surety hereby waives notice of any alteration or extension of time made by the Owner.

Whenever Contractor shall be, and declared by Owner to be in default under the Contract, the Owner having performed Owner's obligations thereunder, the Surety may promptly remedy the default, or shall promptly:

1. Complete the Contract in accordance with its terms and conditions, or
2. Obtain a bid or bids for completing the Contract in accordance with its terms and

conditions, and upon determination by Surety of the lowest responsible bidder, or, if the Owner elects, upon determination by the Owner and the Surety jointly of the lowest responsible bidder, arrange for a contract between such bidder and Owner, and make available as work progresses (even though there should be a default or a succession of defaults under the contract or contracts of completion arranged under this paragraph) sufficient funds to pay the cost of completion less the balance of the contract price; but not exceeding, including other costs and damages for which Surety may be liable hereunder, the amount set forth in the first paragraph hereof. The term "balance of contract price," as used in this paragraph, shall mean the total amount payable by the Owner to Contractor under the Contract and any amendments thereto, less the amount properly paid by Owner to Contractor.

Any suit under this bond must be instituted before the expiration of two (2) years from the date on which final payment under the Contract falls due.

No right of action shall accrue on this bond to or for the use of any person or corporation other than the Owner named herein or the heirs, executors, administrators or successors of the Owner.

Signed and sealed this _____ day of _____ 2009.

PRINCIPAL

SURETY

TITLE

TITLE

WITNESS

WITNESS

CONTRACTOR QUALIFICATION DATA SHEET

1. General:

In order to be considered for selection, Bidders shall submit the following information as part of your response to this solicitation. Failure to complete and provide this data sheet and the requested information may result in finding your quote/bid nonresponsive.

1.1 Proprietary Information

All source code, executables, user data, materials, meeting minutes, progress reports and documentation shall be submitted to the City and shall belong exclusively to the City, and shall be subject to public inspection in accordance with the Virginia Freedom of Information Act. Trade secrets or proprietary information submitted by a Bidder shall not be subject to public disclosure under the Virginia Freedom of Information Act provided the Bidder invokes the protections of Section 2.2-4342F of the Virginia Public Procurement Act, which provides that:

“Trade secrets or proprietary information submitted by a Bidder, or subsequently the Contractor, in connection with a procurement transaction, shall not be subject to public disclosure under the Virginia Freedom of Information Act. However, the Bidder or Contractor must invoke the protection of this Section prior to, or upon submission of the data or other materials. The Contractor must identify the data or other materials to be protected and justify in writing the explicit reasons that such protection is necessary. Failure to mark the data or other materials as proprietary or otherwise classified, will result in the data or other materials being released to Bidders or to the public as provided in the Virginia Freedom of Information Act.”

The classification of the entire proposal document and total bid price as proprietary or trade secrets is not acceptable.

1.2 Incurred Cost

The offeror is responsible for all costs of proposal preparation. The City of Winchester is not liable for any costs incurred in response to the quote/bid.

1.3 Contractor Qualifications:

Responses should be as thorough and detailed as possible so that City may properly evaluate your capabilities to provide the required services. Offerors shall submit responses for the following items within your quote/bid response.

1.3.1 General

1.3.1.1 How many years has your organization been in business as a General Contractor?

1.3.1.2 How many years has your organization been in business under its present name?

1.3.1.3 What is your organization's Virginia Contractors Registration Number?

1.3.1.4 List the states and categories of construction in which your organization is legally qualified to do business?

1.3.1.5 *Qualifications:* Provide a description of the organizational structure and history. Identify key personnel to be assigned to this project and their relevant experience in utility and infrastructure replacement, including roadway reconstruction, paving and markings. Describe the company's experience with task order construction contracts.

1.3.1.6 Debarment/Suspension List: Firms shall confirm in writing that they are not currently on any debarment or suspension list of any local, state or federal government. Any firm found to be listed shall be rejected as non-responsive.

1.3.2 Construction-Specific

1.3.2.1 Quality Management Plan and Timeliness Tracking Plan

The Contractor shall provide a detailed description of all internal control methods used to insure quality throughout all of the contractor's operations, as well as the system or method that will be employed to track, monitor, and ensure compliance with all time line requirements of this quote/bid.

1.4.2.2 Past Project Experience

The Contractor shall provide up to five (5) reference projects that are similar in nature to the City's proposed construction project. The submitted projects shall have been initiated or completed in the past five (5) years and shall have involved construction exceeding \$3,0500,000 in value in a one-year period. In the response, the Contractor shall provide a one to two paragraph description of the work performed, and the name, address, telephone number, and email address of the owner's representative.

The Contractor shall include in this list any contract(s) that was/were awarded to the company by a Virginia-based public agency or public agency in another state in the past five (5) years that was/were terminated for performance-related reasons. The contractor shall provide the reason for termination.

1.4.2.3 Management of Simultaneous Contracts

The Contractor shall list all the name of projects, owner's name and address, percent complete and scheduled completion of the major projects in progress on the date of proposal submittal and the estimated contract amount of all executed contracts that will be underway at the same time as the City's proposed construction project. The contractor shall also state how the contract needs of the City will be met with the available company resources considering that these other contracts will be underway simultaneously.

1.4.3 Financial Statements

Please submit your company's audited annual financial statement and/or Dunn & Bradstreet report for the last two (2) years.

1.4.4 Subcontracting Restrictions

The Prime Contractor shall perform or exercise responsibility for this contract with its own work force for at least 570% of the total dollar value of the contract. ~~List any work normally subcontracted and~~ Identify the sub-Contractor(s) who will do that work on this project and the amount of work that each will perform.

1.4.5 Certification

An authorized representative of the company shall sign the Technical Proposal, which shall include the following statement above the name/signature/date line:

I certify that the information provided in the Contractor Qualifications is complete and accurate to the best of my knowledge.

This document has important legal consequences; consultation with an attorney is encouraged with respect to its use or modification. This document should be adapted to the particular circumstances of the contemplated Project and the Controlling Law.

STANDARD GENERAL CONDITIONS OF THE CONSTRUCTION CONTRACT

Prepared by

ENGINEERS JOINT CONTRACT DOCUMENTS COMMITTEE

and

Issued and Published Jointly By



PROFESSIONAL ENGINEERS IN PRIVATE PRACTICE
a practice division of the
NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS

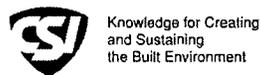
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The Associated General Contractors of America



Construction Specifications Institute

EJCDC C-700 Standard General Conditions of the Construction Contract.
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00700 - 1

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These General Conditions have been prepared for use with the Suggested Forms of Agreement Between Owner and Contractor Nos. C-520 or C-525 (2002 Editions). Their provisions are interrelated and a change in one may necessitate a change in the other. Comments concerning their usage are contained in the EJCDC Construction Documents, General and Instructions (No. C-001) (2002 Edition). For guidance in the preparation of Supplementary Conditions, see Guide to the Preparation of Supplementary Conditions (No. C-800) (2002 Edition).

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GENERAL CONDITIONS

ARTICLE 1 - DEFINITIONS AND TERMINOLOGY

1.01 *Defined Terms*

A. Wherever used in the Bidding Requirements or Contract Documents and printed with initial capital letters, the terms listed below will have the meanings indicated which are applicable to both the singular and plural thereof. In addition to terms specifically defined, terms with initial capital letters in the Contract Documents include references to identified articles and paragraphs, and the titles of other documents or forms.

1. *Addenda*--Written or graphic instruments issued prior to the opening of Bids which clarify, correct, or change the Bidding Requirements or the proposed Contract Documents.

2. *Agreement*--The written instrument which is evidence of the agreement between Owner and Contractor covering the Work.

3. *Application for Payment*--The form acceptable to Engineer which is to be used by Contractor during the course of the Work in requesting progress or final payments and which is to be accompanied by such supporting documentation as is required by the Contract Documents.

4. *Asbestos*--Any material that contains more than one percent asbestos and is friable or is releasing asbestos fibers into the air above current action levels established by the United States Occupational Safety and Health Administration.

5. *Bid*--The offer or proposal of a Bidder submitted on the prescribed form setting forth the prices for the Work to be performed.

6. *Bidder*--The individual or entity who submits a Bid directly to Owner.

7. *Bidding Documents*--The Bidding Requirements and the proposed Contract Documents (including all Addenda).

8. *Bidding Requirements*--The Advertisement or Invitation to Bid, Instructions to Bidders, bid security of

acceptable form, if any, and the Bid Form with any supplements.

9. *Change Order*--A document recommended by Engineer which is signed by Contractor and Owner and authorizes an addition, deletion, or revision in the Work or an adjustment in the Contract Price or the Contract Times, issued on or after the Effective Date of the Agreement.

10. *Claim*--A demand or assertion by Owner or Contractor seeking an adjustment of Contract Price or Contract Times, or both, or other relief with respect to the terms of the Contract. A demand for money or services by a third party is not a Claim.

11. *Contract*--The entire and integrated written agreement between the Owner and Contractor concerning the Work. The Contract supersedes prior negotiations, representations, or agreements, whether written or oral.

12. *Contract Documents*-- Those items so designated in the Agreement. Only printed or hard copies of the items listed in the Agreement are Contract Documents. Approved Shop Drawings, other Contractor's submittals, and the reports and drawings of subsurface and physical conditions are not Contract Documents.

13. *Contract Price*--The moneys payable by Owner to Contractor for completion of the Work in accordance with the Contract Documents as stated in the Agreement (subject to the provisions of Paragraph 11.03 in the case of Unit Price Work).

14. *Contract Times*--The number of days or the dates stated in the Agreement to: (i) achieve Milestones, if any, (ii) achieve Substantial Completion; and (iii) complete the Work so that it is ready for final payment as evidenced by Engineer's written recommendation of final payment.

15. *Contractor*--The individual or entity with whom Owner has entered into the Agreement.

16. *Cost of the Work*--See Paragraph 11.01.A for definition.

17. *Drawings*--That part of the Contract Documents prepared or approved by Engineer which graphically shows the scope, extent, and character of the Work to be performed by Contractor. Shop Drawings and

other Contractor submittals are not Drawings as so defined.

18. *Effective Date of the Agreement*--The date indicated in the Agreement on which it becomes effective, but if no such date is indicated, it means the date on which the Agreement is signed and delivered by the last of the two parties to sign and deliver.

19. *Engineer*--The individual or entity named as such in the Agreement.

20. *Field Order*--A written order issued by Engineer which requires minor changes in the Work but which does not involve a change in the Contract Price or the Contract Times.

21. *General Requirements*--Sections of Division 1 of the Specifications. The General Requirements pertain to all sections of the Specifications.

22. *Hazardous Environmental Condition*--The presence at the Site of Asbestos, PCBs, Petroleum, Hazardous Waste, or Radioactive Material in such quantities or circumstances that may present a substantial danger to persons or property exposed thereto in connection with the Work.

23. *Hazardous Waste*--The term Hazardous Waste shall have the meaning provided in Section 1004 of the Solid Waste Disposal Act (42 USC Section 6903) as amended from time to time.

24. *Laws and Regulations; Laws or Regulations*--Any and all applicable laws, rules, regulations, ordinances, codes, and orders of any and all governmental bodies, agencies, authorities, and courts having jurisdiction.

25. *Liens*--Charges, security interests, or encumbrances upon Project funds, real property, or personal property.

26. *Milestone*--A principal event specified in the Contract Documents relating to an intermediate completion date or time prior to Substantial Completion of all the Work.

27. *Notice of Award*--The written notice by Owner to the Successful Bidder stating that upon timely compliance by the Successful Bidder with the conditions precedent listed therein, Owner will sign and deliver the Agreement.

28. *Notice to Proceed*--A written notice given by Owner to Contractor fixing the date on which the Contract Times will commence to run and on which Contractor shall start to perform the Work under the Contract Documents.

29. *Owner*--The individual or entity with whom Contractor has entered into the Agreement and for whom the Work is to be performed.

30. *PCBs*--Polychlorinated biphenyls.

31. *Petroleum*--Petroleum, including crude oil or any fraction thereof which is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute), such as oil, petroleum, fuel oil, oil sludge, oil refuse, gasoline, kerosene, and oil mixed with other non-Hazardous Waste and crude oils.

32. *Progress Schedule*--A schedule, prepared and maintained by Contractor, describing the sequence and duration of the activities comprising the Contractor's plan to accomplish the Work within the Contract Times.

33. *Project*--The total construction of which the Work to be performed under the Contract Documents may be the whole, or a part.

34. *Project Manual*--The bound documentary information prepared for bidding and constructing the Work. A listing of the contents of the Project Manual, which may be bound in one or more volumes, is contained in the table(s) of contents.

35. *Radioactive Material*--Source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954 (42 USC Section 2011 et seq.) as amended from time to time.

36. *Related Entity* -- An officer, director, partner, employee, agent, consultant, or subcontractor.

37. *Resident Project Representative*--The authorized representative of Engineer who may be assigned to the Site or any part thereof.

38. *Samples*--Physical examples of materials, equipment, or workmanship that are representative of some portion of the Work and which establish the standards by which such portion of the Work will be judged.

39. *Schedule of Submittals*--A schedule, prepared and maintained by Contractor, of required submittals and the time requirements to support scheduled performance of related construction activities.

40. *Schedule of Values*--A schedule, prepared and maintained by Contractor, allocating portions of the Contract Price to various portions of the Work and used as the basis for reviewing Contractor's Applications for Payment.

41. *Shop Drawings*--All drawings, diagrams, illustrations, schedules, and other data or information which are specifically prepared or assembled by or for Contractor and submitted by Contractor to illustrate some portion of the Work.

42. *Site*--Lands or areas indicated in the Contract Documents as being furnished by Owner upon which the Work is to be performed, including rights-of-way and easements for access thereto, and such other lands furnished by Owner which are designated for the use of Contractor.

43. *Specifications*--That part of the Contract Documents consisting of written requirements for materials, equipment, systems, standards and workmanship as applied to the Work, and certain administrative requirements and procedural matters applicable thereto.

44. *Subcontractor*--An individual or entity having a direct contract with Contractor or with any other Subcontractor for the performance of a part of the Work at the Site.

45. *Substantial Completion*--The time at which the Work (or a specified part thereof) has progressed to the point where, in the opinion of Engineer, the Work (or a specified part thereof) is sufficiently complete, in accordance with the Contract Documents, so that the Work (or a specified part thereof) can be utilized for the purposes for which it is intended. The terms "substantially

complete" and "substantially completed" as applied to all or part of the Work refer to Substantial Completion thereof.

46. *Successful Bidder*--The Bidder submitting a responsive Bid to whom Owner makes an award.

47. *Supplementary Conditions*--That part of the Contract Documents which amends or supplements these General Conditions.

48. *Supplier*--A manufacturer, fabricator, supplier, distributor, materialman, or vendor having a direct contract with Contractor or with any Subcontractor to furnish materials or equipment to be incorporated in the Work by Contractor or any Subcontractor.

49. *Underground Facilities*--All underground pipelines, conduits, ducts, cables, wires, manholes, vaults, tanks, tunnels, or other such facilities or attachments, and any encasements containing such facilities, including those that convey electricity, gases, steam, liquid petroleum products, telephone or other communications, cable television, water, wastewater, storm water, other liquids or chemicals, or traffic or other control systems.

50. *Unit Price Work*--Work to be paid for on the basis of unit prices.

51. *Work*--The entire construction or the various separately identifiable parts thereof required to be provided under the Contract Documents. Work includes and is the result of performing or providing all labor, services, and documentation necessary to produce such construction, and furnishing, installing, and incorporating all materials and equipment into such construction, all as required by the Contract Documents.

52. *Work Change Directive*--A written statement to Contractor issued on or after the Effective Date of the Agreement and signed by Owner and recommended by Engineer ordering an addition, deletion, or revision in the Work, or responding to differing or unforeseen subsurface or physical conditions under which the Work is to be performed or to emergencies. A Work Change Directive will not change the Contract Price or the Contract Times but is evidence that the parties expect that the change ordered or documented by a Work Change Directive will be incorporated in a subsequently issued Change Order following negotiations by the parties as to its effect, if any, on the Contract Price or Contract Times.

1.02 Terminology

A. The following words or terms are not defined but, when used in the Bidding Requirements or Contract Documents, have the following meaning.

B. Intent of Certain Terms or Adjectives

1. The Contract Documents include the terms "as allowed," "as approved," "as ordered", "as directed" or terms of like effect or import to authorize an exercise of professional judgment by Engineer. In addition, the adjectives "reasonable," "suitable," "acceptable," "proper," "satisfactory," or adjectives of like effect or import are used to describe an action or determination of Engineer as to the Work. It is intended that such exercise of professional judgment, action or determination will be solely to evaluate, in general, the Work for compliance with the requirements of and information in the Contract Documents and conformance with the design concept of the completed Project as a functioning whole as shown or indicated in the Contract Documents (unless there is a specific statement indicating otherwise). The use of any such term or adjective is not intended to and shall not be effective to assign to Engineer any duty or authority to supervise or direct the performance of the Work or any duty or authority to undertake responsibility contrary to the provisions of Paragraph 9.09 or any other provision of the Contract Documents.

C. Day

1. The word "day" means a calendar day of 24 hours measured from midnight to the next midnight.

D. Defective

1. The word "defective," when modifying the word "Work," refers to Work that is unsatisfactory, faulty, or deficient in that it:

- a. does not conform to the Contract Documents, or
- b. does not meet the requirements of any applicable inspection, reference standard, test, or approval referred to in the Contract Documents, or
- c. has been damaged prior to Engineer's - recommendation of final payment (unless responsibility for the protection thereof has been assumed by Owner at Substantial Completion in accordance with Paragraph 14.04 or 14.05).

E. Furnish, Install, Perform, Provide

1. The word "furnish," when used in connection with services, materials, or equipment, shall mean to supply and deliver said services, materials, or equipment to the Site (or some other specified location) ready for use or installation and in usable or operable condition.

2. The word "install," when used in connection with services, materials, or equipment, shall mean to put into use or place in final position said services, materials, or equipment complete and ready for intended use.

3. The words "perform" or "provide," when used in connection with services, materials, or equipment, shall mean to furnish and install said services, materials, or equipment complete and ready for intended use.

4. When "furnish," "install," "perform," or "provide" is not used in connection with services, materials, or equipment in a context clearly requiring an obligation of Contractor, "provide" is implied.

F. Unless stated otherwise in the Contract Documents, words or phrases which have a well-known technical or construction industry or trade meaning are used in the Contract Documents in accordance with such recognized meaning.

ARTICLE 2 - PRELIMINARY MATTERS

2.01 Delivery of Bonds and Evidence of Insurance

A. When Contractor delivers the executed counterparts of the Agreement to Owner, Contractor shall also deliver to Owner such bonds as Contractor may be required to furnish.

B. *Evidence of Insurance:* Before any Work at the Site is started, Contractor and Owner shall each deliver to the other, with copies to each additional insured identified in the Supplementary Conditions, certificates of insurance (and other evidence of insurance which either of them or any additional insured may reasonably request) which Contractor and Owner respectively are required to purchase and maintain in accordance with Article 5.

2.02 Copies of Documents

A. Owner shall furnish to Contractor up to ten printed or hard copies of the Drawings and Project

Manual. Additional copies will be furnished upon request at the cost of reproduction.

2.03 *Commencement of Contract Times; Notice to Proceed*

A. The Contract Times will commence to run on the thirtieth day after the Effective Date of the Agreement or, if a Notice to Proceed is given, on the day indicated in the Notice to Proceed. A Notice to Proceed may be given at any time within 30 days after the Effective Date of the Agreement. In no event will the Contract Times commence to run later than the sixtieth day after the day of Bid opening or the thirtieth day after the Effective Date of the Agreement, whichever date is earlier.

2.04 *Starting the Work*

A. Contractor shall start to perform the Work on the date when the Contract Times commence to run. No Work shall be done at the Site prior to the date on which the Contract Times commence to run.

2.05 *Before Starting Construction*

A. *Preliminary Schedules:* Within 10 days after the Effective Date of the Agreement (unless otherwise specified in the General Requirements), Contractor shall submit to Engineer for timely review:

1. a preliminary Progress Schedule; indicating the times (numbers of days or dates) for starting and completing the various stages of the Work, including any Milestones specified in the Contract Documents;

2. a preliminary Schedule of Submittals; and

3. a preliminary Schedule of Values for all of the Work which includes quantities and prices of items which when added together equal the Contract Price and subdivides the Work into component parts in sufficient detail to serve as the basis for progress payments during performance of the Work. Such prices will include an appropriate amount of overhead and profit applicable to each item of Work.

2.06 *Preconstruction Conference*

A. Before any Work at the Site is started, a conference attended by Owner, Contractor, Engineer, and others as appropriate will be held to establish a working understanding among the parties as to the Work and to discuss the schedules referred to in Paragraph 2.05.A, procedures for handling Shop Drawings and other

submittals, processing Applications for Payment, and maintaining required records.

2.07 *Initial Acceptance of Schedules*

A. At least 10 days before submission of the first Application for Payment a conference attended by Contractor, Engineer, and others as appropriate will be held to review for acceptability to Engineer as provided below the schedules submitted in accordance with Paragraph 2.05.A. Contractor shall have an additional 10 days to make corrections and adjustments and to complete and resubmit the schedules. No progress payment shall be made to Contractor until acceptable schedules are submitted to Engineer.

