

# **FAIRFAX COUNTY ECONOMIC DEVELOPMENT AUTHORITY PROCUREMENT GUIDELINE**

The Fairfax County Economic Development Authority (“FCEDA”) is an independent political subdivision of the Commonwealth of Virginia, as created by the General Assembly’s enactment of Chapter 643 of the Acts of Assembly of 1964, as amended. The FCEDA operates under the direction and supervision of the FCEDA Commissioners. The purchasing function and contract administration of FCEDA procurement are regulated by common law, federal and state statutes, and local resolutions. The operation of FCEDA procurement is conducted primarily under the Virginia Public Procurement Act and according to provisions contained in this Guideline.

The purpose of this Guideline is to set forth a general outline of the purchasing procedures that pertain to the FCEDA’s procurement of goods and services. Members of the public are advised to additionally review the Virginia Public Procurement Act contained in Section 2.2-4300, et. seq. of the Virginia Code for more detailed information.

## **ARTICLE I**

### **GENERAL PROVISIONS**

#### **Section 1. Purpose**

Pursuant to the Virginia Public Procurement Act, (hereinafter the “VPPA”), all FCEDA contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, construction, or construction management shall be awarded after competitive sealed bidding or competitive negotiation, except as provided for in this Guideline or by law.

The purpose of the Virginia Public Procurement Act (“VPPA”) is to enunciate the public policies pertaining to governmental procurement from nongovernmental sources, to include governmental procurement which may or may not result in monetary consideration for either party. The Procurement Act applies whether the consideration is monetary or nonmonetary and regardless of whether the public body, the contractor, or some third party is providing the consideration.

#### **Section 2. Definitions**

- A. Best Value: as predetermined in the solicitation, means the overall combination of quality, price and various elements of required services that in total are optimal relative to a public body’s needs.

- B. **Competitive Sealed Bidding:** a formal method of procurement where the FCEDA selects the lowest responsive and responsible bidder. It includes the issuance of an Invitation to Bid, public notice, a public bid opening and evaluation based on the requirements set forth in the invitation. Upon implementation of methods prescribed by the FCEDA Director of Purchasing for conducting transactions electronically, an Invitation to Bid may be issued directly to vendors electronically, or bids in response thereto may be submitted electronically if specifically authorized in the Invitation to Bid.
- C. **Competitive Negotiation:** a formal method of procurement where the FCEDA selects the top rated offeror. It includes the issuance of a Request for Proposal, public notice, evaluation based on criteria set forth in the Request for Proposal and negotiation with the top rated offerors. Upon implementation of methods prescribed by the FCEDA Director of Purchasing for conducting transactions electronically, a Request for Proposal may be issued directly to vendors electronically, or proposals in response thereto may be submitted electronically if specifically authorized in the Request for Proposal.
- D. **Construction:** the building, altering, repairing, improving or demolishing any structure, building, road, drainage, or sanitary facility, and any draining, dredging, excavation, grading or similar work upon real property.
- E. **Emergency:** an emergency shall be deemed to exist when a breakdown in machinery and/or a threatened termination of essential services or a dangerous condition develops, or when any unforeseen circumstances arise causing curtailment or diminution of essential service.
- F. **Faith-Based Organizations** shall mean a religious organization that is or applies to be a contractor to provide goods or services for programs funded by the block grant provided pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193.
- G. **Firm:** any individual, partnership, corporation, association or other legal entity permitted by law to practice in the Commonwealth of Virginia; or any other individual, firm, partnership, corporation, association or other legal entity qualified to perform professional services.
- H. **Goods:** all material, equipment, supplies, printing and automated data processing hardware and software.
- I. **Immediate Family:** a spouse, child, parent, brother, sister, and any other person living in the same household as the employee.
- J. **Ineligibility:** an action taken to suspend or debar an individual or firm from consideration for award of contracts. The suspension shall not be for a period exceeding three (3) months and the debarment shall not be for a period exceeding three (3) years.

- K. Informality: a minor defect or variation of a bid or proposal from the exact requirements of the Invitation to Bid or the Request for Proposal, which does not affect the price, quality, quantity or delivery schedule for the goods, services or construction being procured.
- L. Nonprofessional services: any services not specifically defined as a professional or consultant service within the meaning of paragraph P.
- M. Official Responsibility: administrative or operating authority, whether intermediate or final, to initiate, approve, disapprove or otherwise affect a procurement transaction or any claim resulting there from.
- N. Pecuniary Interest Arising from Procurement: a personal interest in a contract, as defined by the State and Local Government Conflict of Interests Act.
- O. Potential Bidder or Offeror: a person who, at the time the FCEDA negotiates and awards or proposes to award a contract, is engaged in the sale or lease of goods, or the sale of services, insurance or construction, of the type to be procured under such contract, and who at such time is eligible and qualified to submit a bid or proposal had the contract been procured through competitive sealed bidding or competitive negotiation.
- P. Procurement transaction: all functions that pertain to the obtaining of any goods, services or construction, including descriptions of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.
- Q. Professional services: any type of professional service performed by an independent contractor in the following areas: accounting, actuarial services, architecture, dentistry, land surveying, landscape architecture, law, medicine, optometry, pharmacy or professional engineering, which service shall be procured as set forth in Section 2.2-4301 of the Code of Virginia in the definition of competitive negotiation, and in conformance with this Guideline.
- R. Professional and consultant services: any type of professional service, not enumerated above, or any other type of similar contractual service (including consultants), required by the FCEDA but not furnished by its own employees, which is in its nature so unique that it should be obtained by negotiation on the basis of demonstrated competence and qualification for the type of service required and at a fair and reasonable compensation, not by competitive sealed bidding. Consultant services include, but are not be limited to, advertising services and public relations services.
- S. 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 Guideline.

- T. Public Contract: an agreement between a public body and a nongovernmental source.
- U. Public or County Employee: any person employed by the County of Fairfax, including elected officials or appointed members of governing bodies.
- V. Qualifying Project: any “qualifying project” as defined under the Public-Private Education Facilities and Infrastructure Act of 2002 (PPEA). The PPEA provides public entities with an option for either approving an unsolicited proposal from a private entity or soliciting request for proposals or invitation for bids from private entities. Such projects would be exempt from the Virginia Public Procurement Act. Prior to initiating the provisions of the PPEA, the EDA must develop procedures that are consistent with the principles of the PPEA and be adopted by the FCEDA Commission.
- W. Responsible bidder or offeror: a person, firm, corporation, partnership, company or other organization 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.
- X. Responsive bidder or offeror: a person, firm, corporation, partnership, company or other organization who has submitted a bid or proposal which conforms in all material respects to the Invitation to Bid or Request for Proposal.
- Y. Services: any work performed by an independent contractor where the service rendered does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials and supplies.
- Z. Sheltered workshop: a work-oriented rehabilitation 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.