1. The Progress Schedule will be acceptable to Engineer if it provides an orderly progression of the Work to completion within the Contract Times. Such acceptance will not impose on Engineer responsibility for the Progress Schedule, for sequencing, scheduling, or progress of the Work nor interfere with or relieve Contractor from Contractor's full responsibility therefor.

2. Contractor's Schedule of Submittals will be acceptable to Engineer if it provides a workable arrangement for reviewing and processing the required submittals.

3. Contractor's Schedule of Values will be acceptable to Engineer as to form and substance if it provides a reasonable allocation of the Contract Price to component parts of the Work.

ARTICLE 3 - CONTRACT DOCUMENTS: INTENT, AMENDING, REUSE

3.01 *Intent*

A. The Contract Documents are complementary; what is required by one is as binding as if required by all.

B. It is the intent of the Contract Documents to describe a functionally complete Project (or part thereof) to be constructed in accordance with the Contract Documents. Any labor, documentation, services, materials, or equipment that may reasonably be inferred from the Contract Documents or from prevailing custom or trade usage as being required to produce the intended result will be provided whether or not specifically called for at no additional cost to Owner.

C. Clarifications and interpretations of the Contract Documents shall be issued by Engineer as provided in Article 9.

3.02 *Reference Standards*

A. Standards, Specifications, Codes, Laws, and Regulations.

1. Reference to standards, specifications, manuals, or codes of any technical society, organization, or association, or to Laws or Regulations, whether such reference be specific or by implication, shall mean the standard, specification, manual, code, or Laws or Regulations in effect at the time of opening of Bids (or on the Effective Date of the Agreement if there were no Bids), except as may be otherwise specifically stated in the Contract Documents.

2. No provision of any such standard, specification, manual or code, or any instruction of a Supplier shall be effective to change the duties or responsibilities of Owner, Contractor, or Engineer, or any of their subcontractors, consultants, agents, or employees from those set forth in the Contract Documents. No such provision or instruction shall be effective to assign to Owner, or Engineer, or any of, their Related Entities, any duty or authority to supervise or direct the performance of the Work or any duty or authority to undertake responsibility inconsistent with the provisions of the Contract Documents.

3.03 *Reporting and Resolving Discrepancies*

A. Reporting Discrepancies

1. *Contractor's Review of Contract Documents Before Starting Work:* Before undertaking each part of the Work, Contractor shall carefully study and compare the Contract Documents and check and verify pertinent figures therein and all applicable field measurements. Contractor shall promptly report in writing to Engineer any conflict, error, ambiguity, or discrepancy which Contractor may discover and shall obtain a written interpretation or clarification from Engineer before proceeding with any Work affected thereby.

2. *Contractor's Review of Contract Documents During Performance of Work:* If, during the performance of the Work, Contractor discovers any conflict, error, ambiguity, or discrepancy within the Contract Documents or between the Contract Documents and any provision of any Law or Regulation applicable to the performance of the Work or of any standard, specification, manual or code, or of any instruction of any Supplier, Contractor

shall promptly report it to Engineer in writing. Contractor shall not proceed with the Work affected thereby (except in an emergency as required by Paragraph 6.16.A) until an amendment or supplement to the Contract Documents has been issued by one of the methods indicated in Paragraph 3.04.

3. Contractor shall not be liable to Owner or Engineer for failure to report any conflict, error, ambiguity, or discrepancy in the Contract Documents unless Contractor knew or reasonably should have known thereof.

B. Resolving Discrepancies

1. Except as may be otherwise specifically stated in the Contract Documents, the provisions of the Contract Documents shall take precedence in resolving any conflict, error, ambiguity, or discrepancy between the provisions of the Contract Documents and:

a. the provisions of any standard, specification, manual, code, or instruction (whether or not specifically incorporated by reference in the Contract Documents); or

b. the provisions of any Laws or Regulations applicable to the performance of the Work (unless such an interpretation of the provisions of the Contract Documents would result in violation of such Law or Regulation).

3.04 *Amending and Supplementing Contract Documents*

A. The Contract Documents may be amended to provide for additions, deletions, and revisions in the Work or to modify the terms and conditions thereof by either a Change Order or a Work Change Directive.

B. The requirements of the Contract Documents may be supplemented, and minor variations and deviations in the Work may be authorized, by one or more of the following ways:

1. A Field Order;

2. Engineer's approval of a Shop Drawing or Sample; (Subject to the provisions of Paragraph 6.17.D.3); or

3. Engineer's written interpretation or clarification.

3.05 *Reuse of Documents*

A. Contractor and any Subcontractor or Supplier or other individual or entity performing or furnishing all of the Work under a direct or indirect contract with Contractor, shall not:

1. have or acquire any title to or ownership rights in any of the Drawings, Specifications, or other documents (or copies of any thereof) prepared by or bearing the seal of Engineer or Engineer's consultants, including electronic media editions; or

2. reuse any of such Drawings, Specifications, other documents, or copies thereof on extensions of the Project or any other project without written consent of Owner and Engineer and specific written verification or adaption by Engineer.

B. The prohibition of this Paragraph 3.05 will survive final payment, or termination of the Contract. Nothing herein shall preclude Contractor from retaining copies of the Contract Documents for record purposes.

3.06 *Electronic Data*

A. Copies of data furnished by Owner or Engineer to Contractor or Contractor to Owner or Engineer that may be relied upon are limited to the printed copies (also known as hard copies). Files in electronic media format of text, data, graphics, or other types are furnished only for the convenience of the receiving party. Any conclusion or information obtained or derived from such electronic files will be at the user's sole risk. If there is a discrepancy between the electronic files and the hard copies, the hard copies govern.

B. Because data stored in electronic media format can deteriorate or be modified inadvertently or otherwise without authorization of the data's creator, the party receiving electronic files agrees that it will perform acceptance tests or procedures within 60 days, after which the receiving party shall be deemed to have accepted the data thus transferred. Any errors detected within the 60-day acceptance period will be corrected by the transferring party..

C. When transferring documents in electronic media format, the transferring party makes no representations as to long term compatibility, usability, or readability of documents resulting from the use of software application packages, operating systems, or computer hardware differing from those used by the data's creator.

ARTICLE 4 - AVAILABILITY OF LANDS;
SUBSURFACE AND PHYSICAL CONDITIONS;
HAZARDOUS ENVIRONMENTAL CONDITIONS;
REFERENCE POINTS

4.01 *Availability of Lands*

A. Owner shall furnish the Site. Owner shall notify Contractor of any encumbrances or restrictions not of general application but specifically related to use of the Site with which Contractor must comply in performing the Work. Owner will obtain in a timely manner and pay for easements for permanent structures or permanent changes in existing facilities. If Contractor and Owner are unable to agree on entitlement to or on the amount or extent, if any, of any adjustment in the Contract Price or Contract Times, or both, as a result of any delay in Owner's furnishing the Site or a part thereof, Contractor may make a Claim therefor as provided in Paragraph 10.05.

B. Upon reasonable written request, Owner shall furnish Contractor with a current statement of record legal title and legal description of the lands upon which the Work is to be performed and Owner's interest therein as necessary for giving notice of or filing a mechanic's or construction lien against such lands in accordance with applicable Laws and Regulations.

C. Contractor shall provide for all additional lands and access thereto that may be required for temporary construction facilities or storage of materials and equipment.

4.02 *Subsurface and Physical Conditions*

A. *Reports and Drawings:* The Supplementary Conditions identify:

1. those reports of explorations and tests of subsurface conditions at or contiguous to the Site that Engineer has used in preparing the Contract Documents; and

2. those drawings of physical conditions in or relating to existing surface or subsurface structures at or contiguous to the Site (except Underground Facilities) that Engineer has used in preparing the Contract Documents.

B. *Limited Reliance by Contractor on Technical Data Authorized:* Contractor may rely upon the general accuracy of the "technical data" contained in such reports and drawings, but such reports and drawings are not

Contract Documents. Such "technical data" is identified in the Supplementary Conditions. Except for such reliance on such "technical data," Contractor may not rely upon or make any claim against Owner or Engineer, or any of their Related Entities with respect to:

1. the completeness of such reports and drawings for Contractor's purposes, including, but not limited to, any aspects of the means, methods, techniques, sequences, and procedures of construction to be employed by Contractor, and safety precautions and programs incident thereto; or

2. other data, interpretations, opinions, and information contained in such reports or shown or indicated in such drawings; or

3. any Contractor interpretation of or conclusion drawn from any "technical data" or any such other data, interpretations, opinions, or information.

4.03 Differing Subsurface or Physical Conditions

A. *Notice:* If Contractor believes that any subsurface or physical condition at or contiguous to the Site that is uncovered or revealed either:

1. is of such a nature as to establish that any "technical data" on which Contractor is entitled to rely as provided in Paragraph 4.02 is materially inaccurate; or

2. is of such a nature as to require a change in the Contract Documents; or

3. differs materially from that shown or indicated in the Contract Documents; or

4. is of an unusual nature, and differs materially from conditions ordinarily encountered and generally recognized as inherent in work of the character provided for in the Contract Documents;

then Contractor shall, promptly after becoming aware thereof and before further disturbing the subsurface or physical conditions or performing any Work in connection therewith (except in an emergency as required by Paragraph 6.16.A), notify Owner and Engineer in writing about such condition. Contractor shall not further disturb such condition or perform any Work in connection therewith (except as aforesaid) until receipt of written order to do so.

B. *Engineer's Review:* After receipt of written notice as required by Paragraph 4.03.A, Engineer will promptly review the pertinent condition, determine the necessity of Owner's obtaining additional exploration or tests with respect thereto, and advise Owner in writing (with a copy to Contractor) of Engineer's findings and conclusions.

C. Possible Price and Times Adjustments

1. The Contract Price or the Contract Times, or both, will be equitably adjusted to the extent that the existence of such differing subsurface or physical condition causes an increase or decrease in Contractor's cost of, or time required for, performance of the Work; subject, however, to the following:

a. such condition must meet any one or more of the categories described in Paragraph 4.03.A; and

b. with respect to Work that is paid for on a Unit Price Basis, any adjustment in Contract Price will be subject to the provisions of Paragraphs 9.07 and 11.03.

2. Contractor shall not be entitled to any adjustment in the Contract Price or Contract Times if:

a. Contractor knew of the existence of such conditions at the time Contractor made a final commitment to Owner with respect to Contract Price and Contract Times by the submission of a Bid or becoming bound under a negotiated contract; or

b. the existence of such condition could reasonably have been discovered or revealed as a result of any examination, investigation, exploration, test, or study of the Site and contiguous areas required by the Bidding Requirements or Contract Documents to be conducted by or for Contractor prior to Contractor's making such final commitment; or

c. Contractor failed to give the written notice as required by Paragraph 4.03.A.

3. If Owner and Contractor are unable to agree on entitlement to or on the amount or extent, if any, of any adjustment in the Contract Price or Contract Times, or both, a Claim may be made therefor as provided in Paragraph 10.05. However, Owner and Engineer, and any of their Related Entities shall not be liable to Contractor for any claims, costs, losses, or damages (including but

not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) sustained by Contractor on or in connection with any other project or anticipated project.

4.04 *Underground Facilities*

A. *Shown or Indicated:* The information and data shown or indicated in the Contract Documents with respect to existing Underground Facilities at or contiguous to the Site is based on information and data furnished to Owner or Engineer by the owners of such Underground Facilities, including Owner, or by others. Unless it is otherwise expressly provided in the Supplementary Conditions:

1. Owner and Engineer shall not be responsible for the accuracy or completeness of any such information or data; and

2. the cost of all of the following will be included in the Contract Price, and Contractor shall have full responsibility for:

- a. reviewing and checking all such information and data,
- b. locating all Underground Facilities shown or indicated in the Contract Documents,
- c. coordination of the Work with the owners of such Underground Facilities, including Owner, during construction, and
- d. the safety and protection of all such Underground Facilities and repairing any damage thereto resulting from the Work.

B. *Not Shown or Indicated*

1. If an Underground Facility is uncovered or revealed at or contiguous to the Site which was not shown or indicated, or not shown or indicated with reasonable accuracy in the Contract Documents, Contractor shall, promptly after becoming aware thereof and before further disturbing conditions affected thereby or performing any Work in connection therewith (except in an emergency as required by Paragraph 6.16.A), identify the owner of such Underground Facility and give written notice to that owner and to Owner and Engineer. Engineer will promptly review the Underground Facility and determine the extent, if any, to which a change is required in the Contract Documents to reflect and document the consequences of the existence or location of the Under-

ground Facility. During such time, Contractor shall be responsible for the safety and protection of such Underground Facility.

2. If Engineer concludes that a change in the Contract Documents is required, a Work Change Directive or a Change Order will be issued to reflect and document such consequences. An equitable adjustment shall be made in the Contract Price or Contract Times, or both, to the extent that they are attributable to the existence or location of any Underground Facility that was not shown or indicated or not shown or indicated with reasonable accuracy in the Contract Documents and that Contractor did not know of and could not reasonably have been expected to be aware of or to have anticipated. If Owner and Contractor are unable to agree on entitlement to or on the amount or extent, if any, of any such adjustment in Contract Price or Contract Times, Owner or Contractor may make a Claim therefor as provided in Paragraph 10.05.

4.05 *Reference Points*

A. Owner shall provide engineering surveys to establish reference points for construction which in Engineer's judgment are necessary to enable Contractor to proceed with the Work. Contractor shall be responsible for laying out the Work, shall protect and preserve the established reference points and property monuments, and shall make no changes or relocations without the prior written approval of Owner. Contractor shall report to Engineer whenever any reference point or property monument is lost or destroyed or requires relocation because of necessary changes in grades or locations, and shall be responsible for the accurate replacement or relocation of such reference points or property monuments by professionally qualified personnel.

4.06 *Hazardous Environmental Condition at Site*

A. *Reports and Drawings:* Reference is made to the Supplementary Conditions for the identification of those reports and drawings relating to a Hazardous Environmental Condition identified at the Site, if any, that have been utilized by the Engineer in the preparation of the Contract Documents.

B. *Limited Reliance by Contractor on Technical Data Authorized:* Contractor may rely upon the general accuracy of the "technical data" contained in such reports and drawings, but such reports and drawings are not Contract Documents. Such "technical data" is identified in the Supplementary Conditions. Except for such reliance on such "technical data," Contractor may not rely upon or make any claim against Owner or Engineer, or any of their Related Entities with respect to:

1. the completeness of such reports and drawings for Contractor's purposes, including, but not limited to, any aspects of the means, methods, techniques, sequences and procedures of construction to be employed by Contractor and safety precautions and programs incident thereto; or

2. other data, interpretations, opinions and information contained in such reports or shown or indicated in such drawings; or

3. any Contractor interpretation of or conclusion drawn from any "technical data" or any such other data, interpretations, opinions or information.

C. Contractor shall not be responsible for any Hazardous Environmental Condition uncovered or revealed at the Site which was not shown or indicated in Drawings or Specifications or identified in the Contract Documents to be within the scope of the Work. Contractor shall be responsible for a Hazardous Environmental Condition created with any materials brought to the Site by Contractor, Subcontractors, Suppliers, or anyone else for whom Contractor is responsible.

D. If Contractor encounters a Hazardous Environmental Condition or if Contractor or anyone for whom Contractor is responsible creates a Hazardous Environmental Condition, Contractor shall immediately: (i) secure or otherwise isolate such condition; (ii) stop all Work in connection with such condition and in any area affected thereby (except in an emergency as required by Paragraph 6.16.A); and (iii) notify Owner and Engineer (and promptly thereafter confirm such notice in writing). Owner shall promptly consult with Engineer concerning the necessity for Owner to retain a qualified expert to evaluate such condition or take corrective action, if any.

E. Contractor shall not be required to resume Work in connection with such condition or in any affected area until after Owner has obtained any required permits related thereto and delivered to Contractor written notice: (i) specifying that such condition and any affected area is or has been rendered safe for the resumption of Work; or (ii) specifying any special conditions under which such Work may be resumed safely. If Owner and Contractor cannot agree as to entitlement to or on the amount or extent, if any, of any adjustment in Contract Price or Contract Times, or both, as a result of such Work stoppage or such special conditions under which Work is agreed to be resumed by Contractor, either party may make a Claim therefor as provided in Paragraph 10.05.

F. If after receipt of such written notice Contractor does not agree to resume such Work based on a reasonable belief it is unsafe, or does not agree to resume such Work under such special conditions, then Owner may order the portion of the Work that is in the area affected by such condition to be deleted from the Work. If Owner and Contractor cannot agree as to entitlement to or on the amount or extent, if any, of an adjustment in Contract Price or Contract Times as a result of deleting such portion of the Work, then either party may make a Claim therefor as provided in Paragraph 10.05. Owner may have such deleted portion of the Work performed by Owner's own forces or others in accordance with Article 7.

G. To the fullest extent permitted by Laws and Regulations, Owner shall indemnify and hold harmless Contractor, Subcontractors, and Engineer, and the officers, directors, partners, employees, agents, consultants, and subcontractors of each and any of them from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to a Hazardous Environmental Condition, provided that such Hazardous Environmental Condition: (i) was not shown or indicated in the Drawings or Specifications or identified in the Contract Documents to be included within the scope of the Work, and (ii) was not created by Contractor or by anyone for whom Contractor is responsible. Nothing in this Paragraph 4.06. G shall obligate Owner to indemnify any individual or entity from and against the consequences of that individual's or entity's own negligence.

H. To the fullest extent permitted by Laws and Regulations, Contractor shall indemnify and hold harmless Owner and Engineer, and the officers, directors, partners, employees, agents, consultants, and subcontractors of each and any of them from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to a Hazardous Environmental Condition created by Contractor or by anyone for whom Contractor is responsible. Nothing in this Paragraph 4.06.H shall obligate Contractor to indemnify any individual or entity from and against the consequences of that individual's or entity's own negligence.

I. The provisions of Paragraphs 4.02, 4.03, and 4.04 do not apply to a Hazardous Environmental Condition uncovered or revealed at the Site.

ARTICLE 5 - BONDS AND INSURANCE

5.01 *Performance, Payment, and Other Bonds*

A. Contractor shall furnish performance and payment bonds, each in an amount at least equal to the Contract Price as security for the faithful performance and payment of all of Contractor's obligations under the Contract Documents. These bonds shall remain in effect until one year after the date when final payment becomes due or until completion of the correction period specified in Paragraph 13.07, whichever is later, except as provided otherwise by Laws or Regulations or by the Contract Documents. Contractor shall also furnish such other bonds as are required by the Contract Documents.

B. All bonds shall be in the form prescribed by the Contract Documents except as provided otherwise by Laws or Regulations, and shall be executed by such sureties as are named in the current list of "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies" as published in Circular 570 (amended) by the Financial Management Service, Surety Bond Branch, U.S. Department of the Treasury. All bonds signed by an agent must be accompanied by a certified copy of the agent's authority to act.

C. If the surety on any bond furnished by Contractor is declared bankrupt or becomes insolvent or its right to do business is terminated in any state where any part of the Project is located or it ceases to meet the requirements of Paragraph 5.01.B, Contractor shall promptly notify Owner and Engineer and shall, within 20 days after the event giving rise to such notification, provide another bond and surety, both of which shall comply with the requirements of Paragraphs 5.01.B and 5.02.

5.02 *Licensed Sureties and Insurers*

A. All bonds and insurance required by the Contract Documents to be purchased and maintained by Owner or Contractor shall be obtained from surety or insurance companies that are duly licensed or authorized in the jurisdiction in which the Project is located to issue bonds or insurance policies for the limits and coverages so required. Such surety and insurance companies shall also meet such additional requirements and qualifications as may be provided in the Supplementary Conditions.

5.03 *Certificates of Insurance*

A. Contractor shall deliver to Owner, with copies to each additional insured identified in the Supplementary Conditions, certificates of insurance (and other evidence of insurance requested by Owner or any other additional insured) which Contractor is required to purchase and maintain.

B. Owner shall deliver to Contractor, with copies to each additional insured identified in the Supplementary Conditions, certificates of insurance (and other evidence of insurance requested by Contractor or any other additional insured) which Owner is required to purchase and maintain.

5.04 *Contractor's Liability Insurance*

A. Contractor shall purchase and maintain such liability and other insurance as is appropriate for the Work being performed and as will provide protection from claims set forth below which may arise out of or result from Contractor's performance of the Work and Contractor's other obligations under the Contract Documents, whether it is to be performed by Contractor, any Subcontractor or Supplier, or by anyone directly or indirectly employed by any of them to perform any of the Work, or by anyone for whose acts any of them may be liable:

1. claims under workers' compensation, disability benefits, and other similar employee benefit acts;

2. claims for damages because of bodily injury, occupational sickness or disease, or death of Contractor's employees;

3. claims for damages because of bodily injury, sickness or disease, or death of any person other than Contractor's employees;

4. claims for damages insured by reasonably available personal injury liability coverage which are sustained:

a. by any person as a result of an offense directly or indirectly related to the employment of such person by Contractor, or

b. by any other person for any other reason;

5. claims for damages, other than to the Work itself, because of injury to or destruction of tangible

property wherever located, including loss of use resulting therefrom; and

6. claims for damages because of bodily injury or death of any person or property damage arising out of the ownership, maintenance or use of any motor vehicle.

B. The policies of insurance required by this Paragraph 5.04 shall:

1. with respect to insurance required by Paragraphs 5.04.A.3 through 5.04.A.6 inclusive, include as additional insured (subject to any customary exclusion regarding professional liability) Owner and Engineer, and any other individuals or entities identified in the Supplementary Conditions, all of whom shall be listed as additional insureds, and include coverage for the respective officers, directors, partners, employees, agents, consultants and subcontractors of each and any of all such additional insureds, and the insurance afforded to these additional insureds shall provide primary coverage for all claims covered thereby;

2. include at least the specific coverages and be written for not less than the limits of liability provided in the Supplementary Conditions or required by Laws or Regulations, whichever is greater;

3. include completed operations insurance;

4. include contractual liability insurance covering Contractor's indemnity obligations under Paragraphs 6.11 and 6.20;

5. contain a provision or endorsement that the coverage afforded will not be canceled, materially changed or renewal refused until at least 30 days prior written notice has been given to Owner and Contractor and to each other additional insured identified in the Supplementary Conditions to whom a certificate of insurance has been issued (and the certificates of insurance furnished by the Contractor pursuant to Paragraph 5.03 will so provide);

6. remain in effect at least until final payment and at all times thereafter when Contractor may be correcting, removing, or replacing defective Work in accordance with Paragraph 13.07; and

7. with respect to completed operations insurance, and any insurance coverage written on a claims-

made basis, remain in effect for at least two years after final payment.

a. Contractor shall furnish Owner and each other additional insured identified in the Supplementary Conditions, to whom a certificate of insurance has been issued, evidence satisfactory to Owner and any such additional insured of continuation of such insurance at final payment and one year thereafter.

5.05 *Owner's Liability Insurance*

A. In addition to the insurance required to be provided by Contractor under Paragraph 5.04, Owner, at Owner's option, may purchase and maintain at Owner's expense Owner's own liability insurance as will protect Owner against claims which may arise from operations under the Contract Documents.

5.06 *Property Insurance*

A. Unless otherwise provided in the Supplementary Conditions, Owner shall purchase and maintain property insurance upon the Work at the Site in the amount of the full replacement cost thereof (subject to such deductible amounts as may be provided in the Supplementary Conditions or required by Laws and Regulations). This insurance shall:

1. include the interests of Owner, Contractor, Subcontractors, and Engineer, and any other individuals or entities identified in the Supplementary Conditions, and the officers, directors, partners, employees, agents, consultants and subcontractors of each and any of them, each of whom is deemed to have an insurable interest and shall be listed as an insured or additional insured;

2. be written on a Builder's Risk "all-risk" or open peril or special causes of loss policy form that shall at least include insurance for physical loss or damage to the Work, temporary buildings, false work, and materials and equipment in transit, and shall insure against at least the following perils or causes of loss: fire, lightning, extended coverage, theft, vandalism and malicious mischief, earthquake, collapse, debris removal, demolition occasioned by enforcement of Laws and Regulations, water damage, (other than caused by flood) and such other perils or causes of loss as may be specifically required by the Supplementary Conditions;

3. include expenses incurred in the repair or replacement of any insured property (including but not limited to fees and charges of engineers and architects);

4. cover materials and equipment stored at the Site or at another location that was agreed to in writing by Owner prior to being incorporated in the Work, provided that such materials and equipment have been included in an Application for Payment recommended by Engineer;

5. allow for partial utilization of the Work by Owner;

6. include testing and startup; and

7. be maintained in effect until final payment is made unless otherwise agreed to in writing by Owner, Contractor, and Engineer with 30 days written notice to each other additional insured to whom a certificate of insurance has been issued.

B. Owner shall purchase and maintain such boiler and machinery insurance or additional property insurance as may be required by the Supplementary Conditions or Laws and Regulations which will include the interests of Owner, Contractor, Subcontractors, and Engineer, and any other individuals or entities identified in the Supplementary Conditions, and the officers, directors, partners, employees, agents, consultants and subcontractors of each and any of them, each of whom is deemed to have an insurable interest and shall be listed as an insured or additional insured.

C. All the policies of insurance (and the certificates or other evidence thereof) required to be purchased and maintained in accordance with Paragraph 5.06 will contain a provision or endorsement that the coverage afforded will not be canceled or materially changed or renewal refused until at least 30 days prior written notice has been given to Owner and Contractor and to each other additional insured to whom a certificate of insurance has been issued and will contain waiver provisions in accordance with Paragraph 5.07.

D. Owner shall not be responsible for purchasing and maintaining any property insurance specified in this Paragraph 5.06 to protect the interests of Contractor, Subcontractors, or others in the Work to the extent of any deductible amounts that are identified in the Supplementary Conditions. The risk of loss within such identified deductible amount will be borne by Contractor, Subcontractors, or others suffering any such loss, and if any of them wishes property insurance coverage within the limits of such amounts, each may purchase and maintain it at the purchaser's own expense.

E. If Contractor requests in writing that other special insurance be included in the property insurance policies provided under Paragraph 5.06, Owner shall, if

possible, include such insurance, and the cost thereof will be charged to Contractor by appropriate Change Order. Prior to commencement of the Work at the Site, Owner shall in writing advise Contractor whether or not such other insurance has been procured by Owner.

5.07 *Waiver of Rights*

A. Owner and Contractor intend that all policies purchased in accordance with Paragraph 5.06 will protect Owner, Contractor, Subcontractors, and Engineer, and all other individuals or entities identified in the Supplementary Conditions to be listed as insureds or additional insureds (and the officers, directors, partners, employees, agents, consultants and subcontractors of each and any of them) in such policies and will provide primary coverage for all losses and damages caused by the perils or causes of loss covered thereby. All such policies shall contain provisions to the effect that in the event of payment of any loss or damage the insurers will have no rights of recovery against any of the insureds or additional insureds thereunder. Owner and Contractor waive all rights against each other and their respective officers, directors, partners, employees, agents, consultants and subcontractors of each and any of them for all losses and damages caused by, arising out of or resulting from any of the perils or causes of loss covered by such policies and any other property insurance applicable to the Work; and, in addition, waive all such rights against Subcontractors, and Engineer, and all other individuals or entities identified in the Supplementary Conditions to be listed as insured or additional insured (and the officers, directors, partners, employees, agents, consultants and subcontractors of each and any of them) under such policies for losses and damages so caused. None of the above waivers shall extend to the rights that any party making such waiver may have to the proceeds of insurance held by Owner as trustee or otherwise payable under any policy so issued.

B. Owner waives all rights against Contractor, Subcontractors, and Engineer, and the officers, directors, partners, employees, agents, consultants and subcontractors of each and any of them for:

1. loss due to business interruption, loss of use, or other consequential loss extending beyond direct physical loss or damage to Owner's property or the Work caused by, arising out of, or resulting from fire or other perils whether or not insured by Owner; and

2. loss or damage to the completed Project or part thereof caused by, arising out of, or resulting from fire or other insured peril or cause of loss covered by any property insurance maintained on the completed Project

or part thereof by Owner during partial utilization pursuant to Paragraph 14.05, after Substantial Completion pursuant to Paragraph 14.04, or after final payment pursuant to Paragraph 14.07.

C. Any insurance policy maintained by Owner covering any loss, damage or consequential loss referred to in Paragraph 5.07.B shall contain provisions to the effect that in the event of payment of any such loss, damage, or consequential loss, the insurers will have no rights of recovery against Contractor, Subcontractors, or Engineer, and the officers, directors, partners, employees, agents, consultants and subcontractors of each and any of them.

5.08 *Receipt and Application of Insurance Proceeds*

A. Any insured loss under the policies of insurance required by Paragraph 5.06 will be adjusted with Owner and made payable to Owner as fiduciary for the insureds, as their interests may appear, subject to the requirements of any applicable mortgage clause and of Paragraph 5.08.B. Owner shall deposit in a separate account any money so received and shall distribute it in accordance with such agreement as the parties in interest may reach. If no other special agreement is reached, the damaged Work shall be repaired or replaced, the moneys so received applied on account thereof, and the Work and the cost thereof covered by an appropriate Change Order .

B. Owner as fiduciary shall have power to adjust and settle any loss with the insurers unless one of the parties in interest shall object in writing within 15 days after the occurrence of loss to Owner's exercise of this power. If such objection be made, Owner as fiduciary shall make settlement with the insurers in accordance with such agreement as the parties in interest may reach. If no such agreement among the parties in interest is reached, Owner as fiduciary shall adjust and settle the loss with the insurers and, if required in writing by any party in interest, Owner as fiduciary shall give bond for the proper performance of such duties.

5.09 *Acceptance of Bonds and Insurance; Option to Replace*

A. If either Owner or Contractor has any objection to the coverage afforded by or other provisions of the bonds or insurance required to be purchased and maintained by the other party in accordance with Article 5 on the basis of non-conformance with the Contract Documents, the objecting party shall so notify the other party in writing within 10 days after receipt of the certificates (or other evidence requested) required by Paragraph 2.01.B. Owner and Contractor shall each provide to the other such additional information in respect

of insurance provided as the other may reasonably request. If either party does not purchase or maintain all of the bonds and insurance required of such party by the Contract Documents, such party shall notify the other party in writing of such failure to purchase prior to the start of the Work, or of such failure to maintain prior to any change in the required coverage. Without prejudice to any other right or remedy, the other party may elect to obtain equivalent bonds or insurance to protect such other party's interests at the expense of the party who was required to provide such coverage, and a Change Order shall be issued to adjust the Contract Price accordingly.

5.10 *Partial Utilization, Acknowledgment of Property Insurer*

A. If Owner finds it necessary to occupy or use a portion or portions of the Work prior to Substantial Completion of all the Work as provided in Paragraph 14.05, no such use or occupancy shall commence before the insurers providing the property insurance pursuant to Paragraph 5.06 have acknowledged notice thereof and in writing effected any changes in coverage necessitated thereby. The insurers providing the property insurance shall consent by endorsement on the policy or policies, but the property insurance shall not be canceled or permitted to lapse on account of any such partial use or occupancy.

ARTICLE 6 - CONTRACTOR'S RESPONSIBILITIES

6.01 *Supervision and Superintendence*

A. Contractor shall supervise, inspect, and direct the Work competently and efficiently, devoting such attention thereto and applying such skills and expertise as may be necessary to perform the Work in accordance with the Contract Documents. Contractor shall be solely responsible for the means, methods, techniques, sequences, and procedures of construction. Contractor shall not be responsible for the negligence of Owner or Engineer in the design or specification of a specific means, method, technique, sequence, or procedure of construction which is shown or indicated in and expressly required by the Contract Documents.

B. At all times during the progress of the Work, Contractor shall assign a competent resident superintendent who shall not be replaced without written notice to Owner and Engineer except under extraordinary circumstances. The superintendent will be Contractor's representative at the Site and shall have authority to act on behalf of Contractor. All communications given to or

received from the superintendent shall be binding on Contractor.

6.02 *Labor; Working Hours*

A. Contractor shall provide competent, suitably qualified personnel to survey and lay out the Work and perform construction as required by the Contract Documents. Contractor shall at all times maintain good discipline and order at the Site.

B. Except as otherwise required for the safety or protection of persons or the Work or property at the Site or adjacent thereto, and except as otherwise stated in the Contract Documents, all Work at the Site shall be performed during regular working hours. Contractor will not permit the performance of Work on a Saturday, Sunday, or any legal holiday without Owner's written consent (which will not be unreasonably withheld) given after prior written notice to Engineer.

6.03 *Services, Materials, and Equipment*

A. Unless otherwise specified in the Contract Documents, Contractor shall provide and assume full responsibility for all services, materials, equipment, labor, transportation, construction equipment and machinery, tools, appliances, fuel, power, light, heat, telephone, water, sanitary facilities, temporary facilities, and all other facilities and incidentals necessary for the performance, testing, start-up, and completion of the Work.

B. All materials and equipment incorporated into the Work shall be as specified or, if not specified, shall be of good quality and new, except as otherwise provided in the Contract Documents. All special warranties and guarantees required by the Specifications shall expressly run to the benefit of Owner. If required by Engineer, Contractor shall furnish satisfactory evidence (including reports of required tests) as to the source, kind, and quality of materials and equipment.

C. All materials and equipment shall be stored, applied, installed, connected, erected, protected, used, cleaned, and conditioned in accordance with instructions of the applicable Supplier, except as otherwise may be provided in the Contract Documents.

6.04 *Progress Schedule*

A. Contractor shall adhere to the Progress Schedule established in accordance with Paragraph 2.07 as it may be adjusted from time to time as provided below.

1. Contractor shall submit to Engineer for acceptance (to the extent indicated in Paragraph 2.07) proposed adjustments in the Progress Schedule that will not result in changing the Contract Times. Such adjustments will comply with any provisions of the General Requirements applicable thereto.

2. Proposed adjustments in the Progress Schedule that will change the Contract Times shall be submitted in accordance with the requirements of Article 12. Adjustments in Contract Times may only be made by a Change Order.

6.05 *Substitutes and "Or-Equals"*

A. Whenever an item of material or equipment is specified or described in the Contract Documents by using the name of a proprietary item or the name of a particular Supplier, the specification or description is intended to establish the type, function, appearance, and quality required. Unless the specification or description contains or is followed by words reading that no like, equivalent, or "or-equal" item or no substitution is permitted, other items of material or equipment or material or equipment of other Suppliers may be submitted to Engineer for review under the circumstances described below.

1. "Or-Equal" Items: If in Engineer's sole discretion an item of material or equipment proposed by Contractor is functionally equal to that named and sufficiently similar so that no change in related Work will be required, it may be considered by Engineer as an "or-equal" item, in which case review and approval of the proposed item may, in Engineer's sole discretion, be accomplished without compliance with some or all of the requirements for approval of proposed substitute items. For the purposes of this Paragraph 6.05.A.1, a proposed item of material or equipment will be considered functionally equal to an item so named if:

a. in the exercise of reasonable judgment Engineer determines that:

1) it is at least equal in materials of construction, quality, durability, appearance, strength, and design characteristics;

2) it will reliably perform at least equally well the function and achieve the results imposed by the design concept of the completed Project as a functioning whole,

3) it has a proven record of performance and availability of responsive service; and

b. Contractor certifies that, if approved and incorporated into the Work:

1) there will be no increase in cost to the Owner or increase in Contract Times, and

2) it will conform substantially to the detailed requirements of the item named in the Contract Documents.

2. Substitute Items

a. If in Engineer's sole discretion an item of material or equipment proposed by Contractor does not qualify as an "or-equal" item under Paragraph 6.05.A.1, it will be considered a proposed substitute item.

b. Contractor shall submit sufficient information as provided below to allow Engineer to determine that the item of material or equipment proposed is essentially equivalent to that named and an acceptable substitute therefor. Requests for review of proposed substitute items of material or equipment will not be accepted by Engineer from anyone other than Contractor.

c. The requirements for review by Engineer will be as set forth in Paragraph 6.05.A.2.d, as supplemented in the General Requirements and as Engineer may decide is appropriate under the circumstances.

d. Contractor shall make written application to Engineer for review of a proposed substitute item of material or equipment that Contractor seeks to furnish or use. The application:

1) shall certify that the proposed substitute item will:

a) perform adequately the functions and achieve the results called for by the general design,

b) be similar in substance to that specified, and

c) be suited to the same use as that specified;

2) will state:

a) the extent, if any, to which the use of the proposed substitute item will pre-

dice Contractor's achievement of Substantial Completion on time;

b) whether or not use of the proposed substitute item in the Work will require a change in any of the Contract Documents (or in the provisions of any other direct contract with Owner for other work on the Project) to adapt the design to the proposed substitute item; and

c) whether or not incorporation or use of the proposed substitute item in connection with the Work is subject to payment of any license fee or royalty;

3) will identify:

a) all variations of the proposed substitute item from that specified, and

b) available engineering, sales, maintenance, repair, and replacement services;

4) and shall contain an itemized estimate of all costs or credits that will result directly or indirectly from use of such substitute item, including costs of redesign and claims of other contractors affected by any resulting change,

B. Substitute Construction Methods or Procedures: If a specific means, method, technique, sequence, or procedure of construction is expressly required by the Contract Documents, Contractor may furnish or utilize a substitute means, method, technique, sequence, or procedure of construction approved by Engineer. Contractor shall submit sufficient information to allow Engineer, in Engineer's sole discretion, to determine that the substitute proposed is equivalent to that expressly called for by the Contract Documents. The requirements for review by Engineer will be similar to those provided in Paragraph 6.05.A.2.

C. Engineer's Evaluation: Engineer will be allowed a reasonable time within which to evaluate each proposal or submittal made pursuant to Paragraphs 6.05.A and 6.05.B. Engineer may require Contractor to furnish additional data about the proposed substitute item. Engineer will be the sole judge of acceptability. No "or equal" or substitute will be ordered, installed or utilized until Engineer's review is complete, which will be evidenced by either a Change Order for a substitute or an approved Shop Drawing for an "or equal." Engineer will

advise Contractor in writing of any negative determination.

D. *Special Guarantee:* Owner may require Contractor to furnish at Contractor's expense a special performance guarantee or other surety with respect to any substitute.

E. *Engineer's Cost Reimbursement:* Engineer will record Engineer's costs in evaluating a substitute proposed or submitted by Contractor pursuant to Paragraphs 6.05.A.2 and 6.05.B Whether or not Engineer approves a substitute item so proposed or submitted by Contractor, Contractor shall reimburse Owner for the charges of Engineer for evaluating each such proposed substitute. Contractor shall also reimburse Owner for the charges of Engineer for making changes in the Contract Documents (or in the provisions of any other direct contract with Owner) resulting from the acceptance of each proposed substitute.

F. *Contractor's Expense:* Contractor shall provide all data in support of any proposed substitute or "or-equal" at Contractor's expense.

6.06 *Concerning Subcontractors, Suppliers, and Others*

A. Contractor shall not employ any Subcontractor, Supplier, or other individual or entity (including those acceptable to Owner as indicated in Paragraph 6.06.B), whether initially or as a replacement, against whom Owner may have reasonable objection. Contractor shall not be required to employ any Subcontractor, Supplier, or other individual or entity to furnish or perform any of the Work against whom Contractor has reasonable objection.

B. If the Supplementary Conditions require the identity of certain Subcontractors, Suppliers, or other individuals or entities to be submitted to Owner in advance for acceptance by Owner by a specified date prior to the Effective Date of the Agreement, and if Contractor has submitted a list thereof in accordance with the Supplementary Conditions, Owner's acceptance (either in writing or by failing to make written objection thereto by the date indicated for acceptance or objection in the Bidding Documents or the Contract Documents) of any such Subcontractor, Supplier, or other individual or entity so identified may be revoked on the basis of reasonable objection after due investigation. Contractor shall submit an acceptable replacement for the rejected Subcontractor, Supplier, or other individual or entity, and the Contract Price will be adjusted by the difference in the cost occasioned by such replacement, and an appropriate Change Order will be issued. No acceptance by Owner of

any such Subcontractor, Supplier, or other individual or entity, whether initially or as a replacement, shall constitute a waiver of any right of Owner or Engineer to reject defective Work.

C. Contractor shall be fully responsible to Owner and Engineer for all acts and omissions of the Subcontractors, Suppliers, and other individuals or entities performing or furnishing any of the Work just as Contractor is responsible for Contractor's own acts and omissions. Nothing in the Contract Documents:

1. shall create for the benefit of any such Subcontractor, Supplier, or other individual or entity any contractual relationship between Owner or Engineer and any such Subcontractor, Supplier or other individual or entity, nor

2. shall anything in the Contract Documents create any obligation on the part of Owner or Engineer to pay or to see to the payment of any moneys due any such Subcontractor, Supplier, or other individual or entity except as may otherwise be required by Laws and Regulations.

D. Contractor shall be solely responsible for scheduling and coordinating the Work of Subcontractors, Suppliers, and other individuals or entities performing or furnishing any of the Work under a direct or indirect contract with Contractor.

E. Contractor shall require all Subcontractors, Suppliers, and such other individuals or entities performing or furnishing any of the Work to communicate with Engineer through Contractor.

F. The divisions and sections of the Specifications and the identifications of any Drawings shall not control Contractor in dividing the Work among Subcontractors or Suppliers or delineating the Work to be performed by any specific trade.

G. All Work performed for Contractor by a Subcontractor or Supplier will be pursuant to an appropriate agreement between Contractor and the Subcontractor or Supplier which specifically binds the Subcontractor or Supplier to the applicable terms and conditions of the Contract Documents for the benefit of Owner and Engineer. Whenever any such agreement is with a Subcontractor or Supplier who is listed as an additional insured on the property insurance provided in Paragraph 5.06, the agreement between the Contractor and the Subcontractor or Supplier will contain provisions whereby the Subcontractor or Supplier waives all rights against Owner, Contractor, and Engineer,, and all other

individuals or entities identified in the Supplementary Conditions to be listed as insureds or additional insureds (and the officers, directors, partners, employees, agents, consultants and subcontractors of each and any of them) for all losses and damages caused by, arising out of, relating to, or resulting from any of the perils or causes of loss covered by such policies and any other property insurance applicable to the Work. If the insurers on any such policies require separate waiver forms to be signed by any Subcontractor or Supplier, Contractor will obtain the same.

6.07 *Patent Fees and Royalties*

A. Contractor shall pay all license fees and royalties and assume all costs incident to the use in the performance of the Work or the incorporation in the Work of any invention, design, process, product, or device which is the subject of patent rights or copyrights held by others. If a particular invention, design, process, product, or device is specified in the Contract Documents for use in the performance of the Work and if to the actual knowledge of Owner or Engineer its use is subject to patent rights or copyrights calling for the payment of any license fee or royalty to others, the existence of such rights shall be disclosed by Owner in the Contract Documents.