## ARTICLE II

### PURCHASING POLICIES

#### Section 1. General

- A. Unless otherwise authorized by law, all FCEDA contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance or construction, or construction management shall be awarded after competitive sealed bidding or competitive negotiation, except as otherwise provided for in this Guideline or law.
- B. Professional services: The eleven areas of professional services as defined by the VPPA, and in Article I, Section 2 Q, shall be procured by competitive negotiation in accordance with Section 2.2-4301 of the Code of Virginia, except as otherwise provided in this Guideline. As part of this competitive negotiation process, the FCEDA President will appoint a Selection Advisory Committee to review and evaluate proposals submitted by prospective offerors. The open market method of procurement may be used for the procurement of single or term contracts for professional services as long as the aggregate or sum of all phases is not expected to exceed the sum of \$30,000.
- C. Other professional and consultant services: As provided for in this Guideline, the FCEDA may procure other professional and consultant services, such as advertising services and public relations services, through competitive negotiation. For services other than the eleven professional services specifically defined in the VPPA, cost may be requested in the Request for Proposal and considered as a factor in the process.
- D. Upon an advance, written determination that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, then goods, services or insurance may be procured by competitive negotiation. A written record documenting this determination will be included in the appropriate contract file.
- E. Construction: construction may be procured by competitive negotiation for: (a) the construction, alteration, repair, renovation or demolition of buildings when the contract is not expected to cost more than \$1,000,000; (b) the construction of highways and any draining, dredging, excavation, grading or similar work upon real property.
- F. Paper and paper products: these goods shall be procured through the Fairfax County Purchasing Supply and Management Agency using the Fairfax County Procurement policies.
- G. Cooperative Procurement: The FCEDA may participate in, sponsor, conduct, or administer a cooperative procurement agreement on behalf of or in conjunction with one or more other public bodies, or public agencies or institutions or localities of the several states, of the United States or its territories, or the District of Columbia, or the U.S. General Services Administration for the purpose of combining the requirements to

increase efficiency or reduce administrative expenses in any acquisition of goods and services. Except for contracts for professional services, the FCEDA may purchase from another public body's contract even if it did not participate in the request for proposal or invitation to bid, if the request for proposal or invitation to bid specified that the procurement was being conducted on behalf of other public bodies. Nothing herein shall prohibit the assessment or payment by direct or indirect means of any administrative fee that will allow for participation in any such arrangement.

- H. Best value concepts may be considered when procuring goods and nonprofessional services, but not for construction or professional services. The criteria, factors, and basis for consideration of best value and the process for the consideration of best value shall be as stated in the procurement solicitation.
- I. Certification of sufficient funds: no order for delivery on a contract or open market transaction for supplies, materials, equipment, professional or consultant services or contractual services for the FCEDA shall be awarded until the FCEDA President has certified that the balance in the County appropriation is sufficient to defray the cost of the order.
- J. The FCEDA may enter into contracts with faith-based organizations on the same basis as any other nongovernmental source subject to the requirements of the Virginia Public Procurement Act, 2.2-4343.1.

## ARTICLE III

### CONTRACT FORMATION AND ADMINISTRATION

#### Section 1. Methods of Procurement

A. **Competitive Sealed Bidding:**

Competitive sealed bidding is a method of contractor selection in which the contract is awarded to the lowest responsive and responsible bidder.

Competitive sealed bidding includes the following:

1. **Issuance of Invitation to Bid.** The FCEDA will issue a written Invitation to Bid containing or incorporating by reference the specifications and contractual terms and conditions applicable to the procurement. Unless the FCEDA has provided for prequalification of bidders, the Invitation to Bid shall include a statement of any required qualifications of potential contractors. When it is impractical to initially prepare a purchase description to support an award based on prices, an Invitation to Bid may be issued requesting the submission of unpriced offers, to be followed by an Invitation to Bid limited to those bidders whose offers have been qualified under the criteria set forth in the first solicitation.
2. **Notice.** The FCEDA shall give public notice of the Invitation to Bid at least ten days prior to the date set for receipt of bids by posting in a designated public area, or publication in a newspaper of general circulation, or both. Public notice may also be published on the FCEDA web site and other appropriate web sites. In addition, bids may be solicited directly from potential contractors.
3. **Receipt of Bids.** Sealed bids are due at the FCEDA on or before the date and time specified in the Notice. The sealed bid envelope will be marked with the time and date of receipt upon arrival at the FCEDA. Bids received at the FCEDA after the date and time specified in the notice shall not be considered for contract award.
4. **Public Opening and Announcement of Bids.** The FCEDA will publicly open all bids received. The exact time and location of the public opening will be specified in the Invitation to Bid.
5. **Evaluation of bids.** The FCEDA will evaluate the bids based upon the requirements set forth in the invitation, which may include special qualifications of potential contractors, lifecycle costing, value analysis, and any other criteria such as inspection, testing, quality, workmanship, delivery and suitability for a particular purpose, which are helpful in determining acceptability. At the same time that the FCEDA evaluates the bids, it will also determine whether the apparent low bidder is *responsible*. If the FCEDA determines that the low bidder is responsible, it may proceed with an award to that bidder. In

determining the responsibility of a bidder, the following criteria should be considered:

- a. The ability, capability and skill of the bidder to perform the contract or provide the services 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, reliability, reputation, judgment, experience and efficiency of the bidder;
  - d. The quality of performance on previous contracts with the FCEDA or services;
  - e. The previous and existing compliance by the bidder with laws and ordinances relating to the contract or service;
  - 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 the conditions attached to the bid;
  - j. Whether the bidder is in arrears to the FCEDA or Fairfax County on a debt or contract or is in default on a surety to the FCEDA or Fairfax County;
  - k. Such other information as may be secured by the FCEDA President having a bearing on the decision to award the contract. If an apparent low bidder is not awarded a contract for reasons of nonresponsibility, the FCEDA Contract Manager will so notify the bidder and shall record the reasons in the contract file.
6. Contract Award. Award of contract to the *lowest responsive*<sup>1</sup> and *responsible*<sup>2</sup> bidder(s). The FCEDA may make multiple awards to fulfill its needs when so specified in the Invitation to Bid. Upon award of a contract, the FCEDA

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<sup>1</sup> "Responsive bidder" means a person who has submitted a bid which conforms in all material respects to the Invitation to Bid.