B. To the fullest extent permitted by Laws and Regulations, Contractor shall indemnify and hold harmless Owner and Engineer, and the officers, directors, partners, employees, agents, consultants and subcontractors of each and any of them from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to any infringement of patent rights or copyrights incident to the use in the performance of the Work or resulting from the incorporation in the Work of any invention, design, process, product, or device not specified in the Contract Documents.

6.08 *Permits*

A. Unless otherwise provided in the Supplementary Conditions, Contractor shall obtain and pay for all construction permits and licenses. Owner shall assist Contractor, when necessary, in obtaining such permits and licenses. Contractor shall pay all governmental charges and inspection fees necessary for the prosecution of the Work which are applicable at the time of opening of Bids, or, if there are no Bids, on the Effective Date of the Agreement. Owner shall pay all charges of utility owners for connections for providing permanent service to the Work.

6.09 *Laws and Regulations*

A. Contractor shall give all notices required by and shall comply with all Laws and Regulations applicable to the performance of the Work. Except where otherwise expressly required by applicable Laws and Regulations, neither Owner nor Engineer shall be responsible for monitoring Contractor's compliance with any Laws or Regulations.

B. If Contractor performs any Work knowing or having reason to know that it is contrary to Laws or Regulations, Contractor shall bear all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to such Work. However, it shall not be Contractor's primary responsibility to make certain that the Specifications and Drawings are in accordance with Laws and Regulations, but this shall not relieve Contractor of Contractor's obligations under Paragraph 3.03.

C. Changes in Laws or Regulations not known at the time of opening of Bids (or, on the Effective Date of the Agreement if there were no Bids) having an effect on the cost or time of performance of the Work shall be the subject of an adjustment in Contract Price or Contract Times. If Owner and Contractor are unable to agree on entitlement to or on the amount or extent, if any, of any such adjustment, a Claim may be made therefor as provided in Paragraph 10.05.

6.10 *Taxes*

A. Contractor shall pay all sales, consumer, use, and other similar taxes required to be paid by Contractor in accordance with the Laws and Regulations of the place of the Project which are applicable during the performance of the Work.

6.11 *Use of Site and Other Areas*

A. Limitation on Use of Site and Other Areas

1. Contractor shall confine construction equipment, the storage of materials and equipment, and the operations of workers to the Site and other areas permitted by Laws and Regulations, and shall not unreasonably encumber the Site and other areas with construction equipment or other materials or equipment. Contractor shall assume full responsibility for any damage to any such land or area, or to the owner or occupant thereof, or of any adjacent land or areas resulting from the performance of the Work.

2. Should any claim be made by any such owner or occupant because of the performance of the Work, Contractor shall promptly settle with such other party by negotiation or otherwise resolve the claim by arbitration or other dispute resolution proceeding or at law.

3. To the fullest extent permitted by Laws and Regulations, Contractor shall indemnify and hold harmless Owner and Engineer, and the officers, directors, partners, employees, agents, consultants and subcontractors of each and any of them from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to any claim or action, legal or equitable, brought by any such owner or occupant against Owner, Engineer, or any other party indemnified hereunder to the extent caused by or based upon Contractor's performance of the Work.

B. Removal of Debris During Performance of the Work: During the progress of the Work Contractor shall keep the Site and other areas free from accumulations of waste materials, rubbish, and other debris. Removal and disposal of such waste materials, rubbish, and other debris shall conform to applicable Laws and Regulations.

C. Cleaning: Prior to Substantial Completion of the Work Contractor shall clean the Site and the Work and make it ready for utilization by Owner. At the completion of the Work Contractor shall remove from the Site all tools, appliances, construction equipment and machinery, and surplus materials and shall restore to original condition all property not designated for alteration by the Contract Documents.

D. Loading Structures: Contractor shall not load nor permit any part of any structure to be loaded in any manner that will endanger the structure, nor shall Contractor subject any part of the Work or adjacent property to stresses or pressures that will endanger it.

6.12 Record Documents

A. Contractor shall maintain in a safe place at the Site one record copy of all Drawings, Specifications, Addenda, Change Orders, Work Change Directives, Field Orders, and written interpretations and clarifications in good order and annotated to show changes made during construction. These record documents together with all approved Samples and a counterpart of all approved Shop Drawings will be available to Engineer for reference. Upon completion of the Work, these record documents, Samples, and Shop Drawings will be delivered to Engineer for Owner.

6.13 Safety and Protection

A. Contractor shall be solely responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work. Contractor shall take all necessary precautions for the safety of, and shall provide the necessary protection to prevent damage, injury or loss to:

1. all persons on the Site or who may be affected by the Work;

2. all the Work and materials and equipment to be incorporated therein, whether in storage on or off the Site; and

3. other property at the Site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, roadways, structures, utilities, and Underground Facilities not designated for removal, relocation, or replacement in the course of construction.

B. Contractor shall comply with all applicable Laws and Regulations relating to the safety of persons or property, or to the protection of persons or property from damage, injury, or loss; and shall erect and maintain all necessary safeguards for such safety and protection. Contractor shall notify owners of adjacent property and of Underground Facilities and other utility owners when prosecution of the Work may affect them, and shall cooperate with them in the protection, removal, relocation, and replacement of their property.

C. All damage, injury, or loss to any property referred to in Paragraph 6.13.A.2 or 6.13.A.3 caused, directly or indirectly, in whole or in part, by Contractor, any Subcontractor, Supplier, or any other individual or entity directly or indirectly employed by any of them to perform any of the Work, or anyone for whose acts any of them may be liable, shall be remedied by Contractor (except damage or loss attributable to the fault of Draw-

ings or Specifications or to the acts or omissions of Owner or Engineer or , or anyone employed by any of them, or anyone for whose acts any of them may be liable, and not attributable, directly or indirectly, in whole or in part, to the fault or negligence of Contractor or any Subcontractor, Supplier, or other individual or entity directly or indirectly employed by any of them).

D. Contractor's duties and responsibilities for safety and for protection of the Work shall continue until such time as all the Work is completed and Engineer has issued a notice to Owner and Contractor in accordance with Paragraph 14.07.B that the Work is acceptable (except as otherwise expressly provided in connection with Substantial Completion).

6.14 *Safety Representative*

A. Contractor shall designate a qualified and experienced safety representative at the Site whose duties and responsibilities shall be the prevention of accidents and the maintaining and supervising of safety precautions and programs.

6.15 *Hazard Communication Programs*

A. Contractor shall be responsible for coordinating any exchange of material safety data sheets or other hazard communication information required to be made available to or exchanged between or among employers at the Site in accordance with Laws or Regulations.

6.16 *Emergencies*

A. In emergencies affecting the safety or protection of persons or the Work or property at the Site or adjacent thereto, Contractor is obligated to act to prevent threatened damage, injury, or loss. Contractor shall give Engineer prompt written notice if Contractor believes that any significant changes in the Work or variations from the Contract Documents have been caused thereby or are required as a result thereof. If Engineer determines that a change in the Contract Documents is required because of the action taken by Contractor in response to such an emergency, a Work Change Directive or Change Order will be issued.

6.17 *Shop Drawings and Samples*

A. Contractor shall submit Shop Drawings and Samples to Engineer for review and approval in accordance with the acceptable Schedule of Submittals (as required by Paragraph 2.07). Each submittal will be identified as Engineer may require.

1. Shop Drawings

a. Submit number of copies specified in the General Requirements.

b. Data shown on the Shop Drawings will be complete with respect to quantities, dimensions, specified performance and design criteria, materials, and similar data to show Engineer the services, materials, and equipment Contractor proposes to provide and to enable Engineer to review the information for the limited purposes required by Paragraph 6.17.D.

2. *Samples*: Contractor shall also submit Samples to Engineer for review and approval in accordance with the acceptable schedule of Shop Drawings and Sample submittals.

a. Submit number of Samples specified in the Specifications.

b. Clearly identify each Sample as to material, Supplier, pertinent data such as catalog numbers, the use for which intended and other data as Engineer may require to enable Engineer to review the submittal for the limited purposes required by Paragraph 6.17.D.

B. Where a Shop Drawing or Sample is required by the Contract Documents or the Schedule of Submittals , any related Work performed prior to Engineer's review and approval of the pertinent submittal will be at the sole expense and responsibility of Contractor.

C. Submittal Procedures

1. Before submitting each Shop Drawing or Sample, Contractor shall have determined and verified:

a. all field measurements, quantities, dimensions, specified performance and design criteria, installation requirements, materials, catalog numbers, and similar information with respect thereto;

b. the suitability of all materials with respect to intended use, fabrication, shipping, handling, storage, assembly, and installation pertaining to the performance of the Work;

c. all information relative to Contractor's responsibilities for means, methods, techniques, sequences, and procedures of construction, and

safety precautions and programs incident thereto;
and

d. shall also have reviewed and coordinated each Shop Drawing or Sample with other Shop Drawings and Samples and with the requirements of the Work and the Contract Documents.

2. Each submittal shall bear a stamp or specific written certification that Contractor has satisfied Contractor's obligations under the Contract Documents with respect to Contractor's review and approval of that submittal.

3. With each submittal, Contractor shall give Engineer specific written notice of any variations, that the Shop Drawing or Sample may have from the requirements of the Contract Documents. This notice shall be both a written communication separate from the Shop Drawing's or Sample Submittal; and, in addition, by a specific notation made on each Shop Drawing or Sample submitted to Engineer for review and approval of each such variation.

D. *Engineer's Review*

1. Engineer will provide timely review of Shop Drawings and Samples in accordance with the Schedule of Submittals acceptable to Engineer. Engineer's review and approval will be only to determine if the items covered by the submittals will, after installation or incorporation in the Work, conform to the information given in the Contract Documents and be compatible with the design concept of the completed Project as a functioning whole as indicated by the Contract Documents.

2. Engineer's review and approval will not extend to means, methods, techniques, sequences, or procedures of construction (except where a particular means, method, technique, sequence, or procedure of construction is specifically and expressly called for by the Contract Documents) or to safety precautions or programs incident thereto. The review and approval of a separate item as such will not indicate approval of the assembly in which the item functions.

3. Engineer's review and approval shall not relieve Contractor from responsibility for any variation from the requirements of the Contract Documents unless Contractor has complied with the requirements of Paragraph 6.17.C.3 and Engineer has given written approval of each such variation by specific written

notation thereof incorporated in or accompanying the Shop Drawing or Sample. Engineer's review and approval shall not relieve Contractor from responsibility for complying with the requirements of Paragraph 6.17.C.1.

E. *Resubmittal Procedures*

1. Contractor shall make corrections required by Engineer and shall return the required number of corrected copies of Shop Drawings and submit, as required, new Samples for review and approval. Contractor shall direct specific attention in writing to revisions other than the corrections called for by Engineer on previous submittals.

6.18 *Continuing the Work*

A. Contractor shall carry on the Work and adhere to the Progress Schedule during all disputes or disagreements with Owner. No Work shall be delayed or postponed pending resolution of any disputes or disagreements, except as permitted by Paragraph 15.04 or as Owner and Contractor may otherwise agree in writing.

6.19 *Contractor's General Warranty and Guarantee*

A. Contractor warrants and guarantees to Owner that all Work will be in accordance with the Contract Documents and will not be defective. Engineer and its Related Entities shall be entitled to rely on representation of Contractor's warranty and guarantee.

B. Contractor's warranty and guarantee hereunder excludes defects or damage caused by:

1. abuse, modification, or improper maintenance or operation by persons other than Contractor, Subcontractors, Suppliers, or any other individual or entity for whom Contractor is responsible; or

2. normal wear and tear under normal usage.

C. Contractor's obligation to perform and complete the Work in accordance with the Contract Documents shall be absolute. None of the following will constitute an acceptance of Work that is not in accordance with the Contract Documents or a release of Contractor's obligation to perform the Work in accordance with the Contract Documents:

1. observations by Engineer;

2. recommendation by Engineer or payment by Owner of any progress or final payment;

3. the issuance of a certificate of Substantial Completion by Engineer or any payment related thereto by Owner;

4. use or occupancy of the Work or any part thereof by Owner;

5. any review and approval of a Shop Drawing or Sample submittal or the issuance of a notice of acceptability by Engineer;

6. any inspection, test, or approval by others; or

7. any correction of defective Work by Owner.

6.20 Indemnification

A. To the fullest extent permitted by Laws and Regulations, Contractor shall indemnify and hold harmless Owner and Engineer, and the officers, directors, partners, employees, agents, consultants and subcontractors of each and any of them from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to the performance of the Work, provided that any such claim, cost, loss, or damage is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom but only to the extent caused by any negligent act or omission of Contractor, any Subcontractor, any Supplier, or any individual or entity directly or indirectly employed by any of them to perform any of the Work or anyone for whose acts any of them may be liable.

B. In any and all claims against Owner or Engineer or any of their respective consultants, agents, officers, directors, partners, or employees by any employee (or the survivor or personal representative of such employee) of Contractor, any Subcontractor, any Supplier, or any individual or entity directly or indirectly employed by any of them to perform any of the Work, or anyone for whose acts any of them may be liable, the indemnification obligation under Paragraph 6.20.A shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for Contractor or any such Subcontractor, Supplier, or other individual or entity under workers' compensation

acts, disability benefit acts, or other employee benefit acts.

C. The indemnification obligations of Contractor under Paragraph 6.20.A shall not extend to the liability of Engineer and Engineer's officers, directors, partners, employees, agents, consultants and subcontractors arising out of:

1. the preparation or approval of, or the failure to prepare or approve, maps, Drawings, opinions, reports, surveys, Change Orders, designs, or Specifications; or

2. giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage.

6.21 Delegation of Professional Design Services

A. Contractor will not be required to provide professional design services unless such services are specifically required by the Contract Documents for a portion of the Work or unless such services are required to carry out Contractor's responsibilities for construction means, methods, techniques, sequences and procedures. Contractor shall not be required to provide professional services in violation of applicable law.

B. If professional design services or certifications by a design professional related to systems, materials or equipment are specifically required of Contractor by the Contract Documents, Owner and Engineer will specify all performance and design criteria that such services must satisfy. Contractor shall cause such services or certifications to be provided by a properly licensed professional, whose signature and seal shall appear on all drawings, calculations, specifications, certifications, Shop Drawings and other submittals prepared by such professional. Shop Drawings and other submittals related to the Work designed or certified by such professional, if prepared by others, shall bear such professional's written approval when submitted to Engineer.

C. Owner and Engineer shall be entitled to rely upon the adequacy, accuracy and completeness of the services, certifications or approvals performed by such design professionals, provided Owner and Engineer have specified to Contractor all performance and design criteria that such services must satisfy.

D. Pursuant to this Paragraph 6.21, Engineer's review and approval of design calculations and design drawings will be only for the limited purpose of checking for conformance with performance and design criteria

given and the design concept expressed in the Contract Documents. Engineer's review and approval of Shop Drawings and other submittals (except design calculations and design drawings) will be only for the purpose stated in Paragraph 6.17.D.1.

E. Contractor shall not be responsible for the adequacy of the performance or design criteria required by the Contract Documents.

ARTICLE 7 - OTHER WORK AT THE SITE

7.01 *Related Work at Site*

A. Owner may perform other work related to the Project at the Site with Owner's employees, or via other direct contracts therefor, or have other work performed by utility owners. If such other work is not noted in the Contract Documents, then:

1. written notice thereof will be given to Contractor prior to starting any such other work; and

2. if Owner and Contractor are unable to agree on entitlement to or on the amount or extent, if any, of any adjustment in the Contract Price or Contract Times that should be allowed as a result of such other work, a Claim may be made therefor as provided in Paragraph 10.05.

B. Contractor shall afford each other contractor who is a party to such a direct contract, each utility owner and Owner, if Owner is performing other work with Owner's employees, proper and safe access to the Site, a reasonable opportunity for the introduction and storage of materials and equipment and the execution of such other work, and shall properly coordinate the Work with theirs. Contractor shall do all cutting, fitting, and patching of the Work that may be required to properly connect or otherwise make its several parts come together and properly integrate with such other work. Contractor shall not endanger any work of others by cutting, excavating, or otherwise altering their work and will only cut or alter their work with the written consent of Engineer and the others whose work will be affected. The duties and responsibilities of Contractor under this Paragraph are for the benefit of such utility owners and other contractors to the extent that there are comparable provisions for the benefit of Contractor in said direct contracts between Owner and such utility owners and other contractors.

C. If the proper execution or results of any part of Contractor's Work depends upon work performed by

others under this Article 7, Contractor shall inspect such other work and promptly report to Engineer in writing any delays, defects, or deficiencies in such other work that render it unavailable or unsuitable for the proper execution and results of Contractor's Work. Contractor's failure to so report will constitute an acceptance of such other work as fit and proper for integration with Contractor's Work except for latent defects and deficiencies in such other work.

7.02 *Coordination*

A. If Owner intends to contract with others for the performance of other work on the Project at the Site, the following will be set forth in Supplementary Conditions:

1. the individual or entity who will have authority and responsibility for coordination of the activities among the various contractors will be identified;

2. the specific matters to be covered by such authority and responsibility will be itemized; and

3. the extent of such authority and responsibilities will be provided.

B. Unless otherwise provided in the Supplementary Conditions, Owner shall have sole authority and responsibility for such coordination.

7.03 *Legal Relationships*

A. Paragraphs 7.01.A and 7.02 are not applicable for utilities not under the control of Owner.

B. Each other direct contract of Owner under Paragraph 7.01.A shall provide that the other contractor is liable to Owner and Contractor for the reasonable direct delay and disruption costs incurred by Contractor as a result of the other contractor's actions or inactions.

C. Contractor shall be liable to Owner and any other contractor for the reasonable direct delay and disruption costs incurred by such other contractor as a result of Contractor's action or inactions.

ARTICLE 8 - OWNER'S RESPONSIBILITIES

8.01 *Communications to Contractor*

A. Except as otherwise provided in these General Conditions, Owner shall issue all communications to Contractor through Engineer.

8.02 *Replacement of Engineer*

A. In case of termination of the employment of Engineer, Owner shall appoint an engineer to whom Contractor makes no reasonable objection, whose status under the Contract Documents shall be that of the former Engineer.

8.03 *Furnish Data*

A. Owner shall promptly furnish the data required of Owner under the Contract Documents.

8.04 *Pay When Due*

A. Owner shall make payments to Contractor when they are due as provided in Paragraphs 14.02.C and 14.07.C.

8.05 *Lands and Easements; Reports and Tests*

A. Owner's duties in respect of providing lands and easements and providing engineering surveys to establish reference points are set forth in Paragraphs 4.01 and 4.05. Paragraph 4.02 refers to Owner's identifying and making available to Contractor copies of reports of explorations and tests of subsurface conditions and drawings of physical conditions in or relating to existing surface or subsurface structures at or contiguous to the Site that have been utilized by Engineer in preparing the Contract Documents.

8.06 *Insurance*

A. Owner's responsibilities, if any, in respect of purchasing and maintaining liability and property insurance are set forth in Article 5.

8.07 *Change Orders*

A. Owner is obligated to execute Change Orders as indicated in Paragraph 10.03.

8.08 *Inspections, Tests, and Approvals*

A. Owner's responsibility in respect to certain inspections, tests, and approvals is set forth in Paragraph 13.03.B.

8.09 *Limitations on Owner's Responsibilities*

A. The Owner shall not supervise, direct, or have control or authority over, nor be responsible for, Contractor's means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto, or for any failure of Contractor to comply with Laws and Regulations applicable to the performance of the Work. Owner will not be responsible for Contractor's failure to perform the Work in accordance with the Contract Documents.

8.10 *Undisclosed Hazardous Environmental Condition*

A. Owner's responsibility in respect to an undisclosed Hazardous Environmental Condition is set forth in Paragraph 4.06.

8.11 *Evidence of Financial Arrangements*

A. If and to the extent Owner has agreed to furnish Contractor reasonable evidence that financial arrangements have been made to satisfy Owner's obligations under the Contract Documents, Owner's responsibility in respect thereof will be as set forth in the Supplementary Conditions.

ARTICLE 9 - ENGINEER'S STATUS DURING CONSTRUCTION

9.01 *Owner's Representative*

A. Engineer will be Owner's representative during the construction period. The duties and responsibilities and the limitations of authority of Engineer as Owner's representative during construction are set forth in the Contract Documents and will not be changed without written consent of Owner and Engineer.

9.02 *Visits to Site*

A. Engineer will make visits to the Site at intervals appropriate to the various stages of construction as Engineer deems necessary in order to observe as an experienced and qualified design professional the progress that has been made and the quality of the various aspects of Contractor's executed Work. Based on

information obtained during such visits and observations, Engineer, for the benefit of Owner, will determine, in general, if the Work is proceeding in accordance with the Contract Documents. Engineer will not be required to make exhaustive or continuous inspections on the Site to check the quality or quantity of the Work. Engineer's efforts will be directed toward providing for Owner a greater degree of confidence that the completed Work will conform generally to the Contract Documents. On the basis of such visits and observations, Engineer will keep Owner informed of the progress of the Work and will endeavor to guard Owner against defective Work.

B. Engineer's visits and observations are subject to all the limitations on Engineer's authority and responsibility set forth in Paragraph 9.09. Particularly, but without limitation, during or as a result of Engineer's visits or observations of Contractor's Work Engineer will not supervise, direct, control, or have authority over or be responsible for Contractor's means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto, or for any failure of Contractor to comply with Laws and Regulations applicable to the performance of the Work.

9.03 *Project Representative*

A. If Owner and Engineer agree, Engineer will furnish a Resident Project Representative to assist Engineer in providing more extensive observation of the Work. The authority and responsibilities of any such Resident Project Representative and assistants will be as provided in the Supplementary Conditions, and limitations on the responsibilities thereof will be as provided in Paragraph 9.09. If Owner designates another representative or agent to represent Owner at the Site who is not Engineer's consultant, agent or employee, the responsibilities and authority and limitations thereon of such other individual or entity will be as provided in the Supplementary Conditions.

9.04 *Authorized Variations in Work*

A. Engineer may authorize minor variations in the Work from the requirements of the Contract Documents which do not involve an adjustment in the Contract Price or the Contract Times and are compatible with the design concept of the completed Project as a functioning whole as indicated by the Contract Documents. These may be accomplished by a Field Order and will be binding on Owner and also on Contractor, who shall perform the Work involved promptly. If Owner or Contractor believes that a Field Order justifies an adjustment in the Contract Price or Contract Times, or both, and the parties are unable to agree on entitlement to or on the amount or extent, if any, of any such adjustment

, a Claim may be made therefor as provided in Paragraph 10.05.

9.05 *Rejecting Defective Work*

A. Engineer will have authority to reject Work which Engineer believes to be defective, or that Engineer believes will not produce a completed Project that conforms to the Contract Documents or that will prejudice the integrity of the design concept of the completed Project as a functioning whole as indicated by the Contract Documents. Engineer will also have authority to require special inspection or testing of the Work as provided in Paragraph 13.04, whether or not the Work is fabricated, installed, or completed.

9.06 *Shop Drawings, Change Orders and Payments*

A. In connection with Engineer's authority, and limitations thereof, as to Shop Drawings and Samples, see Paragraph 6.17.

B. In connection with Engineer's authority, and limitations thereof, as to design calculations and design drawings submitted in response to a delegation of professional design services, if any, see Paragraph 6.21.

C. In connection with Engineer's authority as to Change Orders, see Articles 10, 11, and 12.

D. In connection with Engineer's authority as to Applications for Payment, see Article 14.

9.07 *Determinations for Unit Price Work*

A. Engineer will determine the actual quantities and classifications of Unit Price Work performed by Contractor. Engineer will review with Contractor the Engineer's preliminary determinations on such matters before rendering a written decision thereon (by recommendation of an Application for Payment or otherwise). Engineer's written decision thereon will be final and binding (except as modified by Engineer to reflect changed factual conditions or more accurate data) upon Owner and Contractor, subject to the provisions of Paragraph 10.05.

9.08 *Decisions on Requirements of Contract Documents and Acceptability of Work*

A. Engineer will be the initial interpreter of the requirements of the Contract Documents and judge of the acceptability of the Work thereunder. All matters in question and other matters between Owner and Contractor arising prior to the date final payment is due relating to the acceptability of the Work, and the interpretation of the

requirements of the Contract Documents pertaining to the performance of the Work, will be referred initially to Engineer in writing within 30 days of the event giving rise to the question

B. Engineer will, with reasonable promptness, render a written decision on the issue referred. If Owner or Contractor believe that any such decision entitles them to an adjustment in the Contract Price or Contract Times or both, a Claim may be made under Paragraph 10.05. The date of Engineer's decision shall be the date of the event giving rise to the issues referenced for the purposes of Paragraph 10.05.B.

C. Engineer's written decision on the issue referred will be final and binding on Owner and Contractor, subject to the provisions of Paragraph 10.05.

D. When functioning as interpreter and judge under this Paragraph 9.08, Engineer will not show partiality to Owner or Contractor and will not be liable in connection with any interpretation or decision rendered in good faith in such capacity.

9.09 *Limitations on Engineer's Authority and Responsibilities*

A. Neither Engineer's authority or responsibility under this Article 9 or under any other provision of the Contract Documents nor any decision made by Engineer in good faith either to exercise or not exercise such authority or responsibility or the undertaking, exercise, or performance of any authority or responsibility by Engineer shall create, impose, or give rise to any duty in contract, tort, or otherwise owed by Engineer to Contractor, any Subcontractor, any Supplier, any other individual or entity, or to any surety for or employee or agent of any of them.

B. Engineer will not supervise, direct, control, or have authority over or be responsible for Contractor's means, methods, techniques, sequences, or procedures of construction, or the safety precautions and programs incident thereto, or for any failure of Contractor to comply with Laws and Regulations applicable to the performance of the Work. Engineer will not be responsible for Contractor's failure to perform the Work in accordance with the Contract Documents.

C. Engineer will not be responsible for the acts or omissions of Contractor or of any Subcontractor, any Supplier, or of any other individual or entity performing any of the Work.

D. Engineer's review of the final Application for Payment and accompanying documentation and all

maintenance and operating instructions, schedules, guarantees, bonds, certificates of inspection, tests and approvals, and other documentation required to be delivered by Paragraph 14.07.A will only be to determine generally that their content complies with the requirements of, and in the case of certificates of inspections, tests, and approvals that the results certified indicate compliance with the Contract Documents.

E. The limitations upon authority and responsibility set forth in this Paragraph 9.09 shall also apply to, the Resident Project Representative, if any, and assistants, if any.

ARTICLE 10 - CHANGES IN THE WORK; CLAIMS

10.01 *Authorized Changes in the Work*

A. Without invalidating the Contract and without notice to any surety, Owner may, at any time or from time to time, order additions, deletions, or revisions in the Work by a Change Order, or a Work Change Directive. Upon receipt of any such document, Contractor shall promptly proceed with the Work involved which will be performed under the applicable conditions of the Contract Documents (except as otherwise specifically provided).

B. If Owner and Contractor are unable to agree on entitlement to, or on the amount or extent, if any, of an adjustment in the Contract Price or Contract Times, or both, that should be allowed as a result of a Work Change Directive, a Claim may be made therefor as provided in Paragraph 10.05.

10.02 *Unauthorized Changes in the Work*

A. Contractor shall not be entitled to an increase in the Contract Price or an extension of the Contract Times with respect to any work performed that is not required by the Contract Documents as amended, modified, or supplemented as provided in Paragraph 3.04, except in the case of an emergency as provided in Paragraph 6.16 or in the case of uncovering Work as provided in Paragraph 13.04.B.

10.03 *Execution of Change Orders*

A. Owner and Contractor shall execute appropriate Change Orders recommended by Engineer covering:

1. changes in the Work which are: (i) ordered by Owner pursuant to Paragraph 10.01.A, (ii) required because of acceptance of defective Work under Paragraph

13.08.A or Owner's correction of defective Work under Paragraph 13.09, or (iii) agreed to by the parties;

2. changes in the Contract Price or Contract Times which are agreed to by the parties, including any undisputed sum or amount of time for Work actually performed in accordance with a Work Change Directive; and

3. changes in the Contract Price or Contract Times which embody the substance of any written decision rendered by Engineer pursuant to Paragraph 10.05; provided that, in lieu of executing any such Change Order, an appeal may be taken from any such decision in accordance with the provisions of the Contract Documents and applicable Laws and Regulations, but during any such appeal, Contractor shall carry on the Work and adhere to the Progress Schedule as provided in Paragraph 6.18.A.

10.04 *Notification to Surety*

A. If notice of any change affecting the general scope of the Work or the provisions of the Contract Documents (including, but not limited to, Contract Price or Contract Times) is required by the provisions of any bond to be given to a surety, the giving of any such notice will be Contractor's responsibility. The amount of each applicable bond will be adjusted to reflect the effect of any such change.

10.05 *Claims*

A. *Engineer's Decision Required:* All Claims, except those waived pursuant to Paragraph 14.09, shall be referred to the Engineer for decision. A decision by Engineer shall be required as a condition precedent to any exercise by Owner or Contractor of any rights or remedies either may otherwise have under the Contract Documents or by Laws and Regulations in respect of such Claims.

B. *Notice:* Written notice stating the general nature of each Claim, shall be delivered by the claimant to Engineer and the other party to the Contract promptly (but in no event later than 30 days) after the start of the event giving rise thereto. The responsibility to substantiate a Claim shall rest with the party making the Claim. Notice of the amount or extent of the Claim, with supporting data shall be delivered to the Engineer and the other party to the Contract within 60 days after the start of such event (unless Engineer allows additional time for claimant to submit additional or more accurate data in support of such Claim). A Claim for an adjustment in Contract Price shall be prepared in accordance with the provisions of Paragraph 12.01.B. A Claim for an adjustment in Contract

Time shall be prepared in accordance with the provisions of Paragraph 12.02.B. Each Claim shall be accompanied by claimant's written statement that the adjustment claimed is the entire adjustment to which the claimant believes it is entitled as a result of said event. The opposing party shall submit any response to Engineer and the claimant within 30 days after receipt of the claimant's last submittal (unless Engineer allows additional time).

C. *Engineer's Action:* Engineer will review each Claim and, within 30 days after receipt of the last submittal of the claimant or the last submittal of the opposing party, if any, take one of the following actions in writing:

1. deny the Claim in whole or in part,
2. approve the Claim, or

3. notify the parties that the Engineer is unable to resolve the Claim if, in the Engineer's sole discretion, it would be inappropriate for the Engineer to do so. For purposes of further resolution of the Claim, such notice shall be deemed a denial.

D. In the event that Engineer does not take action on a Claim within said 30 days, the Claim shall be deemed denied.

E. Engineer's written action under Paragraph 10.05.C or denial pursuant to Paragraphs 10.05.C.3 or 10.05.D will be final and binding upon Owner and Contractor, unless Owner or Contractor invoke the dispute resolution procedure set forth in Article 16 within 30 days of such action or denial.

F. No Claim for an adjustment in Contract Price or Contract Times will be valid if not submitted in accordance with this Paragraph 10.05.

ARTICLE 11 - COST OF THE WORK; ALLOWANCES; UNIT PRICE WORK

11.01 *Cost of the Work*

A. *Costs Included:* The term Cost of the Work means the sum of all costs, except those excluded in Paragraph 11.01.B, necessarily incurred and paid by Contractor in the proper performance of the Work. When the value of any Work covered by a Change Order or when a Claim for an adjustment in Contract Price is determined on the basis of Cost of the Work, the costs to be reimbursed to Contractor will be only those additional

or incremental costs required because of the change in the Work or because of the event giving rise to the Claim. Except as otherwise may be agreed to in writing by Owner, such costs shall be in amounts no higher than those prevailing in the locality of the Project, shall include only the following items, and shall not include any of the costs itemized in Paragraph 11.01.B.

1. Payroll costs for employees in the direct employ of Contractor in the performance of the Work under schedules of job classifications agreed upon by Owner and Contractor. Such employees shall include, without limitation, superintendents, foremen, and other personnel employed full time at the Site. Payroll costs for employees not employed full time on the Work shall be apportioned on the basis of their time spent on the Work. Payroll costs shall include, but not be limited to, salaries and wages plus the cost of fringe benefits, which shall include social security contributions, unemployment, excise, and payroll taxes, workers' compensation, health and retirement benefits, bonuses, sick leave, vacation and holiday pay applicable thereto. The expenses of performing Work outside of regular working hours, on Saturday, Sunday, or legal holidays, shall be included in the above to the extent authorized by Owner.

2. Cost of all materials and equipment furnished and incorporated in the Work, including costs of transportation and storage thereof, and Suppliers' field services required in connection therewith. All cash discounts shall accrue to Contractor unless Owner deposits funds with Contractor with which to make payments, in which case the cash discounts shall accrue to Owner. All trade discounts, rebates and refunds and returns from sale of surplus materials and equipment shall accrue to Owner, and Contractor shall make provisions so that they may be obtained.

3. Payments made by Contractor to Subcontractors for Work performed by Subcontractors. If required by Owner, Contractor shall obtain competitive bids from subcontractors acceptable to Owner and Contractor and shall deliver such bids to Owner, who will then determine, with the advice of Engineer, which bids, if any, will be acceptable. If any subcontract provides that the Subcontractor is to be paid on the basis of Cost of the Work plus a fee, the Subcontractor's Cost of the Work and fee shall be determined in the same manner as Contractor's Cost of the Work and fee as provided in this Paragraph 11.01.

4. Costs of special consultants (including but not limited to Engineers, architects, testing laboratories,

surveyors, attorneys, and accountants) employed for services specifically related to the Work.

5. Supplemental costs including the following:

a. The proportion of necessary transportation, travel, and subsistence expenses of Contractor's employees incurred in discharge of duties connected with the Work.

b. Cost, including transportation and maintenance, of all materials, supplies, equipment, machinery, appliances, office, and temporary facilities at the Site, and hand tools not owned by the workers, which are consumed in the performance of the Work, and cost, less market value, of such items used but not consumed which remain the property of Contractor.

c. Rentals of all construction equipment and machinery, and the parts thereof whether rented from Contractor or others in accordance with rental agreements approved by Owner with the advice of Engineer, and the costs of transportation, loading, unloading, assembly, dismantling, and removal thereof. All such costs shall be in accordance with the terms of said rental agreements. The rental of any such equipment, machinery, or parts shall cease when the use thereof is no longer necessary for the Work.

d. Sales, consumer, use, and other similar taxes related to the Work, and for which Contractor is liable, imposed by Laws and Regulations.

e. Deposits lost for causes other than negligence of Contractor, any Subcontractor, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable, and royalty payments and fees for permits and licenses.

f. Losses and damages (and related expenses) caused by damage to the Work, not compensated by insurance or otherwise, sustained by Contractor in connection with the performance of the Work (except losses and damages within the deductible amounts of property insurance established in accordance with Paragraph 5.06.D), provided such losses and damages have resulted from causes other than the negligence of Contractor, any Subcontractor, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable. Such losses shall include settlements made with the written consent and approval of Owner. No such

losses, damages, and expenses shall be included in the Cost of the Work for the purpose of determining Contractor's fee.

g. The cost of utilities, fuel, and sanitary facilities at the Site.

h. Minor expenses such as telegrams, long distance telephone calls, telephone service at the Site, expresses, and similar petty cash items in connection with the Work.

i. The costs of premiums for all bonds and insurance Contractor is required by the Contract Documents to purchase and maintain.

B. Costs Excluded: The term Cost of the Work shall not include any of the following items:

1. Payroll costs and other compensation of Contractor's officers, executives, principals (of partnerships and sole proprietorships), general managers, safety managers, engineers, architects, estimators, attorneys, auditors, accountants, purchasing and contracting agents, expeditors, timekeepers, clerks, and other personnel employed by Contractor, whether at the Site or in Contractor's principal or branch office for general administration of the Work and not specifically included in the agreed upon schedule of job classifications referred to in Paragraph 11.01.A.1 or specifically covered by Paragraph 11.01.A.4, all of which are to be considered administrative costs covered by the Contractor's fee.

2. Expenses of Contractor's principal and branch offices other than Contractor's office at the Site.

3. Any part of Contractor's capital expenses, including interest on Contractor's capital employed for the Work and charges against Contractor for delinquent payments.

4. Costs due to the negligence of Contractor, any Subcontractor, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable, including but not limited to, the correction of defective Work, disposal of materials or equipment wrongly supplied, and making good any damage to property.

5. Other overhead or general expense costs of any kind and the costs of any item not specifically and expressly included in Paragraphs 11.01.A and 11.01.B.

C. Contractor's Fee: When all the Work is performed on the basis of cost-plus, Contractor's fee shall be determined as set forth in the Agreement. When the value of any Work covered by a Change Order or when a Claim for an adjustment in Contract Price is determined on the basis of Cost of the Work, Contractor's fee shall be determined as set forth in Paragraph 12.01.C.

D. Documentation: Whenever the Cost of the Work for any purpose is to be determined pursuant to Paragraphs 11.01.A and 11.01.B, Contractor will establish and maintain records thereof in accordance with generally accepted accounting practices and submit in a form acceptable to Engineer an itemized cost breakdown together with supporting data.

11.02 Allowances

A. It is understood that Contractor has included in the Contract Price all allowances so named in the Contract Documents and shall cause the Work so covered to be performed for such sums and by such persons or entities as may be acceptable to Owner and Engineer.

B. Cash Allowances

1. Contractor agrees that:

a. the cash allowances include the cost to Contractor (less any applicable trade discounts) of materials and equipment required by the allowances to be delivered at the Site, and all applicable taxes; and

b. Contractor's costs for unloading and handling on the Site, labor, installation, overhead, profit, and other expenses contemplated for the cash allowances have been included in the Contract Price and not in the allowances, and no demand for additional payment on account of any of the foregoing will be valid.

C. Contingency Allowance

1. Contractor agrees that a contingency allowance, if any, is for the sole use of Owner to cover unanticipated costs.

D. Prior to final payment, an appropriate Change Order will be issued as recommended by Engineer to reflect actual amounts due Contractor on account of Work covered by allowances, and the Contract Price shall be correspondingly adjusted.

11.03 Unit Price Work

A. Where the Contract Documents provide that all or part of the Work is to be Unit Price Work, initially the Contract Price will be deemed to include for all Unit Price Work an amount equal to the sum of the unit price for each separately identified item of Unit Price Work times the estimated quantity of each item as indicated in the Agreement.

B. The estimated quantities of items of Unit Price Work are not guaranteed and are solely for the purpose of comparison of Bids and determining an initial Contract Price. Determinations of the actual quantities and classifications of Unit Price Work performed by Contractor will be made by Engineer subject to the provisions of Paragraph 9.07.

C. Each unit price will be deemed to include an amount considered by Contractor to be adequate to cover Contractor's overhead and profit for each separately identified item.

D. Owner or Contractor may make a Claim for an adjustment in the Contract Price in accordance with Paragraph 10.05 if:

1. the quantity of any item of Unit Price Work performed by Contractor differs materially and significantly from the estimated quantity of such item indicated in the Agreement; and

2. there is no corresponding adjustment with respect to any other item of Work; and

3. Contractor believes that Contractor is entitled to an increase in Contract Price as a result of having incurred additional expense or Owner believes that Owner is entitled to a decrease in Contract Price and the parties are unable to agree as to the amount of any such increase or decrease.

ARTICLE 12 - CHANGE OF CONTRACT PRICE; CHANGE OF CONTRACT TIMES

12.01 Change of Contract Price

A. The Contract Price may only be changed by a Change Order. Any Claim for an adjustment in the Contract Price shall be based on written notice submitted by the party making the Claim to the Engineer and the other party to the Contract in accordance with the provisions of Paragraph 10.05.

B. The value of any Work covered by a Change Order or of any Claim for an adjustment in the Contract Price will be determined as follows:

1. where the Work involved is covered by unit prices contained in the Contract Documents, by application of such unit prices to the quantities of the items involved (subject to the provisions of Paragraph 11.03); or

2. where the Work involved is not covered by unit prices contained in the Contract Documents, by a mutually agreed lump sum (which may include an allowance for overhead and profit not necessarily in accordance with Paragraph 12.01.C.2); or

3. where the Work involved is not covered by unit prices contained in the Contract Documents and agreement to a lump sum is not reached under Paragraph 12.01.B.2, on the basis of the Cost of the Work (determined as provided in Paragraph 11.01) plus a Contractor's fee for overhead and profit (determined as provided in Paragraph 12.01.C).

C. *Contractor's Fee:* The Contractor's fee for overhead and profit shall be determined as follows:

1. a mutually acceptable fixed fee; or

2. if a fixed fee is not agreed upon, then a fee based on the following percentages of the various portions of the Cost of the Work:

a. for costs incurred under Paragraphs 11.01.A.1 and 11.01.A.2, the Contractor's fee shall be 15 percent;

b. for costs incurred under Paragraph 11.01.A.3, the Contractor's fee shall be five percent;

c. where one or more tiers of subcontracts are on the basis of Cost of the Work plus a fee and no fixed fee is agreed upon, the intent of Paragraph 12.01.C.2.a is that the Subcontractor who actually performs the Work, at whatever tier, will be paid a fee of 15 percent of the costs incurred by such Subcontractor under Paragraphs 11.01.A.1 and 11.01.A.2 and that any higher tier Subcontractor and Contractor will each be paid a fee of five percent of the amount paid to the next lower tier Subcontractor;

d. no fee shall be payable on the basis of costs itemized under Paragraphs 11.01.A.4, 11.01.A.5, and 11.01.B;

e. the amount of credit to be allowed by Contractor to Owner for any change which results in a net decrease in cost will be the amount of the actual net decrease in cost plus a deduction in Contractor's fee by an amount equal to five percent of such net decrease; and

f. when both additions and credits are involved in any one change, the adjustment in Contractor's fee shall be computed on the basis of the net change in accordance with Paragraphs 12.01.C.2.a through 12.01.C.2.e, inclusive.

12.02 *Change of Contract Times*

A. The Contract Times may only be changed by a Change Order. Any Claim for an adjustment in the Contract Times shall be based on written notice submitted by the party making the Claim to the Engineer and the other party to the Contract in accordance with the provisions of Paragraph 10.05.

B. Any adjustment of the Contract Times covered by a Change Order or any Claim for an adjustment in the Contract Times will be determined in accordance with the provisions of this Article 12.

12.03 *Delays*

A. Where Contractor is prevented from completing any part of the Work within the Contract Times due to delay beyond the control of Contractor, the Contract Times will be extended in an amount equal to the time lost due to such delay if a Claim is made therefor as provided in Paragraph 12.02.A. Delays beyond the control of Contractor shall include, but not be limited to, acts or neglect by Owner, acts or neglect of utility owners or other contractors performing other work as contemplated by Article 7, fires, floods, epidemics, abnormal weather conditions, or acts of God.