<sup>2</sup> "Responsible bidder" means 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.

President shall execute the Acceptance Agreement to indicate approval on behalf of the FCEDA, and acceptance of the terms and conditions of the bid. The successful bidder will be notified of the bid award by receipt of the signed Acceptance Agreement indicating that he or she has been awarded the contract. Acceptance will result in a binding contract based upon the terms contained in the bid. The parties may also execute a contract prepared by the FCEDA's legal counsel.

7. Negotiation. Unless canceled or rejected, a responsive bid from the lowest responsible bidder shall be accepted as submitted, except that if the bid from the lowest responsible bidder exceeds available funds, the FCEDA may negotiate with the apparent low bidder to obtain a contract price within available funds. However, such negotiations may be undertaken only under conditions and procedures described in writing, approved by the FCEDA President and summarized in the Invitation to Bid prior to issuance of the Invitation to Bid.
8. Competitive sealed bidding shall not be required for the acquisition of professional and consultant services. Competitive negotiation will be used.

B. **Competitive Negotiation:**

Competitive negotiation is a method of contractor selection used for service contracts, with the goal of looking at the best combination of quality and price.

Competitive negotiation includes the following:

1. Request for Proposal. The FCEDA will issue a Request for Proposal (hereinafter "RFP"), indicating in general terms that which is sought to be procured, specifying the factors that will be used in evaluating the proposal and containing or incorporating by reference the other applicable contractual terms and conditions, including any unique capabilities or qualifications that will be required of the contractor.
2. Notice. The FCEDA must give public notice of the RFP at least ten days prior to the date set for receipt of proposals by posting in a public area normally used for posting of public notices; and publication in a newspaper of general circulation in the area in which the contract is to be performed so as to provide reasonable notice to the maximum number of offerors. Public notice may also be published on the FCEDA web site and other appropriate web sites. In addition, proposals may be solicited directly from potential contractors.
3. Receipt of Proposals. Proposals are due at the FCEDA on or before the date and time specified in the notice. Proposals will be date-stamped with the time and date of receipt upon receipt at the FCEDA. Proposals received at the FCEDA after the date and time specified in the notice shall not be considered for contract award. The names of the offerors and the amounts of their offers/proposals are

*not* announced at the time of receipt or opening as bids are in the competitive sealed bidding process.

4. Selection Advisory Committee. When selecting a firm for professional services where the compensation for such services is estimated to exceed \$30,000, and for selection of a firm for other professional services or consulting services when the compensation for such services is estimated to exceed \$50,000, the FCEDA President will designate a Selection Advisory Committee (hereinafter “SAC”) to review and evaluate of the proposals submitted in response to the RFP.
5. Procurement of Professional Services. Professional services shall include those eleven professional services specifically defined by the VPPA. The FCEDA may also utilize this method of procurement for the procurement of its international representatives.
  - a. The SAC will evaluate the proposals on the basis of the statement of qualifications, and other information provided in the proposal; the ability of the firm’s professional personnel; past performance; ability to meet time and budget requirements; location; references; recent, current and projected workloads of the firms; as well as paragraph 23 of the General Conditions and Instructions to bidders.
  - b. Based upon the results of the preliminary evaluation, the SAC will then select two or more offerors deemed fully qualified, responsible, with emphasis on professional competence. The SAC will then engage in informal, individual discussions with the offerors selected. At this discussion stage, the SAC may discuss non-binding estimates of total project costs, and where appropriate, non-binding estimates for price for services. However, the RFP shall not request that offerors furnish estimates of man-hours or costs for services. Proprietary information from competing offerors shall not be disclosed to the public or to competitors.
  - c. At the conclusion of these discussions, on the basis of the evaluation factors published in the RFP and all information obtained in the selection process to this point, the SAC will then select in the order of preference two or more offerors deemed to be the most highly qualified. If it is determined that negotiations are necessary, then the SAC will begin negotiations with each of the offerors so selected. The SAC shall select the offeror which in its opinion has made the best proposal and shall award the contract to that offeror. If a contract satisfactory and advantageous to the FCEDA can be negotiated at a price considered fair and reasonable, award shall be made to that offeror. Final approval of the award of the contract(s) shall be made by the FCEDA President/CEO.

- d. If the FCEDA President determines 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.

6. Procurement of other professional services and consultant services.

- a. The SAC will evaluate the technical proposals on the basis of the statement of qualifications, and other information provided in the proposal; the ability of the firm's professional personnel; past performance; ability to meet time requirements; location; references; recent, current and projected workloads of the firms; as well as paragraph 23 of the General Conditions and Instructions to bidders. The SAC will then rate the offeror(s) in order of preference. Based upon this review, the business proposals of the highest rated offeror(s) will be reviewed. Price shall be considered, but need not be the sole determining factor.
- b. Based upon the results of the evaluation and rating, the SAC will then select two or more offerors deemed fully qualified and responsible. The SAC will then engage in individual discussions with the offerors selected.
- c. If at the conclusion of these discussions it is determined that negotiations as to price are not necessary, then based on the evaluation factors published in the RFP and all information obtained in the selection process to this point, the SAC will select the offeror, which in its opinion, has made the best proposal and recommend award to such offeror.
- d. If at the conclusion of these discussions it is determined that negotiations as to price are necessary, then based on the evaluation factors published in the RFP and all information obtained in the selection process to this point, the SAC will then select in order of preference two or more offerors deemed to be the most highly qualified. If it is determined that negotiations are necessary, then the SAC will begin negotiations with each of the offerors so selected. The SAC shall select the offeror which in its opinion has made the best proposal and shall award the contract to that offeror. If a contract satisfactory and advantageous to the FCEDA can be negotiated at a price considered fair and reasonable, award shall be made to that offeror. Final approval of the award of the contract(s) shall be made by the FCEDA President/CEO.
- e. If the FCEDA President determines 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.