B. If Owner, Engineer, or other contractors or utility owners performing other work for Owner as contemplated by Article 7, or anyone for whom Owner is responsible, delays, disrupts, or interferes with the performance or progress of the Work, then Contractor shall be entitled to an equitable adjustment in the Contract Price or the Contract Times, or both. Contractor's entitlement to an adjustment of the Contract Times is conditioned on such adjustment being essential to Contractor's ability to complete the Work within the Contract Times.

C If Contractor is delayed in the performance or progress of the Work by fire, flood, epidemic, abnormal weather conditions, acts of God, acts or failures to act of utility owners not under the control of Owner, or other causes not the fault of and beyond control of Owner and Contractor, then Contractor shall be entitled to an equitable adjustment in Contract Times, if such adjustment is essential to Contractor's ability to complete the Work within the Contract Times. Such an adjustment shall be Contractor's sole and exclusive remedy for the delays described in this Paragraph 12.03.C.

D. Owner, Engineer and the Related Entities of each of them shall not be liable to Contractor for any claims, costs, losses, or damages (including but not limited to all fees and charges of Engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) sustained by Contractor on or in connection with any other project or anticipated project.

E. Contractor shall not be entitled to an adjustment in Contract Price or Contract Times for delays within the control of Contractor. Delays attributable to and within the control of a Subcontractor or Supplier shall be deemed to be delays within the control of Contractor.

ARTICLE 13 - TESTS AND INSPECTIONS; CORRECTION, REMOVAL OR ACCEPTANCE OF DEFECTIVE WORK

13.01 *Notice of Defects*

A. Prompt notice of all defective Work of which Owner or Engineer has actual knowledge will be given to Contractor. All defective Work may be rejected, corrected, or accepted as provided in this Article 13.

13.02 *Access to Work*

A. Owner, Engineer, their consultants and other representatives and personnel of Owner, independent testing laboratories, and governmental agencies with jurisdictional interests will have access to the Site and the Work at reasonable times for their observation, inspecting, and testing. Contractor shall provide them proper and safe conditions for such access and advise them of Contractor's Site safety procedures and programs so that they may comply therewith as applicable.

13.03 *Tests and Inspections*

A. Contractor shall give Engineer timely notice of readiness of the Work for all required inspections, tests, or approvals and shall cooperate with inspection and testing personnel to facilitate required inspections or tests.

B. Owner shall employ and pay for the services of an independent testing laboratory to perform all inspections, tests, or approvals required by the Contract Documents except:

1. for inspections, tests, or approvals covered by Paragraphs 13.03.C and 13.03.D below;

2. that costs incurred in connection with tests or inspections conducted pursuant to Paragraph 13.04.B shall be paid as provided in said Paragraph 13.04.C; and

3. as otherwise specifically provided in the Contract Documents.

C. If Laws or Regulations of any public body having jurisdiction require any Work (or part thereof) specifically to be inspected, tested, or approved by an employee or other representative of such public body, Contractor shall assume full responsibility for arranging and obtaining such inspections, tests, or approvals, pay all costs in connection therewith, and furnish Engineer the required certificates of inspection or approval.

D. Contractor shall be responsible for arranging and obtaining and shall pay all costs in connection with any inspections, tests, or approvals required for Owner's and Engineer's acceptance of materials or equipment to be incorporated in the Work; or acceptance of materials, mix designs, or equipment submitted for approval prior to Contractor's purchase thereof for incorporation in the Work. Such inspections, tests, or approvals shall be performed by organizations acceptable to Owner and Engineer.

E. If any Work (or the work of others) that is to be inspected, tested, or approved is covered by Contractor without written concurrence of Engineer, it must, if requested by Engineer, be uncovered for observation.

F. Uncovering Work as provided in Paragraph 13.03.E shall be at Contractor's expense unless Contractor has given Engineer timely notice of Contractor's intention to cover the same and Engineer has not acted with reasonable promptness in response to such notice.

13.04 *Uncovering Work*

A. If any Work is covered contrary to the written request of Engineer, it must, if requested by Engineer, be uncovered for Engineer's observation and replaced at Contractor's expense.

B. If Engineer considers it necessary or advisable that covered Work be observed by Engineer or inspected or tested by others, Contractor, at Engineer's request, shall uncover, expose, or otherwise make available for observation, inspection, or testing as Engineer may require, that portion of the Work in question, furnishing all necessary labor, material, and equipment.

C. If it is found that the uncovered Work is defective, Contractor shall pay all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to such uncovering, exposure, observation, inspection, and testing, and of satisfactory replacement or reconstruction (including but not limited to all costs of repair or replacement of work of others); and Owner shall be entitled to an appropriate decrease in the Contract Price. If the parties are unable to agree as to the amount thereof, Owner may make a Claim therefor as provided in Paragraph 10.05.

D. If, the uncovered Work is not found to be defective, Contractor shall be allowed an increase in the Contract Price or an extension of the Contract Times, or both, directly attributable to such uncovering, exposure, observation, inspection, testing, replacement, and reconstruction. If the parties are unable to agree as to the amount or extent thereof, Contractor may make a Claim therefor as provided in Paragraph 10.05.

13.05 *Owner May Stop the Work*

A. If the Work is defective, or Contractor fails to supply sufficient skilled workers or suitable materials or equipment, or fails to perform the Work in such a way that the completed Work will conform to the Contract Documents, Owner may order Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, this right of Owner to stop the Work shall not give rise to any duty on the part of Owner to exercise this right for the benefit of Contractor, any Subcontractor, any Supplier, any other individual or entity, or any surety for, or employee or agent of any of them.

13.06 *Correction or Removal of Defective Work*

A. Promptly after receipt of notice, Contractor shall correct all defective Work, whether or not fabricated, installed, or completed, or, if the Work has been rejected by Engineer, remove it from the Project and replace it with Work that is not defective. Contractor shall pay all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to such correction or removal (including but not limited to all costs of repair or replacement of work of others).

B. When correcting defective Work under the terms of this Paragraph 13.06 or Paragraph 13.07, Contractor shall take no action that would void or otherwise impair Owner's special warranty and guarantee, if any, on said Work.

13.07 *Correction Period*

A. If within one year after the date of Substantial Completion (or such longer period of time as may be prescribed by the terms of any applicable special guarantee required by the Contract Documents) or by any specific provision of the Contract Documents, any Work is found to be defective, or if the repair of any damages to the land or areas made available for Contractor's use by Owner or permitted by Laws and Regulations as contemplated in Paragraph 6.11.A is found to be defective, Contractor shall promptly, without cost to Owner and in accordance with Owner's written instructions:

1. repair such defective land or areas; or
2. correct such defective Work; or
3. if the defective Work has been rejected by Owner, remove it from the Project and replace it with Work that is not defective, and
4. satisfactorily correct or repair or remove and replace any damage to other Work, to the work of others or other land or areas resulting therefrom.

B. If Contractor does not promptly comply with the terms of Owner's written instructions, or in an emergency where delay would cause serious risk of loss or damage, Owner may have the defective Work corrected or repaired or may have the rejected Work removed and replaced. All claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals

and all court or arbitration or other dispute resolution costs) arising out of or relating to such correction or repair or such removal and replacement (including but not limited to all costs of repair or replacement of work of others) will be paid by Contractor.

C. In special circumstances where a particular item of equipment is placed in continuous service before Substantial Completion of all the Work, the correction period for that item may start to run from an earlier date if so provided in the Specifications .

D. Where defective Work (and damage to other Work resulting therefrom) has been corrected or removed and replaced under this Paragraph 13.07, the correction period hereunder with respect to such Work will be extended for an additional period of one year after such correction or removal and replacement has been satisfactorily completed.

E. Contractor's obligations under this Paragraph 13.07 are in addition to any other obligation or warranty. The provisions of this Paragraph 13.07 shall not be construed as a substitute for or a waiver of the provisions of any applicable statute of limitation or repose.

13.08 *Acceptance of Defective Work*

A. If, instead of requiring correction or removal and replacement of defective Work, Owner (and, prior to Engineer's recommendation of final payment, Engineer) prefers to accept it, Owner may do so. Contractor shall pay all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) attributable to Owner's evaluation of and determination to accept such defective Work (such costs to be approved by Engineer as to reasonableness) and the diminished value of the Work to the extent not otherwise paid by Contractor pursuant to this sentence. If any such acceptance occurs prior to Engineer's recommendation of final payment, a Change Order will be issued incorporating the necessary revisions in the Contract Documents with respect to the Work, and Owner shall be entitled to an appropriate decrease in the Contract Price, reflecting the diminished value of Work so accepted. If the parties are unable to agree as to the amount thereof, Owner may make a Claim therefor as provided in Paragraph 10.05. If the acceptance occurs after such recommendation, an appropriate amount will be paid by Contractor to Owner.

13.09 *Owner May Correct Defective Work*

A. If Contractor fails within a reasonable time after written notice from Engineer to correct defective

Work or to remove and replace rejected Work as required by Engineer in accordance with Paragraph 13.06.A, or if Contractor fails to perform the Work in accordance with the Contract Documents, or if Contractor fails to comply with any other provision of the Contract Documents, Owner may, after seven days written notice to Contractor, correct or remedy any such deficiency.

B. In exercising the rights and remedies under this Paragraph 13.09, Owner shall proceed expeditiously. In connection with such corrective or remedial action, Owner may exclude Contractor from all or part of the Site, take possession of all or part of the Work and suspend Contractor's services related thereto, take possession of Contractor's tools, appliances, construction equipment and machinery at the Site, and incorporate in the Work all materials and equipment stored at the Site or for which Owner has paid Contractor but which are stored elsewhere. Contractor shall allow Owner, Owner's representatives, agents and employees, Owner's other contractors, and Engineer and Engineer's consultants access to the Site to enable Owner to exercise the rights and remedies under this Paragraph.

C. All claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) incurred or sustained by Owner in exercising the rights and remedies under this Paragraph 13.09 will be charged against Contractor, and a Change Order will be issued incorporating the necessary revisions in the Contract Documents with respect to the Work; and Owner shall be entitled to an appropriate decrease in the Contract Price. If the parties are unable to agree as to the amount of the adjustment, Owner may make a Claim therefor as provided in Paragraph 10.05. Such claims, costs, losses and damages will include but not be limited to all costs of repair, or replacement of work of others destroyed or damaged by correction, removal, or replacement of Contractor's defective Work.

D. Contractor shall not be allowed an extension of the Contract Times because of any delay in the performance of the Work attributable to the exercise by Owner of Owner's rights and remedies under this Paragraph 13.09.

ARTICLE 14 - PAYMENTS TO CONTRACTOR AND COMPLETION

14.01 *Schedule of Values*

A. The Schedule of Values established as provided in Paragraph 2.07.A will serve as the basis for progress payments and will be incorporated into a form of Application for Payment acceptable to Engineer. Progress payments on account of Unit Price Work will be based on the number of units completed.

14.02 *Progress Payments*

A. Applications for Payments

1. At least 20 days before the date established in the Agreement for each progress payment (but not more often than once a month), Contractor shall submit to Engineer for review an Application for Payment filled out and signed by Contractor covering the Work completed as of the date of the Application and accompanied by such supporting documentation as is required by the Contract Documents. If payment is requested on the basis of materials and equipment not incorporated in the Work but delivered and suitably stored at the Site or at another location agreed to in writing, the Application for Payment shall also be accompanied by a bill of sale, invoice, or other documentation warranting that Owner has received the materials and equipment free and clear of all Liens and evidence that the materials and equipment are covered by appropriate property insurance or other arrangements to protect Owner's interest therein, all of which must be satisfactory to Owner.

2. Beginning with the second Application for Payment, each Application shall include an affidavit of Contractor stating that all previous progress payments received on account of the Work have been applied on account to discharge Contractor's legitimate obligations associated with prior Applications for Payment.

3. The amount of retainage with respect to progress payments will be as stipulated in the Agreement.

B. *Review of Applications*

1. Engineer will, within 10 days after receipt of each Application for Payment, either indicate in writing a recommendation of payment and present the Application to Owner or return the Application to Contractor indicating in writing Engineer's reasons for refusing to recommend payment. In the latter case, Contractor may

make the necessary corrections and resubmit the Application.

2. Engineer's recommendation of any payment requested in an Application for Payment will constitute a representation by Engineer to Owner, based on Engineer's observations on the Site of the executed Work as an experienced and qualified design professional and on Engineer's review of the Application for Payment and the accompanying data and schedules, that to the best of Engineer's knowledge, information and belief:

a. the Work has progressed to the point indicated;

b. the quality of the Work is generally in accordance with the Contract Documents (subject to an evaluation of the Work as a functioning whole prior to or upon Substantial Completion, to the results of any subsequent tests called for in the Contract Documents, to a final determination of quantities and classifications for Unit Price Work under Paragraph 9.07, and to any other qualifications stated in the recommendation); and

c. the conditions precedent to Contractor's being entitled to such payment appear to have been fulfilled in so far as it is Engineer's responsibility to observe the Work.

3. By recommending any such payment Engineer will not thereby be deemed to have represented that:

a. inspections made to check the quality or the quantity of the Work as it has been performed have been exhaustive, extended to every aspect of the Work in progress, or involved detailed inspections of the Work beyond the responsibilities specifically assigned to Engineer in the Contract Documents; or

b. that there may not be other matters or issues between the parties that might entitle Contractor to be paid additionally by Owner or entitle Owner to withhold payment to Contractor.

4. Neither Engineer's review of Contractor's Work for the purposes of recommending payments nor Engineer's recommendation of any payment, including final payment, will impose responsibility on Engineer:

a. to supervise, direct, or control the Work, or

b. for the means, methods, techniques, sequences, or procedures of construction, or the

safety precautions and programs incident thereto, or

c. for Contractor's failure to comply with Laws and Regulations applicable to Contractor's performance of the Work, or

d. to make any examination to ascertain how or for what purposes Contractor has used the moneys paid on account of the Contract Price, or

e. to determine that title to any of the Work, materials, or equipment has passed to Owner free and clear of any Liens.

5. Engineer may refuse to recommend the whole or any part of any payment if, in Engineer's opinion, it would be incorrect to make the representations to Owner stated in Paragraph 14.02.B.2. Engineer may also refuse to recommend any such payment or, because of subsequently discovered evidence or the results of subsequent inspections or tests, revise or revoke any such payment recommendation previously made, to such extent as may be necessary in Engineer's opinion to protect Owner from loss because:

a. the Work is defective, or completed Work has been damaged, requiring correction or replacement;

b. the Contract Price has been reduced by Change Orders;

c. Owner has been required to correct defective Work or complete Work in accordance with Paragraph 13.09; or

d. Engineer has actual knowledge of the occurrence of any of the events enumerated in Paragraph 15.02.A.

C. Payment Becomes Due

1. Ten days after presentation of the Application for Payment to Owner with Engineer's recommendation, the amount recommended will (subject to the provisions of Paragraph 14.02.D) become due, and when due will be paid by Owner to Contractor.

D. Reduction in Payment

1. Owner may refuse to make payment of the full amount recommended by Engineer because:

a. claims have been made against Owner on account of Contractor's performance or furnishing of the Work;

b. Liens have been filed in connection with the Work, except where Contractor has delivered a specific bond satisfactory to Owner to secure the satisfaction and discharge of such Liens;

c. there are other items entitling Owner to a set-off against the amount recommended; or

d. Owner has actual knowledge of the occurrence of any of the events enumerated in Paragraphs 14.02.B.5.a through 14.02.B.5.c or Paragraph 15.02.A.

2. If Owner refuses to make payment of the full amount recommended by Engineer, Owner will give Contractor immediate written notice (with a copy to Engineer) stating the reasons for such action and promptly pay Contractor any amount remaining after deduction of the amount so withheld. Owner shall promptly pay Contractor the amount so withheld, or any adjustment thereto agreed to by Owner and Contractor, when Contractor corrects to Owner's satisfaction the reasons for such action.

3. If it is subsequently determined that Owner's refusal of payment was not justified, the amount wrongfully withheld shall be treated as an amount due as determined by Paragraph 14.02.C.1.

14.03 *Contractor's Warranty of Title*

A. Contractor warrants and guarantees that title to all Work, materials, and equipment covered by any Application for Payment, whether incorporated in the Project or not, will pass to Owner no later than the time of payment free and clear of all Liens.

14.04 *Substantial Completion*

A. When Contractor considers the entire Work ready for its intended use Contractor shall notify Owner and Engineer in writing that the entire Work is substantially complete (except for items specifically listed by Contractor as incomplete) and request that Engineer issue a certificate of Substantial Completion.

B. Promptly after Contractor's notification, , Owner, Contractor, and Engineer shall make an inspection of the Work to determine the status of completion. If Engineer does not consider the Work

substantially complete, Engineer will notify Contractor in writing giving the reasons therefor.

C. If Engineer considers the Work substantially complete, Engineer will deliver to Owner a tentative certificate of Substantial Completion which shall fix the date of Substantial Completion. There shall be attached to the certificate a tentative list of items to be completed or corrected before final payment. Owner shall have seven days after receipt of the tentative certificate during which to make written objection to Engineer as to any provisions of the certificate or attached list. If, after considering such objections, Engineer concludes that the Work is not substantially complete, Engineer will within 14 days after submission of the tentative certificate to Owner notify Contractor in writing, stating the reasons therefor. If, after consideration of Owner's objections, Engineer considers the Work substantially complete, Engineer will within said 14 days execute and deliver to Owner and Contractor a definitive certificate of Substantial Completion (with a revised tentative list of items to be completed or corrected) reflecting such changes from the tentative certificate as Engineer believes justified after consideration of any objections from Owner.

D. At the time of delivery of the tentative certificate of Substantial Completion, Engineer will deliver to Owner and Contractor a written recommendation as to division of responsibilities pending final payment between Owner and Contractor with respect to security, operation, safety, and protection of the Work, maintenance, heat, utilities, insurance, and warranties and guarantees. Unless Owner and Contractor agree otherwise in writing and so inform Engineer in writing prior to Engineer's issuing the definitive certificate of Substantial Completion, Engineer's aforesaid recommendation will be binding on Owner and Contractor until final payment.

E. Owner shall have the right to exclude Contractor from the Site after the date of Substantial Completion subject to allowing Contractor reasonable access to complete or correct items on the tentative list.

14.05 *Partial Utilization*

A. Prior to Substantial Completion of all the Work, Owner may use or occupy any substantially completed part of the Work which has specifically been identified in the Contract Documents, or which Owner, Engineer, and Contractor agree constitutes a separately functioning and usable part of the Work that can be used by Owner for its intended purpose without significant interference with Contractor's performance of the remainder of the Work, subject to the following conditions.

1. Owner at any time may request Contractor in writing to permit Owner to use or occupy any such part of the Work which Owner believes to be ready for its intended use and substantially complete. If and when Contractor agrees that such part of the Work is substantially complete, Contractor will certify to Owner and Engineer that such part of the Work is substantially complete and request Engineer to issue a certificate of Substantial Completion for that part of the Work.

2. Contractor at any time may notify Owner and Engineer in writing that Contractor considers any such part of the Work ready for its intended use and substantially complete and request Engineer to issue a certificate of Substantial Completion for that part of the Work.

3. Within a reasonable time after either such request, Owner, Contractor, and Engineer shall make an inspection of that part of the Work to determine its status of completion. If Engineer does not consider that part of the Work to be substantially complete, Engineer will notify Owner and Contractor in writing giving the reasons therefor. If Engineer considers that part of the Work to be substantially complete, the provisions of Paragraph 14.04 will apply with respect to certification of Substantial Completion of that part of the Work and the division of responsibility in respect thereof and access thereto.

4. No use or occupancy or separate operation of part of the Work may occur prior to compliance with the requirements of Paragraph 5.10 regarding property insurance.

14.06 *Final Inspection*

A. Upon written notice from Contractor that the entire Work or an agreed portion thereof is complete, Engineer will promptly make a final inspection with Owner and Contractor and will notify Contractor in writing of all particulars in which this inspection reveals that the Work is incomplete or defective. Contractor shall immediately take such measures as are necessary to complete such Work or remedy such deficiencies.

14.07 *Final Payment*

A. Application for Payment

1. After Contractor has, in the opinion of Engineer, satisfactorily completed all corrections identified during the final inspection and has delivered, in accordance with the Contract Documents, all maintenance and operating instructions, schedules, guarantees, bonds, certificates or other evidence of insurance certificates of

inspection, marked-up record documents (as provided in Paragraph 6.12), and other documents, Contractor may make application for final payment following the procedure for progress payments.

2. The final Application for Payment shall be accompanied (except as previously delivered) by:

- a. all documentation called for in the Contract Documents, including but not limited to the evidence of insurance required by Paragraph 5.04.B.7;
- b. consent of the surety, if any, to final payment;
- c. a list of all Claims against Owner that Contractor believes are unsettled; and
- d. complete and legally effective releases or waivers (satisfactory to Owner) of all Lien rights arising out of or Liens filed in connection with the Work.

3. In lieu of the releases or waivers of Liens specified in Paragraph 14.07.A.2 and as approved by Owner, Contractor may furnish receipts or releases in full and an affidavit of Contractor that: (i) the releases and receipts include all labor, services, material, and equipment for which a Lien could be filed; and (ii) all payrolls, material and equipment bills, and other indebtedness connected with the Work for which Owner or Owner's property might in any way be responsible have been paid or otherwise satisfied. If any Subcontractor or Supplier fails to furnish such a release or receipt in full, Contractor may furnish a bond or other collateral satisfactory to Owner to indemnify Owner against any Lien.