7. **Contract Award.** Upon award of a contract, the FCEDA President shall execute the Acceptance Agreement/Coversheet to indicate approval on behalf of the FCEDA, and acceptance of the terms and conditions of the RFP and proposal. The successful offeror will be notified of the contract award by receipt of the signed Acceptance Agreement/Coversheet indicating that he or she has been awarded the contract. Acceptance will result in a binding contract based upon the terms contained in the RFP. The parties may also execute Memorandum of Negotiation and/or a contract prepared by the FCEDA's legal counsel. The FCEDA may make multiple awards to fulfill its needs when so specified in the Request for Proposal.

C. **Sole Source:**

Upon a written determination by the FCEDA that there is only one source practicably available to supply that which is to be procured, a contract may be negotiated and awarded to that source without competitive sealed bidding or competitive negotiation. This method of contracting may be used when dealing with a unique good or service. A written records documenting the basis for this determination shall be included in the appropriate contract file. In addition, a notice shall be posted in a designated public area or published in a newspaper of general circulation on the day the FCEDA awards or announces its decision to award the contract, whichever occurs first. Public notice may also be posted on the FCEDA web site and other appropriate web sites.

D. **Emergency Situation:**

In case of an emergency, a contract may be awarded without competitive sealed bidding or competitive negotiation; however, such procurement must 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 appropriate contract file. In addition, a notice shall be posted in a designated public area or published in a newspaper of general circulation on the day the FCEDA awards or announces its decision to award the contract, whichever occurs first, or as soon thereafter as is practicable. Public notice may also be posted on the FCEDA web site and other appropriate web sites.

E. **Open Market Transactions:**

Any FCEDA contract for the purchase or lease of goods, nonprofessional services, or for the purchase of insurance, construction or construction management, where the aggregate or sum of all phases is not expected to exceed \$50,000, shall be deemed an open market transaction and shall not be subject to the rules requiring competitive sealed bidding or competitive negotiation. However, such purchases shall provide for competition wherever practicable. The FCEDA will issue a Request for Quotes to interested bidders or offerors. Purchases that are expected to exceed \$30,000 shall require the written informal solicitation of at least four bidders or offerors, and purchases that are estimated between \$5,000 - \$30,000, require the written informal solicitation of at least three bidders or offerors.

Selection may be made without public announcement; however, the FCEDA whenever possible, may utilize available lists and other known sources. Bids will be analyzed

by ranking and selection of the bidder that has submitted the most favorable bid. A Selection Advisory Committee is not used. The FCEDA's goal is to obtain the best combination of price and quality. *See also* The Public Procurement Guideline, Article III, Section 3 for other procedures to be observed with open market transactions.

The open market method of procurement may also be used for the procurement of single or term contracts for professional services as long as the aggregate or sum of all phases is not expected to exceed \$30,000. Selection may be accomplished without public announcement; however, the FCEDA, whenever possible, may utilize available lists and other known sources to solicit at least four potential offerors.

F. **Small Purchase Transaction:**

Any purchase or lease of goods, nonprofessional services, or for the purchase of insurance, construction or construction management, when the estimated cost thereof shall not exceed \$5,000, shall be deemed a small purchase transaction and shall *not* be subject to the rules governing open market transactions, competitive sealed bidding or competitive negotiation. However, the FCEDA, may, wherever possible, attempt to place small purchases with vendors having an existing contract with the FCEDA.

G. **Public Auction:**

Upon a determination made in advance by the FCEDA and set forth in writing that the purchase of goods, products or commodities from a public auction sale is in the best interest of the public, such items may be purchased at the auction. The writing shall document the basis for this determination. The FCEDA may purchase items at online public auctions unless it is making bulk purchases of commodities used in road and highway construction and maintenance.

H. **Public-Private Education Facilities and Infrastructure Act**

The Act provides the FCEDA, once procedures have been adopted and approved by the Commission, with an option for either accepting an unsolicited proposal or soliciting RFPs or IFBs to acquire "qualifying projects" such as buildings, schools, etc. Such projects would be exempt from the Procurement Act.

As required by the PPEA, the Governor and the chairs of the General Laws Committee of the Senate and House of Delegates must develop model procedures to assist in the implementation of this act. Once the procedures are developed, the EDA will develop procedures that are consistent with the procedures and the principles of PPEA and obtain Commission approval.

## **Section 2. Exceptions to Requirement for Competitive Procurement**

- A. The FCEDA may enter into contracts, without competition, for goods or services which are performed by persons or in schools or workshops, under the supervision of the Virginia Department for the Visually Handicapped; or which are performed or produced by nonprofit sheltered workshops or other nonprofit organizations which offer transitional or supported employment services serving the handicapped.
- B. The FCEDA may enter into contracts without competition for: legal services or expert witnesses and other services associated with litigation or regulatory proceedings.
- C. The FCEDA may enter into contracts without competitive sealed bidding or competitive negotiation for insurance or electric utility services if purchased through an association of which it is a member if the association was formed and is maintained for the purpose of promoting the interest and welfare of and developing close relationships with similar public bodies, provided that such association has procured the insurance or utility services by use of competitive principles, and provided that the FCEDA has made an advance written determination, after reasonable notice to the public, that competitive sealed bidding and competitive negotiation are not fiscally advantageous to the public.

## **Section 3. Contract Administration and General Purchasing Provisions**

- A. Competitive Solicitation:
  - 1. The FCEDA Contracts Manager may solicit bids from all responsible prospective vendors who are registered on Fairfax County vendor lists and/or who have registered on the Commonwealth of Virginia's "eVA" central vendor registration system for all solicitations using competitive sealed bidding or competitive negotiation. These vendor lists may also be used for open market solicitations. Other potential vendors may be solicited at the discretion of the FCEDA Contract Manager.
  - 2. The FCEDA shall encourage open and competitive bidding by all possible means and shall endeavor to obtain the maximum degree of open competition on all purchase transactions using the competitive sealed bidding, competitive negotiation or open market transaction methods of procurement. In submitting a bid, each bidder shall, by virtue of submitting a bid, guarantee that the bidder has not been party with other bidders to an agreement to bid a fixed or uniform price. Violation of this implied guarantee shall render void the bid of such bidders. Any disclosure to or acquisition by a competitive bidder, in advance of the opening of the bids, of the terms and conditions of the bid submitted by another competitor shall render the entire proceedings void and shall require readvertising for bids.
  - 3. All formal bids and proposals shall contain the following provisions:

- a. Each bidder or offeror shall certify, upon signing a bid or proposal, that to the best of his or her knowledge, no FCEDA official or employee having official responsibility for the procurement transaction, or a member of his or her immediate family, has received or will receive any financial benefit or more than nominal or minimal value relating to the award of this contract. If such a benefit has been received or will be received, this fact shall be disclosed with the bid or proposal or as soon thereafter as it appears that such a benefit will be received. Failure to disclose the information prescribed above may result in suspension or debarment, or rescission of the contract made, or could affect payment pursuant to the terms of the contract.
- b. Whenever there is reason to believe that a financial benefit of the sort described in paragraph (a) has been or will be received in connection with a bid, proposal or contract, and that the contractor has failed to disclose such benefit or has inadequately disclosed it, the FCEDA President, as a prerequisite to payment pursuant to the contract, or at any other time, may require the contractor to furnish, under oath, answers to any interrogatories related to such possible benefit.

B. 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 FCEDA, in its sole discretion, determines to be the equal of that specified, considering the quality, workmanship, economy of operation, and suitability for the purpose intended, shall be accepted.

C. Prequalification of Bidders, Offerors and Contractors:

1. Prospective contractors may be prequalified for particular types of supplies, services, insurance or construction, and consideration of bids or proposals may be limited to prequalified contractors. The FCEDA shall establish a written prequalification procedure sufficiently in advance of its implementation to allow potential contractors a fair opportunity to complete the process.
2. Any prequalification of prospective contractors for construction by the FCEDA shall be pursuant to a prequalification process outlined below:
  - a. The application form used for such process shall set forth the criteria upon which the qualifications of prospective contractors will be evaluated. The application form shall request of prospective contractors only such information as is appropriate for an objective evaluation of all prospective contractors pursuant to such criteria. Such form shall allow the prospective contractor seeking prequalification to request, by checking the appropriate box, that all information voluntarily submitted by the

contractor pursuant to this provision shall be considered a trade secret or proprietary information subject to the provisions of subsection D of §2.2-4342 of the VPPA, or Article III, Section 3 N of this Guideline.

- b. In all instances in which the FCEDA requires prequalification of potential contractors for construction projects, advance notice shall be given of the deadline for the submission of prequalification applications. The deadline for submission shall be sufficiently in advance of the date set for the submission of bids for such construction so as to allow the procedures set forth in this subsection to be accomplished.
- c. At least thirty (30) days prior to the date set for submission of bids or proposals under the procurement of the contract for which the prequalification applies, the FCEDA shall advise in writing each contractor which submitted an application whether that contractor has been prequalified. In the event that a contractor is denied prequalification, the written notification shall state the reasons for such denial of prequalification and the factual basis of such reasons.
- d. The FCEDA's decision denying prequalification shall be final and conclusive unless the contractor appeals the decision as provided in §2.2-4357 of the VPPA.
- e. The FCEDA may deny prequalification to any contractor only if the FCEDA finds one of the following:
  - i. The contractor does not have sufficient financial ability to perform the contract. If a bond is required to ensure the performance of a contract, evidence that the contractor can acquire a surety bond from a corporation included on the U.S. Treasury list of acceptable surety corporations in the amount and type required by the FCEDA shall be sufficient to establish the financial ability of such contractor to perform the contract.
  - ii. The contractor does not have appropriate experience to perform the construction project in question.
  - iii. The contractor, or any officer, director or owner thereof has had judgments entered against him within the past ten years for the breach of contractors for governmental or nongovernmental construction, including, but not limited to, design-build or construction management.
  - iv. The contractor has been in substantial noncompliance with the terms and conditions of prior construction contracts with the FCEDA without good cause. If the FCEDA has not contracted

with a contractor in any prior construction projects, the FCEDA may deny prequalification if the contractor has been in substantial noncompliance with the terms and conditions of comparable construction contracts with another public body without good cause. In all instances, the facts underlying the substantial noncompliance must be documented in writing in the prior construction file, and such information relating thereto given to the contractor at that time, with the opportunity to respond.

- v. The contractor or any officer, director, owner, project manager, procurement manager or chief financial officer has been convicted within the past ten years of a crime related to governmental or nongovernmental construction or contracting.
  - vi. The contractor or any officer, director or owner thereof is currently debarred pursuant to an established debarment procedure from bidding or contracting by any public body, agency of another state or agency of the federal government.
  - vii. The contractor failed to provide to the FCEDA in a timely manner any information requested by the FCEDA relevant to the above six subsections.
3. If a public body has a prequalification ordinance that provides for minority participation in municipal construction projects, that the public body may also deny prequalification based on minority participation criteria, provided, however, that nothing herein shall authorize the adoption or enforcement of minority participation criteria except to the extent that such criteria, and the adoption and enforcement thereof, are in accordance with the Constitution and laws of the United States and the Commonwealth.

D. Withdrawal of Bids Due to Error.

1. A bidder for a public construction project, other than a contract for construction or maintenance of public highways, may withdraw his or her 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. Furthermore, the mistake must be a clerical mistake as opposed to a judgment mistake, and actually due to an unintentional arithmetic error or unintentional omission of a quantity of work, labor or material made directly in the compilation of a bid, which can be shown by objective evidence drawn from the inspection of original work papers, documents and materials used in the preparation of the bid. If a bid contains both a clerical and a judgment mistake, a bidder may withdraw his bid from consideration if the unintentional clerical mistake caused the bid to be substantially lower than competing bids.

One of the following procedures for withdrawal of bids must be selected by the FCEDA and stated in the advertisement for bids:

- a. The bidder shall give notice in writing to the FCEDA of his or her claim or right to withdraw his or her bid within two business days after the conclusion of the bid opening procedure and shall submit original work papers with such notice; or
- b. The bidder shall submit to the FCEDA his or her original work papers, documents and materials used in the preparation of the bid within *one* day after the date fixed for submission of bids. The work papers shall be delivered by the bidder in person or by registered mail at or prior to the time fixed for the opening of bids.

In either instance, such work papers, documents and materials may be considered trade secrets or proprietary information subject to the conditions of subsection F of §2.2-4342 of the Virginia Code.