B. *Engineer's Review of Application and Acceptance*

1. If, on the basis of Engineer's observation of the Work during construction and final inspection, and Engineer's review of the final Application for Payment and accompanying documentation as required by the Contract Documents, Engineer is satisfied that the Work has been completed and Contractor's other obligations under the Contract Documents have been fulfilled, Engineer will, within ten days after receipt of the final Application for Payment, indicate in writing Engineer's recommendation of payment and present the Application for Payment to Owner for payment. At the same time Engineer will also give written notice to Owner and Contractor that the Work is acceptable subject to the provisions of Paragraph 14.09. Otherwise, Engineer will

return the Application for Payment to Contractor, indicating in writing the reasons for refusing to recommend final payment, in which case Contractor shall make the necessary corrections and resubmit the Application for Payment.

C. Payment Becomes Due

1. Thirty days after the presentation to Owner of the Application for Payment and accompanying documentation, the amount recommended by Engineer, less any sum Owner is entitled to set off against Engineer's recommendation, including but not limited to liquidated damages, will become due and , will be paid by Owner to Contractor.

14.08 *Final Completion Delayed*

A. If, through no fault of Contractor, final completion of the Work is significantly delayed, and if Engineer so confirms, Owner shall, upon receipt of Contractor's final Application for Payment (for Work fully completed and accepted) and recommendation of Engineer, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance to be held by Owner for Work not fully completed or corrected is less than the retainage stipulated in the Agreement, and if bonds have been furnished as required in Paragraph 5.01, the written consent of the surety to the payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by Contractor to Engineer with the Application for such payment. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of Claims.

14.09 *Waiver of Claims*

A. The making and acceptance of final payment will constitute:

1. a waiver of all Claims by Owner against Contractor, except Claims arising from unsettled Liens, from defective Work appearing after final inspection pursuant to Paragraph 14.06, from failure to comply with the Contract Documents or the terms of any special guarantees specified therein, or from Contractor's continuing obligations under the Contract Documents; and

2. a waiver of all Claims by Contractor against Owner other than those previously made in accordance with the requirements herein and expressly acknowledged by Owner in writing as still unsettled.

ARTICLE 15 - SUSPENSION OF WORK AND TERMINATION

15.01 *Owner May Suspend Work*

A. At any time and without cause, Owner may suspend the Work or any portion thereof for a period of not more than 90 consecutive days by notice in writing to Contractor and Engineer which will fix the date on which Work will be resumed. Contractor shall resume the Work on the date so fixed. Contractor shall be granted an adjustment in the Contract Price or an extension of the Contract Times, or both, directly attributable to any such suspension if Contractor makes a Claim therefor as provided in Paragraph 10.05.

15.02 *Owner May Terminate for Cause*

A. The occurrence of any one or more of the following events will justify termination for cause:

1. Contractor's persistent failure to perform the Work in accordance with the Contract Documents (including, but not limited to, failure to supply sufficient skilled workers or suitable materials or equipment or failure to adhere to the Progress Schedule established under Paragraph 2.07 as adjusted from time to time pursuant to Paragraph 6.04);

2. Contractor's disregard of Laws or Regulations of any public body having jurisdiction;

3. Contractor's disregard of the authority of Engineer; or

4. Contractor's violation in any substantial way of any provisions of the Contract Documents.

B. If one or more of the events identified in Paragraph 15.02.A occur, Owner may, after giving Contractor (and surety) seven days written notice of its intent to terminate the services of Contractor:

1. exclude Contractor from the Site, and take possession of the Work and of all Contractor's tools, appliances, construction equipment, and machinery at the

Site, and use the same to the full extent they could be used by Contractor (without liability to Contractor for trespass or conversion),

2. incorporate in the Work all materials and equipment stored at the Site or for which Owner has paid Contractor but which are stored elsewhere, and

3. complete the Work as Owner may deem expedient.

C. If Owner proceeds as provided in Paragraph 15.02.B, Contractor shall not be entitled to receive any further payment until the Work is completed. If the unpaid balance of the Contract Price exceeds all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) sustained by Owner arising out of or relating to completing the Work, such excess will be paid to Contractor. If such claims, costs, losses, and damages exceed such unpaid balance, Contractor shall pay the difference to Owner. Such claims, costs, losses, and damages incurred by Owner will be reviewed by Engineer as to their reasonableness and, when so approved by Engineer, incorporated in a Change Order. When exercising any rights or remedies under this Paragraph Owner shall not be required to obtain the lowest price for the Work performed.

D. Notwithstanding Paragraphs 15.02.B and 15.02.C, Contractor's services will not be terminated if Contractor begins within seven days of receipt of notice of intent to terminate to correct its failure to perform and proceeds diligently to cure such failure within no more than 30 days of receipt of said notice.

E. Where Contractor's services have been so terminated by Owner, the termination will not affect any rights or remedies of Owner against Contractor then existing or which may thereafter accrue. Any retention or payment of moneys due Contractor by Owner will not release Contractor from liability.

F. If and to the extent that Contractor has provided a performance bond under the provisions of Paragraph 5.01.A, the termination procedures of that bond shall supersede the provisions of Paragraphs 15.02.B, and 15.02.C.

15.03 *Owner May Terminate For Convenience*

A. Upon seven days written notice to Contractor and Engineer, Owner may, without cause and without prejudice to any other right or remedy of Owner,

terminate the Contract. In such case, Contractor shall be paid for (without duplication of any items):

1. completed and acceptable Work executed in accordance with the Contract Documents prior to the effective date of termination, including fair and reasonable sums for overhead and profit on such Work;

2. expenses sustained prior to the effective date of termination in performing services and furnishing labor, materials, or equipment as required by the Contract Documents in connection with uncompleted Work, plus fair and reasonable sums for overhead and profit on such expenses;

3. all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) incurred in settlement of terminated contracts with Subcontractors, Suppliers, and others; and

4. reasonable expenses directly attributable to termination.

B. Contractor shall not be paid on account of loss of anticipated profits or revenue or other economic loss arising out of or resulting from such termination.

15.04 *Contractor May Stop Work or Terminate*

A. If, through no act or fault of Contractor, (i) the Work is suspended for more than 90 consecutive days by Owner or under an order of court or other public authority, or (ii) Engineer fails to act on any Application for Payment within 30 days after it is submitted, or (iii) Owner fails for 30 days to pay Contractor any sum finally determined to be due, then Contractor may, upon seven days written notice to Owner and Engineer, and provided Owner or Engineer do not remedy such suspension or failure within that time, terminate the Contract and recover from Owner payment on the same terms as provided in Paragraph 15.03.

B. In lieu of terminating the Contract and without prejudice to any other right or remedy, if Engineer has failed to act on an Application for Payment within 30 days after it is submitted, or Owner has failed for 30 days to pay Contractor any sum finally determined to be due, Contractor may, seven days after written notice to Owner and Engineer, stop the Work until payment is made of all such amounts due Contractor, including interest thereon. The provisions of this Paragraph 15.04 are not intended to preclude Contractor from making a

Claim under Paragraph 10.05 for an adjustment in Contract Price or Contract Times or otherwise for expenses or damage directly attributable to Contractor's stopping the Work as permitted by this Paragraph.

ARTICLE 16 - DISPUTE RESOLUTION

16.01 *Methods and Procedures*

A. Either Owner or Contractor may request mediation of any Claim submitted to Engineer for a decision under Paragraph 10.05 before such decision becomes final and binding. The mediation will be governed by the Construction Industry Mediation Rules of the American Arbitration Association in effect as of the Effective Date of the Agreement. The request for mediation shall be submitted in writing to the American Arbitration Association and the other party to the Contract. Timely submission of the request shall stay the effect of Paragraph 10.05.E.

B. Owner and Contractor shall participate in the mediation process in good faith. The process shall be concluded within 60 days of filing of the request. The date of termination of the mediation shall be determined by application of the mediation rules referenced above.

C. If the Claim is not resolved by mediation, Engineer's action under Paragraph 10.05.C or a denial pursuant to Paragraphs 10.05.C.3 or 10.05.D shall become final and binding 30 days after termination of the mediation unless, within that time period, Owner or Contractor:

1. elects in writing to invoke any dispute resolution process provided for in the Supplementary Conditions, or
2. agrees with the other party to submit the Claim to another dispute resolution process, or
3. gives written notice to the other party of their intent to submit the Claim to a court of competent jurisdiction.

ARTICLE 17 - MISCELLANEOUS

17.01 *Giving Notice*

A. Whenever any provision of the Contract Documents requires the giving of written notice, it will be deemed to have been validly given if:

1. delivered in person to the individual or to a member of the firm or to an officer of the corporation for whom it is intended, or
2. delivered at or sent by registered or certified mail, postage prepaid, to the last business address known to the giver of the notice.

17.02 *Computation of Times*

A. When any period of time is referred to in the Contract Documents by days, it will be computed to exclude the first and include the last day of such period. If the last day of any such period falls on a Saturday or Sunday or on a day made a legal holiday by the law of the applicable jurisdiction, such day will be omitted from the computation.

17.03 *Cumulative Remedies*

A. The duties and obligations imposed by these General Conditions and the rights and remedies available hereunder to the parties hereto are in addition to, and are not to be construed in any way as a limitation of, any rights and remedies available to any or all of them which are otherwise imposed or available by Laws or Regulations, by special warranty or guarantee, or by other provisions of the Contract Documents. The provisions of this Paragraph will be as effective as if repeated specifically in the Contract Documents in connection with each particular duty, obligation, right, and remedy to which they apply.

17.04 *Survival of Obligations*

A. All representations, indemnifications, warranties, and guarantees made in, required by, or given in accordance with the Contract Documents, as well as all continuing obligations indicated in the Contract Documents, will survive final payment, completion, and acceptance of the Work or termination or completion of the Contract or termination of the services of Contractor.

17.05 *Controlling Law*

A. This Contract is to be governed by the law of the state in which the Project is located.

17.06 *Headings*

A. Article and paragraph headings are inserted for convenience only and do not constitute parts of these General Conditions.

1. Delete subparagraph 5.06(A), 5.06(A) Sections 1-7, and subparagraph 5.06(B)

2. Delete sentence in subparagraph 5.07(A) beginning with “All such projects shall contain provisions....”

3. Delete subparagraph 5.07(B), 5.06(B) Sections 1-2, and subparagraph 5.06(C)

4. Delete Paragraph 10.05 (Claims) and replace Paragraph 10.05 (Claims) by reference with the Winchester City Code, Section 21-61 (Contractual Disputes), as amended and where the Winchester City Code does not specify in writing the Virginia Public Procurement Act (VPPA) §2.2-4363 shall apply, as amended. Under Winchester City Code 21-61(C), the Purchasing Agent will render such decision within thirty (30) days.

5. Add subparagraph 12.01(D), as follows:

“In accordance with Winchester City Code, Section 21-44, Contract Modification: A public 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 ten thousand dollars (\$10,000), whichever is greater, without the advance written approval of the City Council. 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.”

6. Add the following language to 14.02 (A3), as follows: “See Special Conditions, Section 4.02.”

7. Delete paragraph 14.09

8. Add subparagraph 17.01 (B), as follows: “This section, or any other General Condition in conflict with Virginia Code §8.01-222 shall not supercede the Commonwealth of Virginia statutory notice provisions. Virginia Code §8.01-222 shall prevail under all circumstances.

NON-COLLUSION AFFIDAVIT

STATE OF VIRGINIA

Ss: ITB # _____ - **Project Description**

CITY OF WINCHESTER, COUNTY of FREDERICK

I, _____ of the City of _____

In the County of _____ and the State of _____

Of full age, being duly sworn according to law or my oath depose and say that:

I am _____ of the firm of _____

_____, of the Company making the Bid for the above named project, and that I executed the said Bid with full authority to do so; that the Company has not, directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free, competitive bid preparation in connection with the above named project; and that all statements contained in said Bid and in this affidavit are true and correct, and made with full knowledge that the City of Winchester relies upon the truth of the statements contained in said Bid and in the statements contained in this affidavit in awarding the Contract for said Project.

I further warrant that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, except bona fide employees or bona fide established commercial or selling agencies maintained by:

(Name of Contractor)

Subscribed and sworn to _____
(Type or print name of applicant under signature)

before me this _____ day of _____, 20____.

(Notary Public)

of _____

My commission expires: _____, 20____.

NOTICE OF AWARD

DATE:

TO:

PROJECT TITLE: ITB # _____ - Project Description

Gentlemen:

Your Bid, dated _____, for the above Project has been considered and you are the apparent successful bidder. You are hereby notified that you have been awarded a Contract for :

The Contract Price of your contract is \$ _____.

Three copies each of the proposed Contract between Owner and Contractor and the Contract Documents accompany this Notice of Award.

You must comply with the following conditions precedent within fifteen days of the date of this Notice of Award, that is by _____.

1. You must deliver to the Owner three (3) fully executed counterparts of the Contract between Owner and Contractor including all the Contract Documents. This includes the sets of Plans and Specifications. Each of the Contract Documents must bear your signature on the Index page of the Plans and on the Specification Table of Contents page.
2. You must deliver with the executed Contract, Payment and Performance Bonds, and required Certificates of Insurance. The Certificate of Insurance must identify the above referenced project as the project for which insurance is being provided. *Additionally, it must indicate the City of Winchester as the Certificate Holder, and name the City of Winchester as an additional insured.*

Failure to comply with these conditions within the time specified will entitle Owner to consider your bid abandoned, to annul this Notice of Award and to declare your Bid Security forfeited.

After you comply with those conditions, and upon approval of the Contract Security by the Owner, the Owner will return to you one fully signed counterpart of the Contract with the Contract Documents.

City of Winchester, Virginia

By: _____
City Manager

NOTICE TO PROCEED

DATE:

TO:

PROJECT TITLE: ITB # _____ - Project Description

Gentlemen:

In accordance with the Contract between Owner and Contractor, you are notified that the Time for Completion under the above Contract will commence to run on _____. By that date, you are to start performing your obligations under the Contract Documents. In accordance with the Contract between Owner and Contractor, the Work shall be substantially completed by _____.

City of Winchester, Virginia

By: _____
City Manager



City of Winchester
15 N. Cameron Street
Winchester, VA 22601

Phone: (540) 667-1815
 Fax: (540) 722-3618

Subject to purchase conditions, furnish articles on the services listed below.
 (Unless otherwise specified)

PURCHASE CONDITIONS

- 1.) This contractual agreement is subject to the *City of Winchester Required Terms and Conditions* and any revisions thereto, as approved by the City Attorney.
- 2.) All prices unless otherwise specified are net, F.O.B. destination with transportation charges prepaid.
- 3.) Goods and services delivered must be strictly in accordance with bid/quote referred to and shall not deviate in any way from terms, conditions or specifications of the bid/quote. No substitution, change or deviation shall be made without written authority from the requesting department.
- 4.) Equipment, materials and/or supplies delivered on this order shall be subject to inspection and test upon receipt and if rejected shall remain the property of the vendor.
- 5.) This purchase order number shall be shown by vendor on all related invoices, delivery memoranda, bills of lading, packages and/or correspondence.
- 6.) A separate invoice for this purchase order or for each shipment thereon shall be rendered immediately following shipment. All copies of invoice shall be forwarded direct to using agency at point shown.
- 7.) If shipment is made by freight or express, the original bill of lading properly receipted shall accompany invoice.

CITY OF WINCHESTER, VIRGINIA

BY: _____

TITLE: _____

Purchasing Agent





City of Winchester, Virginia

Office of the City Attorney
Rouss City Hall
22601
540-667-1815
Fax: 667-2259

CONTRACT #[ITB/RFP Number]

THIS CONTRACT WAS MADE AND ENTERED INTO THIS ____ DAY OF _____, 2009, BY AND BETWEEN _____, F.I.N. OR S.S. NUMBER _____ ("CONTRACTOR"), AND THE **CITY OF WINCHESTER, VIRGINIA**, A POLITICAL SUBDIVISION OF THE COMMONWEALTH OF VIRGINIA ("CITY").

WHEREAS, THE CITY HAS PREVIOUSLY ISSUED INVITATION TO BID 200729 (ITB #200729"), DATED _____, TO PROVIDE ELECTRICAL MAINTENANCE, REPAIR AND INSTALLATION SERVICES FOR ROUTINE JOBS, GENERAL RENOVATIONS, PROJECT WORK, AND EMERGENCY PROCUREMENTS TO THE CITY OF WINCHESTER, AS MORE FULLY DESCRIBED AND REQUESTED IN THE ITB, AND;

WHEREAS, CONTRACTOR HAS SUBMITTED A PROPOSAL IN RESPONSE TO THE ITB DATED _____ 2009, SIGNED BY _____ WHICH STATES VARIOUS PRICING ASSIGNED TO THE CITY.

NOW, THEREFORE, FOR AND IN CONSIDERATION OF THE MUTUAL COVENANTS AND AGREEMENTS HEREIN CONTAINED, THE PARTIES COVENANT AND AGREE AS FOLLOWS:

1. THE CONTRACTOR SHALL PROVIDE THE CITY THE SERVICES OUTLINED IN ITB #200729, WHICH IS INCORPORATED IN ITS ENTIRETY HEREIN BY REFERENCE. THE CITY SHALL PAY THE CONTRACTOR THE ASSIGNED PRICING SCHEDULE. THE CONTRACTOR SHALL FORWARD AN INVOICE FOR SUCH WORK TO THE REQUESTING DEPARTMENT HEAD, OR DESIGNEE ON OR ABOUT THE FIRST AND FIFTEENTH DAYS OF EACH MONTH DURING THE TERM OF THIS CONTRACT. THE CITY SHALL PAY SUCH INVOICE IN ACCORDANCE WITH THE PROMPT PAYMENT ACT PROVISIONS OF THE VIRGINIA PUBLIC PROCUREMENT ACT, WHICH ARE INCORPORATED HEREIN BY REFERENCE.
2. THE TERM OF THIS CONTRACT SHALL ORIGINATE ON NOVEMBER 1, 2008 AND REMAIN IN EFFECT FOR TWELVE (12) MONTHS. THE CITY RESERVES THE RIGHT TO CANCEL AND TERMINATE THIS CONTRACT, WITHOUT PENALTY, UPON TEN (10) DAYS WRITTEN NOTICE TO CONTRACTOR. THE PARTIES UNDERSTAND AND AGREE THAT BY MUTUAL AGREEMENT THIS CONTRACT MAY BE RENEWED FOR FOUR (4) ADDITIONAL TWELVE (12) MONTH PERIODS
3. APPLICABLE LAW AND VENUE: THE PARTIES AGREE THAT THIS CONTRACT FOR SERVICES SHALL BE CONSTRUED UNDER AND IN ACCORDANCE WITH THE LAWS OF THE COMMONWEALTH OF VIRGINIA. ANY DISPUTE ARISING FROM THE PERFORMANCE OR NON-PERFORMANCE OF THIS AGREEMENT SHALL BE

RESOLVED OR OTHERWISE LITIGATED IN THE CIRCUIT COURT FOR THE CITY OF WINCHESTER, VIRGINIA OR THE FOURTH CIRCUIT FEDERAL DISTRICT COURT IN HARRISONBURG, VIRGINIA.

4. IF ANY PROVISION OF THIS AGREEMENT IS FOUND TO BE ILLEGAL, INVALID OR UNENFORCEABLE, THAT SHALL NOT AFFECT THE VALIDITY OR ENFORCEABILITY OF ANY OTHER PROVISION OF THIS AGREEMENT.

5. THE CONTRACTOR HAS, AT THE TIME OF ITS EXECUTION OF THIS CONTRACT, PROVIDED THE CITY WITH A CERTIFICATE OF INSURANCE SHOWING THAT IT HAS CURRENTLY IN FORCE ALL OF THE INSURANCE REQUIRED BY ITB #200729. CONTRACTOR COVENANTS THAT SUCH CERTIFICATE SHALL REMAIN IN FULL FORCE AND EFFECT THROUGHOUT THE TERM OF THIS CONTRACT, AND THAT IT WILL PROMPTLY NOTIFY THE CITY IN THE EVENT, SUCH INSURANCE IS NO LONGER IN EFFECT FOR WHATEVER REASON.

IN WITNESS WHEREOF, THE PARTIES HAVE SIGNED THIS INSTRUMENT ON THE DATE INDICATED BELOW, WITH ONE (1) FULLY SIGNED ORIGINAL DELIVERED TO CONTRACTOR AND ONE (1) FULLY SIGNED ORIGINAL DELIVERED TO THE CITY.

CONTRACTOR:

CITY OF WINCHESTER:

BY: _____

BY: _____

TITLE: _____

TITLE: _____

DATE: _____

DATE: _____

City of Winchester, Virginia

CONTRACT FORM ADDENDUM TO CONTRACTOR'S

AGENCY NAME: _____

CONTRACTOR NAME: _____

DATE: _____

The City and the Contractor are this day entering into a contract and, for their mutual convenience, the parties are using the standard form agreement provided by the Contractor, _____. This addendum, duly executed by the parties, is attached to and hereby made a part of the contract.

The Contractor represents and warrants that it is a(n) // individual proprietorship // association // partnership // corporation // governmental agency or authority authorized to do in Virginia the business provided for in this contract. (Check the appropriate box.)