- c. The bids shall be opened one day following the time fixed by the FCEDA for the submission of bids. Thereafter, the bidder shall have two hours after the opening of bids within which to claim in writing any mistake as defined herein and withdraw his bid. The contract shall not be awarded by the FCEDA until the two-hour period has elapsed. Such mistake shall be proved only from the original work papers, documents and materials delivered as required herein.
2. A bidder for a contract other than for public construction may request withdraw of his or her bid under the following circumstances:
    - a. Requests for withdrawal of bids prior to opening of such bids shall be transmitted in writing to the FCEDA.
    - b. Requests for withdrawal of bids after opening of such bids but prior to award shall be transmitted in writing to the FCEDA, accompanied by full documentation to support the request. If the request is based on a claim of error, the documentation must show the basis for the error. Such documentation may take the form of supplier quotations, vendor work sheets, etc. If bid bonds were tendered with the bid, the FCEDA may exercise its right of collection.
  3. If a bid is withdrawn, the lowest remaining bid shall be deemed to be the low bid.
  4. No bid may be withdrawn when the result would be the awarding of any 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.

5. 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.
  6. If the FCEDA denies the withdrawal of a bid under this section, it shall notify the bidder in writing stating the reasons for its decision and award the contract to that bidder at the bid price, provided such bidder is a responsible and responsive bidder.
- E. Debarment from Contracting:  
Prospective contractors may be debarred from contracting for particular types of goods, services, insurance, or construction, for specified periods of time. The debarment procedures are set forth under Article IV, Section 1 of this Guideline.
- F. Bid or Proposal Specification:  
The FCEDA shall establish procedures whereby comments concerning specifications or other provisions in Invitations to Bid or Requests for Proposal can be received and considered prior to the time set for receipt of bids or proposals or award of the contract. This may take the form of a pre-bid conference or a pre-proposal conference.
- G. Contract Award Process:
1. The FCEDA has the authority to cancel an Invitation to Bid, Request for Proposal or any other solicitation, and to cancel or reject any and all bids or proposals, or parts of any or all bids or proposals, or bids or proposals for any one or more goods or services included in a solicitation when, in the FCEDA President's judgment, the public interest may be served thereby. The reasons for the cancellation or rejection shall be made part of the contract file. The FCEDA may also waive informalities in bids or proposals.
  2. If all bids are for the same total amount or unit price (including authorized discounts and delivery times), the FCEDA President is authorized to award the contract to the resident Fairfax County tie bidder whose firm has its principal place of business in the County, or if there be none, to the resident Virginia tie bidder, or if there be none, to one of the bidders by drawing lots in public. In the case of a tie bid in instances where goods are being offered, and existing price preferences have already been taken into account, the FCEDA shall give preference to the bidder whose goods contain the greatest amount of recycled content. These preferences may only be applied in response to a written Invitation to Bid.
  3. All contracts shall be approved as to form by the FCEDA President and the FCEDA legal counsel.

H. Retainage on Construction Contracts:

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.

I. Bid Bonds. Except in cases of emergency, all bids or proposals for construction contracts in excess of \$100,000 shall be accompanied by a bid bond from a surety company selected by the bidder that is legally authorized to do business in Virginia, as a guarantee that if the contract is awarded to such bidder, that bidder will enter into the contract for the work mentioned in the bid or proposal. The amount of the bid bond shall not exceed five percent of the amount of the bid.

No forfeiture under a bid bond will 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.

Nothing in this section shall preclude the FCEDA from requiring bid bonds to accompany bids or proposals for construction contracts anticipated to be less than \$100,000.

J. Performance and Payment Bonds. Upon award of any public construction contract exceeding \$100,000 awarded to any prime contractor, such contractor shall furnish to the FCEDA a performance bond in the amount of the contract, and a payment bond in the amount of the contract. 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. See § 2.2-4340 and § 2.2-4341 for additional information on actions on performance and payment bonds.

Nothing in this section shall preclude the FCEDA from requiring payment or performance bonds for construction contracts anticipated to be less than \$100,000.

K. Modification of Contracts:

An FCEDA contract may include provisions for modification of the contract during performance, but no fixed-price contract may be increased by more than 25% of the amount of the contract or \$50,000, whichever is greater, without the advance written approval of the FCEDA President. A contract may not, 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. The FCEDA 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.

L. Non Discrimination:

In the solicitation or awarding of contracts, the FCEDA shall not discriminate because of race, religion, color, sex, national origin, age, disability or any other basis prohibited by

state law relating to discrimination in employment in the performance of its procurement activity.

Every FCEDA contract over \$10,000 shall contain the following provisions:

1. During the performance of the contract, the contractor agrees that it 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, accessible to employees and applicants for employment, notices setting forth the provisions of this non-discrimination clause.
2. The Contractor, in all solicitations or advertisements for employees placed by or on behalf of the contract, will state that such Contractor is an equal opportunity employer.
3. 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.
4. The Contractor will include the provisions of the foregoing paragraphs 1, 2, and 3 above in every subcontract or purchase order of over \$10,000 so that the provisions will be binding upon each subcontractor or vendor.

M. Drug-Free Workplace:

The FCEDA shall include in all contracts over \$10,000, the following provisions:

1. 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 over \$10,000, so that the provisions will be binding upon each subcontractor or vendor. For purposes of this section, a "drug-free workplace" means a site for the performance of work done in connection with a specific contract awarded to a contractor in accordance with the Public Procurement Act, 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.

N. Disclosure of Information to the Public:

1. Except as provided herein, all proceedings, records, contracts and other public records relating to procurement transactions shall be open to public inspection in accordance with the Virginia Freedom of Information Act, §2.2-3700, et seq.
2. All bids received under the competitive sealed bidding method of procurement shall be available for public inspection in the offices of the FCEDA during regular business hours for a period of not less than thirty (30) calendar days after the opening of bids. Proposals received under the competitive negotiation method of procurement shall be available for a period of not less than thirty (30) days after a contract award.
3. With respect to the competitive negotiation method of procurement, Selection Advisory Committee minutes shall be maintained for at least three years and are available for review upon request. Nothing contained in this section shall be construed to require the FCEDA, when procuring by competitive negotiation, to furnish a statement of the reasons why a particular proposal was not deemed to be the most advantageous to the FCEDA.
4. Cost estimates relating to a proposed procurement transaction prepared by or for a public body shall not be open to public inspection.
5. Trade secrets or proprietary information submitted by a bidder or offeror or contractor in connection with a procurement transaction or prequalification application shall not be subject to public disclosure under the Virginia Freedom of Information Act; however, the bidder, offeror or contractor must invoke these protections prior to or upon submission of the data or other materials, and must identify why the data or other materials to be protected and state the reasons why the protection is necessary.
6. Any inspection of procurement transaction records under this section shall be subject to reasonable restrictions to ensure the security and integrity of the records.

O. Audit by FCEDA:

All contracts and amendments entered into by negotiation shall include a provision permitting the FCEDA or its agents to have access to and the right to examine any books, documents, papers and records of the contractor involving transactions related to the contract or compliance with any clauses thereunder, for a period of three (3) years after final payment. The contractor shall include these same provisions in all related subcontracts.

## ARTICLE IV

### BIDDER, OFFEROR AND CONTRACTOR REMEDIES

#### Section 1. Ineligibility/Disqualification/Debarment:

- A. Any bidder, offeror or contractor debarred or refused permission to participate or disqualified from participating in public contracts must be notified in writing. Prior to the issuance of a written determination of disqualification or ineligibility, the FCEDA shall (i) notify the bidder in writing of the results of the evaluation, (ii) disclose the factual support for the determination, and (iii) allow the bidder an opportunity to inspect any documents which relate to the determination, if so requested by the bidder within five business days after receipt of the notice.
- B. Within ten business days after receipt of the notice, the bidder may submit rebuttal information challenging the evaluation. The FCEDA shall issue its written determination of disqualification or ineligibility based on all information in the possession of the public body, including any rebuttal information within five business days of the date the FCEDA received such rebuttal information.
- C. If the evaluation reveals that the bidder, offeror or contractor should be allowed to participate in the public contract, the FCEDA shall cancel the proposed disqualification action. If the evaluation reveals that the bidder should be refused permission to participate, or disqualified from participation, in the public contract, the FCEDA shall so notify the bidder or offeror or contractor. Such notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within ten days after receipt of the notice by instituting legal action in accordance with the Code of Virginia.
- D. The FCEDA shall have the authority to suspend or disbar a person or firm from bidding on any contract for the reasons stated below:
  - 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 or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibilities as a FCEDA contractor;
  - 3. Conviction under the state or federal antitrust statutes arising out of the submission of bids or proposals;
  - 4. Violation of contract provisions, as set forth below, of a character which is regarded by the FCEDA to be so serious as to justify suspension or disbarment:

- a. Failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or
  - b. A recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts, provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for suspension or disbarment;
- 5. Any other cause the FCEDA determines to be so serious and compelling as to affect responsibility as a contractor, such as debarment by another governmental entity for any cause listed herein, or because of prior reprimands;
  - 6. The contractor has abandoned performance or been terminated for default on any other FCEDA project;
  - 7. The contractor is in default on any surety bond or written guarantee on which FCEDA or Fairfax County is an obligee.
- E. If, on 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.

**Section 2. Appeal of Denial of Withdrawal of Bid:**

- A. A decision denying withdrawal of a bid under Article III, Section 3, Subsection F, above shall be final and conclusive unless the bidder appeals the decision within ten days after receipt of the decision by instituting legal action in accordance with the Code of Virginia.
- B. If no bid bond was posted, a bidder refused withdrawal of a bid under Article III, Section 3, Subsection F, above, prior to appealing, shall deliver to the FCEDA a certified check or cash bond in the amount of the difference between the bid sought to be withdrawn and the next low bid. This security will be released only upon a final determination that the bidder was entitled to withdraw the bid.
- C. If, upon appeal, it is determined that the decision refusing withdrawal of the bid was not an honest exercise of discretion, but rather was arbitrary or capricious, or was not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid, the sole relief shall be withdrawal of the bid.

### **Section 3. Determination of Nonresponsibility**

- A. Following public opening and announcement of bids received on an Invitation to Bid, the FCEDA will evaluate the bids in accordance with the provisions set forth in Article III, Section 1, above. At the same time, the FCEDA will determine whether the apparent low bidder is responsible. If the FCEDA determines that the apparent low bidder is not responsible, it will proceed as follows:
1. Prior to the issuance of a written determination of nonresponsibility, the FCEDA must (i) notify the apparent low bidder in writing of the results of the evaluation; (ii) disclose the factual support for the determination; and (iii) allow the apparent low bidder an opportunity to inspect any documents which relate to the determination, if so requested by the bidder within five business days after receipt of the notice.
  2. Within ten business days after receipt of the notice, the bidder may submit rebuttal information challenging the evaluation. The FCEDA shall issue its written determination of responsibility based on all information in its possession, including any rebuttal information, within five business days of the date the FCEDA received such rebuttal information. At the same time, the FCEDA shall notify the bidder in writing of its determination via certified mail, return receipt requested. This notice shall state the basis for the determination, which shall be final unless the bidder appeals the decision within ten days after receipt of the notice by instituting legal action in accordance with the Code of Virginia.
  3. The provisions of this subsection do not apply to procurements involving the prequalification of bidders and the rights of any potential bidders under such prequalification to appeal a decision that such bidders are not responsible.
  4. If, upon appeal by the institution of legal action, it is determined that the FCEDA's decision was not an honest exercise of discretion, but rather was arbitrary or capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid, and the award of the contract in question has not been made, the sole relief shall be a finding that the bidder is a responsible bidder for the contract in question or a directed award of the contract to the bidder in accordance with the Invitation to Bid, or both. Where award of the contract 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 FCEDA 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.

- B. A bidder contesting a determination that he is not a responsible bidder for a particular contract shall proceed under this section. A bidder cannot protest a decision to award or an award on the basis that the bidder was not responsible.
- C. Nothing contained in this section shall be construed to require the FCEDA, when procuring by competitive negotiation, to furnish a statement of the reasons why a particular proposal was not deemed to be the most advantageous.