Notwithstanding anything in the Contractor's form to which this Addendum is attached, the payments to be made by the City for all goods, services and other deliverables under this contract shall not exceed \$_____; payments will be made only upon receipt of a proper invoice, detailing the goods/services provided and submitted to _____. The total cumulative liability of the City, its officers, employees and agents in connection with this contract or in connection with any goods, services, actions or omissions relating to the contract, shall not under any circumstance exceed payment of the above maximum purchase price plus liability for an additional amount equal to such maximum purchase price. In its performance under this contract, the Contractor acts and will act as an independent contractor, and not as an agent or employee of the City.

The Contractor's form contract is, with the exceptions noted herein, acceptable to the City. Nonetheless, because certain standard clauses that may appear in the Contractor's form agreement cannot be accepted by the City, and in consideration of the convenience of using that form, and this form, without the necessity of specifically negotiating a separate contract document, the parties hereto specifically agree that, notwithstanding any provisions appearing in the attached Contractor's form contract, none of the following shall have any effect or be enforceable against the City:

1. Requiring the City to maintain any type of insurance either for the City's benefit or for the contractor's benefit;
2. Renewing or extending the agreement beyond the initial term or automatically continuing the contract period from term to term;
3. Requiring or stating that the terms of the attached Contractor's form agreement shall prevail over the terms of this addendum in the event of conflict;
4. Requiring the City to indemnify or to hold harmless the Contractor for any act or omission;
5. Imposing interest charges contrary to that specified by the *Code of Virginia*, § 2.2-4347 through 2.2-4354, Prompt Payment;
6. Requiring the application of the law of any state other than Virginia in interpreting or enforcing the contract or requiring or permitting that any dispute under the contract be resolved in the courts of any state other than Virginia;
7. Requiring any total or partial compensation or payment for lost profit or liquidated damages by the City if the contract is terminated before its ordinary period;
8. Requiring that the contract be "accepted" or endorsed by the home office or by any other officer subsequent to execution by an official of the City before the contract is considered in effect;

9. Delaying the acceptance of this contract or its effective date beyond the date of execution;
10. Limiting or adding to the time period within which claims can be made or actions can be brought;
11. Limiting the liability of the Contractor for property damage or personal injury;
12. Permitting unilateral modification of this contract by the Contractor;
13. Binding the City to any arbitration or to the decision of any arbitration board, commission, panel or other entity;
14. Obligating the City to pay costs of collection or attorney's fees;
15. Granting the Contractor a security interest in property of the City.
16. Bestowing any right or incurring any obligation that is beyond the duly granted authority of the undersigned agency representative to bestow or incur on behalf of the City.

This contract consisting of this addendum and the attached Contractor's form contract constitute the entire agreement between the parties and may not be waived or modified except by written agreement between the parties.

This contract has been reviewed by staff of the agency. Its substantive terms are appropriate to the needs of the agency and sufficient funds have been allocated for its performance by the agency. This contract is subject to appropriations by the Winchester City Council.

IN WITNESS WHEREOF, the parties have caused this contract to be duly executed, intending thereby to be legally bound.

AGENCY by _____

CONTRACTOR by _____

Title _____

Title _____

When Used: For contracts valued at less than \$50,000 and it is not feasible to award a contract without using the contractor's form, and clauses which are not in the best interest of the Commonwealth cannot be crossed out, then use this form. For contracts over \$50,000, your legal advisor should be consulted prior to using this form.



CITY OF WINCHESTER, VIRGINIA

Rouss City Hall
15 North Cameron Street
Winchester, VA 22601

Telephone: 540-667-1815
FAX: 540-723-0238

CONTRACT ADMINISTRATOR'S REPORT ON CONTRACTOR'S PERFORMANCE AND EVALUATION

Contract Administrator's Reporting Responsibilities: Effective with the Contract Period Start Date, you must submit reports on the following schedule below and when problems occur:

30 Days 3 Months 6 Months 9 Months* Urgent Problem

*To Continue This Service for Next Year:

Submit proper documentation to Steve Corbit, Purchasing/Risk Manager, Finance Department, 15 N. Cameron Street, Winchester, VA 22601, 90 days prior to contract period expiration date (See Below).

Contractor's Name:
Contract Number:
Description of Service:
Contract Period:
Contract Renewable Through:

Is contractor responding to the service requirements as specified? Yes No

If "No" please explain:

Problem(s) experienced and date(s) of occurrence:

Action taken to resolve problem(s):

Person(s) notified of problem(s):

Problem(s) resolved at present time? Yes No

Contractor's Overall Performance Rating:

Excellent Satisfactory Below Satisfactory

Comments on Contractor's Performance:

Would you refer this contractor for future projects for this agency? Yes No

/ /
Date of Report

Contract Administrator's Signature

“MAKE OR BUY” ANALYSIS PROCEDURES

PROCEDURE FOR EVALUATING SERVICE DELIVERY ALTERNATIVES

BACKGROUND

“Make or buy” analyses offer an opportunity for increasing the provision of government services by private sector entities and for removing government from activities that might more appropriately be provided by the private sector.

This “make or buy” analysis procedure is intended to provide a concise procedural framework for city departments or agencies to follow in carrying out their responsibilities toward privatization. It should be used by departments or agencies as a guide for accomplishing and documenting their evaluations and decisions regarding contracting with the private sector for services.

Comments and suggestions for improving this procedure should be addressed to the Finance Department, ATTN: Purchasing Agent.

I. PHASE ONE - INVENTORY OF SERVICES

- A. List all services now provided or proposed to be provided by your agency to the public or to other agencies, and the services your agency provides or contracts for, in support of its operations.
- B. Consider the public acceptability of contracting. Determine which services are close to the fundamental purpose of government, which includes the discretionary exercise of government authority (e.g., judicial, police, tax collection, revenue disbursement, intergovernmental affairs), or are essential to the government’s ability to protect the health, safety and welfare of its citizens (e.g., regulatory functions). Exercise caution in considering services of this nature for provision by contractors. Some parts of a particular service may be suitable for contractor provision while others may not.
- C. Determine which of the services on the list meet all or part of the following criteria. Those that may be good candidates for contracting out and should be further examined as discussed in subsequent steps.
 1. Service is tangible, making stipulation of specific contractor requirements and performance measures possible.
 2. Service can be, or already is, available from the private sector.
 3. Service involves either repetitious and routine activities, or it requires a relatively low skill level, e.g., janitorial services, grounds keeping work, etc.
 4. Service requires special equipment or technical/specialized skills or credentials.
 5. Service is susceptible to changes in demand or funding support, making it difficult to justify a full time year-around work force, or the service is now provided using temporary employees.

II. PHASE TWO - DETERMINE COST OF IN-HOUSE PROVISION

- A. Determine the number of full time equivalent employees (FTEs) required to provide the service along with all other costs of service provision. The in-house costs include base expenses, such as salaries, fringe benefits, supplies and equipment, maintenance, and the dollar costs for space and utilities. Some costs that need to be considered may cross program lines, e.g., inspection work done by personnel of another activity or other types of assistance provided from shared resources. The total in-house cost is needed for comparison with the net contract cost from Phase Three. If agencies wish to protect this information from public disclosure, it must be treated as a part of the cost estimate for the proposed procurement (*Code of Virginia*, § 2.2-4342B).

- B. For services currently provided in-house, the agency may wish to determine if there is a more cost efficient way to provide the required service in-house. The agency would then determine other factors (e.g., organizational structure, staffing, the use of resources, operational procedures) that would make for more efficient, effective, and economical in-house provision of the service. Based on the selected improvements, an estimate of the proposed optimum in-house cost of providing the service can be made. If the changes can be implemented within the same time frame as the contracting option, this optimum cost can be used for comparison with the net contract cost from Phase Three.

III. PHASE THREE - DETERMINE FEASIBILITY OF CONTRACTING OUT

- A. Determine availability of at least two commercial sources.
- B. An administrator or project officer is critical to a successful privatization program.
- C. Consider the impact on your ability to bring the service back in-house if substantial capital equipment investment is involved and contracting out provides unsatisfactory results.
- D. Consider the impact on displaced employees and what provisions could be made for their continued employment, such as being hired by the contractor or retrained for other City service.
- E. Work with the purchasing office to prepare and issue a formal solicitation [Invitation to Bids (ITB) or Request for Proposals (RFP)] based on the scope of services, performance standards, job analysis, etc.
- F. Prepare an estimate of the City's net cost of contracting the service (see II A. above). This includes the projected contract price; contract administration, e.g., audit, performance evaluation, communication; and other management costs, such as salaries, fringe benefits, etc.; contractor support costs, such as any space to be provided to the contractor; and "one time" costs or savings, such as solicitation costs, staff training, savings from sale of surplus property; personnel costs or savings, such as severance pay, unemployment benefits; savings on real property for the function, etc.
- G. Compare estimates of net contract cost to in-house cost. Existing or optimum in-house cost (paragraph II, A or B) can be used for this comparison. However, if optimum cost (paragraph B) is used and becomes the basis to retain the service in-house, the necessary improvements must be promptly implemented.

IV. PHASE FOUR - MAKE FINAL DETERMINATION

- A. If the net cost of contracting is equal to or less than the in-house cost and the quality and reliability of services are at least equal, proceed with award of the contract.
- B. If the net cost of contracting is higher than the in-house cost or the quality and reliability of services are not at least equal, provide/continue to provide the service in-house. Cancel the solicitation and reject all bids/proposals received.

V. PHASE FIVE - REVIEW AND REEVALUATE

- A. Review contracts continuously to ensure the costs stay below those estimated for in-house provision. The original estimate for in-house costs should be adjusted for inflation to properly compare them with contract costs.
- B. Completely reevaluate services retained in-house every two years in conjunction with budget request preparation to determine that it is still the most cost effective means of provision.

Tips for Detecting Bid Rigging, Price Fixing, and other Types of Collusion

The following are some tips for consideration when suspicious actions are detected:

1. Some bids are much higher than published price lists, previous bids by the same firms, or engineering cost estimates. (This could indicate token or complementary bids.)
2. Fewer competitors than normal submit bids. (This could indicate a deliberate plan to withhold bids.)
3. The same contractor has been the low bidder and was awarded the contract on successive occasions over a period of time.
4. There is an inexplicably large dollar margin between the winning bid and all other bids.
5. There is an apparent pattern of low bids regularly recurring, such as corporation "X" always winning a bid in a certain geographical area for a particular service, or in a fixed rotation with other bidders.
6. A certain company appears to be bidding substantially higher on some bids than on other bids, with no logical cost differences to account for the difference.
7. A successful bidder repeatedly subcontracts work to companies that submitted higher bids on the same projects.
8. There are irregularities (e.g., identical calculation errors) in the physical appearance of the bids or proposals, or in the method of their submission (e.g., use of identical forms or stationery), suggesting that competitors had copies, discussed, or planned one another's bids or proposals. If the bids are obtained by mail, there are similarities of postmark or post metering machine marks.
9. Two or more competitors file a "joint bid," even though at least one of the competitors could have bid on their own.
10. A bidder appears in person to present his bid and also submits the bid or bond of a competitor.
11. Competitors regularly socialize or appear to hold meetings, or otherwise get together in the vicinity of procurement offices shortly before bid filing deadlines.
12. Competitors meet as a group with procurement personnel to discuss or review terms of bids or proposals. (This may facilitate subtle exchanges of pricing information.)
13. Competitors exchange any form of price information among themselves. (When this occurs among sellers in concentrated markets [markets with sellers], it is suspicious. Note that such exchanges may take quite subtle forms, such as public discussions of the "right" price.)
14. There is industry-wide resale price maintenance. (This could help manufacturers police collusion at the manufacturing level, since any reduction in the resale price, which is both easily observable and known to be controlled by the manufacturer, is readily detected by other manufacturers to account for the extra cost of the transportation expense.)
15. Competitors submit identical bids or frequently change prices at about the same time and to the same extent. (Regulations currently permit submission of identical bid data to the Antitrust Division.)
16. Bidders who ship their product short distances to the buyer charge the same price as those that ship long distances. (This may indicate price fixing, since otherwise the distant sellers would probably charge more for a given item to account for the extra cost of transportation.)

17. Local competitors are bidding higher prices for local delivery than for delivery to points farther away. (This may indicate rigged prices in the local market.
18. Bid prices appear to drop whenever a new or infrequent bidder submits a bid.
19. An employee (buyer, clerk, temporary hire), upon receipt and opening of bids/proposals reveals pricing information to various bidders/offerors via telephone or mail to give them a chance to submit or change their pricing prior to bid/proposal due date and time for receipt.

Waste and Abuse Warning Symptoms

The following are some "warning symptoms" for consideration when waste and abuse may be suspected.

1. Billing for work not performed (false invoices).
2. Delivered item was other than what was specified (substituted product, demonstration equipment).
3. Frequent dating of requisition and/or approval after receipt of merchandise.
4. Improper Charge e.g., a part number is listed on an invoice but is not verified to assure the correct part was installed on the correct item (Cadillac fuel pump installed on an employee's car but billed as installed on the agency's Chevrolet shuttle bus).
5. Order splitting to avoid bidding (\$17,000 house repair in under \$5,000 increments).
6. Repeated use of restricted specs therefore avoiding competition, not using "or equal." The winning contractor always is the same for the specified item.
7. High number of sole source and "emergencies" or single source purchases - possible "specification rigging."
8. High use of change orders - adding new items, significant change in scope of work, original bid much lower than other bidders (low balling).
9. Staggered invoices but same pick up date and signature on a copied delivery ticket.
10. Using contractor furnished usage figures when rebidding.
11. Minimum advertisement time - excessive use of mandatory prebid conferences - discourages and prevents competition.
12. Not properly advertising (use of small newspaper, few mailings, etc.).
13. Site visits required - site visitors being told of special conditions and no addenda issued.
14. Accepting nonresponsive bid from a preferred contractor.
15. Using biased individuals on evaluation panels.
16. Statement that bidder does not service that area or only ABC Co. sells in that area (possible collusion/price fixing).



CITY OF WINCHESTER, VIRGINIA

Rouss City Hall
15 North Cameron Street
Winchester, VA 22601

Telephone: 540-667-1815
FAX: 540-723-0238

TO: All Department Heads

FROM: Steven Corbit, Purchasing / Risk Manager

SUBJECT: How to Dispose of City Surplus?

DATE: November 7, 2008

Below is a step-approach to proper disposal of City surplus. Throughout the process the department or agency must hold onto the surplus item(s) and after disposal, please forward a record of the transaction to Purchasing.

Step One - Disrepair/Obsolete:

Your first question is whether the equipment works? If item(s) are in disrepair or obsolete, then I recommend disposal by e-cycle, landfill or salvage. Please send Purchasing a record or list of each item including the make/model/serial number/description and why this is the best choice and/or what is wrong with the item(s).

Step Two - Other Department or Agency:

If the surplus is not in disrepair or obsolete, then ask other departments or other agencies if they have a need to utilize the surplus. With digital pictures, the Purchasing Agent can post your surplus items on the City's internal web site and request interested departments or agencies to call you and arrange an inspection and pick up. No need to do any paperwork, except for titled items and fixed assets. NOTE: City departments and agencies may negotiate a fair market value sale of City surplus property to other Commonwealth of Virginia public bodies.

Step Three - Non-Profit Donation:

If the surplus is not in disrepair or obsolete and no other public body wants the item(s), then ask a local non-profit whether they can use the surplus (attached is the form 'Surplus Property Donation Record Form' to be completed and returned). The non-profit organization must be 501 (C)(3) tax-exempt status.

Step Four - Online Surplus:

If the surplus works and no non-profit, department or agency can benefit, then the department or agency must complete and return the attached Surplus Property Log-in Form with digital pictures. The item(s) will be included in the next online auction. When the bid period expires, the successful bidder pays for the item(s) within 5 days and they must pick up the item(s) within 10 days after the close of the auction. The bidder will make arrangements with the department or agency to pick up their item(s) and they must show the receipt prior to the department or agency releasing the item(s).

In conclusion, the above options are the primary methods of disposing of surplus although **the Purchasing Agent may use** the following alternatives to dispose of property when found to be in the best interest of the City: negotiated sale, sale by competitive bid/quote, live auction, contracts, set price, disposal by landfill, and insurance claim-salvage. All surplus sale or salvage proceeds will be deposited by Finance into the respective fund.

Thank you!

CITY OF WINCHESTER SURPLUS FOR SALE



Public | Surplus®

Please complete the below information for each of your inventory items and return to Purchasing Agent for the next online auction:

City Department: _____

Address and Location of Surplus (for Buyer pick-up): _____

Inventory #: _____

Digital Pictures (email to Purchasing Agent): Yes No

Type of Item: _____

Quantity: _____

Brand: _____

Model / Description / Mileage: _____

Model or Serial #: _____

Year: _____

Features: _____

Surplus Condition (check one): Excellent Good Fair Poor

Department Head Signature: _____	Date: _____
----------------------------------	-------------



CITY OF WINCHESTER, VIRGINIA

Rouss City Hall
15 North Cameron Street
Winchester, VA 22601

Telephone: 540-667-1815
FAX: 540-723-0238

City of Winchester, Surplus Property Program Surplus Property Donation Record Form

Please complete the following to document your department's donation of these items for a public purpose as authorized by *Code of Virginia*, § 2.2-1124. Keep a copy for your records and send the original to:

Finance Department - Purchasing Agent
Rouss City Hall
15 North Cameron St.
Winchester, VA 22601

Department: _____
Contact Name: _____ Phone: _____
E-Mail: _____

Donation made for Public Purpose to:
(Donee): _____
Address: _____
Phone: _____ Contact: _____

Please list items donated. Use an additional sheet if needed.

Market Value (if applicable) _____ How determined _____

I certify that this organization is a Virginia Public body or a division thereof and eligible to receive donated surplus property as defined by Code.

Department Head _____
Print name _____ Date _____
Donee Representative _____ Date _____
Print name _____

Guidelines for Surplus Donations:

(1) Property valued at less than \$500: The City of Winchester may donate low value dollar items when the market value of the surplus materials, which shall be donated for a public purpose, is less than \$500; however, the total market value of all surplus materials so donated by any department, division, institution, or agency shall not exceed twenty-five percent(25) of the revenue generated by such department's, division's, institution's, or agency's sale of surplus materials in the fiscal year.

(2) Surplus Computers: Surplus computers and related equipment may be donated to public schools in the Commonwealth and Virginia charitable organizations granted 501(c)(3) status, and providing services to persons with disabilities, at-risk youths, or low-income families. Departments are responsible for determining eligibility for donations of those eligible organizations not participating in the federal surplus program. Surplus computers are not subject to market value limits, as stated in section (1)



CITY OF WINCHESTER

COMPLAINT TO CITY CONTRACTOR

Department or agency filing a complaint regarding a City contractor providing goods and/or services to the City of Winchester MUST complete the following information. The information provided serves as a formal complaint to the Contractor. The Purchasing Agent and will review with the Contractor and Department to determine further action(s).

Return one completed copy to contractor and one copy to:

City of Winchester
 Attn: Purchasing Agent
 1st floor City Hall
 15 North Cameron Street
 Winchester, VA 22601
 Phone: 540-667-1815
 Fax: 540-723-0238

CONTRACTOR BUSINESS NAME:	CONTACT PERSON:
CONTRACTOR MAILING ADDRESS:	PHONE NUMBER & EMAIL:
CONTRACT OR PURCHASE ORDER NUMBER:	YEARS SERVED AS A CITY CONTRACTOR?
DESCRIBE GOODS AND/OR SERVICES SUPPLIED TO THE CITY:	
DESCRIBE PREVIOUS ACTION TAKEN WITH CITY CONTRACTOR, IF ANY:	
Contractor Contact(check one): Dates: Contractor Response (circle one): <input type="checkbox"/> Department Contacted Contractor: _____ No Response <input type="checkbox"/> Personal Letter Sent: _____ Denied Responsibility <input type="checkbox"/> Contractor Contacted City: _____ Offered Unacceptable Solution <input type="checkbox"/> Purchasing Contacted Contractor: _____ Resolved (filed for record) <input type="checkbox"/> Other : _____ Other: _____	
DESCRIBE IN DETAIL THE CIRCUMSTANCES OF THE COMPLAINT (PLS GIVE DATES, NAMES, TIMES, ETC.)	
<input type="checkbox"/> Delivery: Required Deliver _____ compared to Actual Delivery _____ or Partial Delivery _____ <input type="checkbox"/> Price: Contract Price \$ _____ compared to Invoice Price \$ _____ <input type="checkbox"/> Quality/Specifications (be specific): _____ <input type="checkbox"/> Other (Explain): _____ _____ _____ _____ _____	

**City of Winchester – Purchasing Department
Procurement Exemption Request**

(Unlike Sole Source or Emergency Procurements, few procurements may be eligible for an Exemption to the Procurement Code, i.e. Attorneys, Insurance Pools. Review of these shall begin with completing the attached form and forwarding to the Purchasing Agent.)

- (1) Requesting Department: _____
- (2) Requestor's Name: _____ Phone #: _____
- (3) Date of Request: _____ FAX #: _____
- (4) Description of Procurement: _____
Applicable Commodity Code(if known): _____
- (5) Proposed Method of Procurement:
 Telephone Quotation Facsimile Solicitation
 Written Solicitation
 Other: _____
- (6) Is There a Recurring Demand for this Commodity? Yes No
- (7) Will Competition Be Sought In Procuring This Requirement? Yes No
- (8) If not seeking Competition, provide reason:
- (9) Justification for Request (Use attachments if necessary):

Finance Department Use Only

- (10) Exemption Request is hereby: Approved Denied
- (11) If denied, reason for denial:
- (12) Additional comments or requirements:
- (13) Signature of Purchasing Agent: _____ Date: _____