#### **Section 4. Protest of Award or Decision to Award**

- A. Any bidder or offeror who wishes to protest the FCEDA's award or decision to award a contract must submit a protest in writing to the FCEDA, or an official designated by the FCEDA, no later than ten days after the award or the announcement of the decision to award, whichever occurs first. Public notice of the award or the announcement of the decision to award shall be given by the FCEDA in manner prescribed in the terms or conditions of the Invitation to Bid or Request for Proposal. Any bidder or offeror who wants to protest a decision to award or a contract awarded on a sole source or emergency basis must submit a protest in the same manner no later than ten days after posting or publication of the notice of the contract. The written protest must include the basis for the protest and the relief sought. If the protest depends in whole or in part on information contained in public records pertaining to the procurement transaction which are subject to inspection under the VPPA, then the time within which to submit the protest shall expire ten days after those records are available for inspection by the bidder or offeror. The FCEDA President shall issue a written decision within ten days stating the reasons for the action taken. This decision will be final unless the bidder or offeror appeals within ten days of the written decision by instituting legal action in accordance with the Code of Virginia. Nothing in this section shall be construed to permit the bidder or offeror to challenge the validity of the terms or conditions of the Invitation to Bid or the Request for Proposal.
- B. If prior to an award it is determined that the decision to award is arbitrary or capricious, then the sole relief shall be a finding to that effect. The FCEDA will 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 herein provided. Where award of the contract 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 FCEDA 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. 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.

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

## **Section 5. Contractual Disputes:**

- A. Any dispute concerning a question of fact which is not disposed of by agreement shall be decided by the FCEDA President, who shall reduce his decision to writing and send by certified mail or otherwise forward a copy thereof to the contractor within ten (30) days of receipt of contractor's claim. The decision of the FCEDA President shall be final and conclusive unless the contractor appeals within six (6) months of the date of receipt of the written decision by the FCEDA by instituting legal action as provided in the Code of Virginia. A contractor may not institute legal action, prior to the receipt of the FCEDA's decision on the claim, unless the FCEDA fails to render such decision within the time specified.
- B. Contractual claims, whether for money or other relief, shall be submitted in writing no later than sixty days after final payment; however, the contractor must have given written notice of his intention to file such claim at the time of the occurrence or beginning of the work upon which the claim is based. Nothing shall preclude a contractor 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.

## **Section 6. Legal Action:**

- A. No bidder, offeror, potential bidder or offeror, or contractor shall institute any legal action until all statutory requirements have been met.
- B. A bidder or offeror, actual or prospective, who is refused permission or disqualified from participating 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, as provided in the Code of Virginia. The FCEDA's decision will only be reversed if the petitioner establishes that the decision was not an honest exercise of discretion but rather was arbitrary or capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid. In the case of a denial of prequalification, the petitioner must establish that the decision to deny prequalification was not based on the FCEDA's criteria for the denial of prequalification. In the event the apparent low bidder, previously determined by the FCEDA to be not responsible, is found by the court to be a responsible bidder, the court may direct the FCEDA to award the contract to that bidder in accordance with the Invitation to Bid.

- C. A bidder denied withdrawal of a bid may bring an action in the appropriate circuit court challenging the decision which will only be reversed if the bidder establishes that the FCEDA's decision was not an honest exercise of discretion, but rather was arbitrary or capricious or not in accordance with the Constitution of Virginia, applicable state law or regulation, or the terms or conditions of the Invitation to Bid.
- D. A bidder, offeror or contractor or potential bidder or offeror on a contract negotiated on a sole source or emergency basis, whose protest of an award or decision to award is denied by the FCEDA, may bring an action in the appropriate circuit court challenging the proposed award or award of a contract. The proposed award or award will be reversed only if the petitioner establishes that the proposed award or award is not an honest exercise of discretion, but rather is arbitrary or capricious or not 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.
- E. If injunctive relief is granted, the court, upon the FCEDA's request, shall require the posting of reasonable security to protect the FCEDA.

## **ARTICLE V**

### **ETHICS IN CONTRACTING**

#### **Section 1. General**

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

#### **Section 2. Participation by Employees**

- A. Except as may be specifically allowed by subdivisions A2 and A3 of 2.1-639.11, no FCEDA employee having official responsibility for a procurement transaction may participate in that transaction on behalf of the FCEDA 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
  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.

#### **Section 3. Solicitation or Acceptance of Gifts:**

No FCEDA 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 or more than nominal or minimal value, present or promised, unless consideration of substantially equal or greater value is exchanged. The FCEDA may recover the value of anything conveyed in violation of this section.

#### **Section 4. Disclosure of Subsequent Employment:**

No FCEDA employee or former FCEDA employee having official responsibility for procurement transactions shall accept employment with any bidder, offeror or contractor with whom the employee or former employee dealt in an official capacity concerning procurement transactions for a period of one year from the cessation of employment by the FCEDA unless the employee or former employee provides written notification to the FCEDA or a public official if designated by the FCEDA or both, prior to commencement of employment by that bidder, offeror or contractor.

#### **Section 5. Gifts:**

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

#### **Section 6. 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 of more than nominal value, 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 or deposit of money, service or anything of value in return for an agreement not to compete on an FCEDA 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 subcontractor or order and ultimately borne by the FCEDA and will be recoverable from both the maker and the recipient. Recovery from one offending party shall not preclude recovery from other offending parties.

#### **Section 7. Participation in Bid Preparation**

No person who, for compensation, prepares an invitation to bid or request for proposal for on behalf of the FCEDA shall (i) submit a bid or proposal for that procurement or any portion thereof or (ii) shall disclose to any bidder or offeror information concerning the procurement which is not available to the public. However, the FCEDA may permit such

person to submit a bid or proposal for that procurement or any portion thereof if the FCEDA 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 FCEDA.

**Section 8. Purchase of Building Materials from Architect or Engineer Prohibited:**

- A. No building materials, supplies, or equipment for any building or structure constructed by or for the FCEDA shall be sold by or purchased from any person employed as an independent contractor by the FCEDA to furnish architectural or engineering services, but not construction, for such building or structure; or from any partnership, association or corporation in which such architect or engineer has a personal interest as defined in 2.1-639.2 of the Code of Virginia.
- B. No building materials, supplies, or equipment for any building or structure constructed by or for the FCEDA shall be sold by or purchased from any person who has provided or is currently providing design services specifying a sole source for such materials, supplies or equipment to be used in such building or structure to the independent contractor employed by the FCEDA to furnish architectural or engineering services in which such person has a personal interest as defined in 2.1-639.2 of the Code of Virginia.
- C. These provisions do not apply in cases of emergency.

**Section 9. Misrepresentations:**

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

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This Guideline was written as a guide only and was not intended to provide complete details of the FCEDA procurement policy or to convey all details of the Virginia Public Procurement Act. Interested persons are encouraged to review the Virginia Public Procurement Act for additional information.